

Office of the Attorney General  
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OFFICE OF THE ATTORNEY GENERAL

March 26, 2013

32-13-214

OPINION

Ref: LEG 13-0193

Honorable Thomas C. Ada  
Senator, *Mina' Trentai Dos Na Liheslaturan Guåhan*  
173 Aspinall Avenue  
Hagåtña, Guam 96910

Office of the Speaker  
Judith T. Won Pat, Ed. D.  
Date 3/26/13  
Time 4:31 PM  
Reviewed by [Signature]

RE: Request Regarding Appointments to the Port Authority of Guam Board of Directors.

On February 28, 2013, this Office received your request for intervention with respect to what you believe may be the unlawful holdover of appointments to the Port Authority of Guam Board of Directors past the expiration of their appointed terms by two board members, specifically Daniel Tydingco and Michael Benito.

FACTS

The Port Authority of Guam is a "public corporation and autonomous instrumentality of the government of Guam" 12 GCA § 10102. Its mandate is to "provide for the needs of ocean commerce, shipping, recreational and commercial boating, and navigation of the territory of Guam." *Id.* It is governed by a five member board of directors appointed by the Governor with the advice and consent of the Legislature. Board members served staggered three year terms. Vacancies are filled "for the unexpired terms." Directors may only be removed for cause upon charges following a hearing. A quorum consists of three members of the board, and three affirmative votes are required for the transaction of all business. 12 GCA § 10103.

(a) The Authority shall be directed by the Board which shall consist of five (5) directors appointed by the Governor with the advice and consent of the Legislature. Directors shall be appointed and their names transmitted to the Legislature within thirty (30) days of the effective date of this Chapter. **The five (5) directors first appointed shall classify themselves by lot so that their terms shall expire respectively as follows: One (1) on December 31, 1976, Two (2) on June 30, 1977 and Two (2) on June 30, 1978. Their successors shall be appointed each for a term of three (3) years to commence on the date of their confirmation by the Legislature. Any director vacancy shall be filled by the Governor, with the advice and consent of the Legislature, for the unexpired term.**

(b) Any director may be removed upon charges, and after hearing, by the Governor.

(c) Three (3) directors shall constitute a quorum of the Board and three (3) affirmative votes are required for the transaction of all business. \* \* \*

12 GCA § 10103 (emphasis added).

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[Signature]

By letters date January 25, 2011, Port Authority of Guam Board of Directors members Monte Mesa; Marilou Lacson; William Beery; Joseph Camacho; and Jovyna Lujan were “relieved of duty” by Governor Eddie Baza Calvo. Each of the five received the same letter which stated in its entirety:

Thank you for contributing your time, expertise, and energies towards helping the people of Guam.

By the authority vested in me as Governor of Guam, under the Organic Act of Guam, as amended, and the laws of Guam, effective immediately I hereby relieve you of your duties and responsibilities as:

**Member, PORT AUTHORITY OF GUAM BOARD OF DIRECTORS**

Your service to the people of Guam is greatly appreciated.

Sincerely,  
/s  
EDDIE BAZA CALVO

Based upon their original dates of confirmation by the Legislature, at the time they were “relieved of duty” from the board of directors by the Governor:

- Joseph Camacho’s term had already expired;
- Monte Mesa’s term of office was not due to expire until August 14, 2011;
- Marilou Lacson’s term of office was not due to expire until October 3, 2011;
- William Beery’s term of office was not due to expire until October 28, 2012; and
- Jovyna Lujan’s term of office was not due to expire until November 21, 2011.<sup>1</sup>

The Governor transmitted appointment letters and supporting documentation to the Legislature for the following individuals who were confirmed by the Legislature on the following dates:

- Michael T. Benito – appointment transmitted January 19, 2011; confirmed February 21, 2011;
- Eduardo R. Ilaos – appointment transmitted January 19, 2011; confirmed February 21, 2011;<sup>2</sup>
- Daniel J. Tydingco – appointment transmitted February 1, 2011 confirmed February 21, 2011;
- Mary Michelle Gibson – appointment transmitted May 16, 2011; confirmed August 3, 2011; and
- Christine Baleto – appointment transmitted December 6, 2011; confirmed March 16, 2012.<sup>3</sup>

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<sup>1</sup> “Upon further consideration” by the Governor, by letter dated February 2, 2011, Jovyna Lujan’s termination was “rescinded” and her three year term counting from the date of her original confirmation “reinstated” to expire November 21, 2011.

<sup>2</sup> Benito and Ilaos both received letters from Governor Calvo dated January 10, 2011, notifying them that they had been appointed to the board of directors, and that their appointments were “effective immediately.” However, their actual appointment letters and supporting documents were not received by the Legislature until January 19, 2011. All five of the appointment transmittal letters to the Legislature advised the Legislature that the appointments were intended for three years terms, the correctness of which is the question presented here. Nevertheless, the transmittal letters to the Legislature with supporting documentation correctly reflected that their appointments were “subject to the advice and consent of *I Liheslaturan Guåhan*.”

Senator Ada posits that because Joseph Camacho's term had already expired by the time that Eduardo Ilao's name was submitted, that Ilao's confirmation on February 21, 2011 should therefore be considered as filling the first vacancy, with Ilao's new three year term to expire on February 21, 2014.<sup>4</sup> Senator Ada next posits, by the order of appointment presented by the Governor and confirmed by the Legislature compared to the next two expiration dates of the "relieved" board members, that Michael Benito and Daniel Tydingco's appointments were intended to fill Monte Mesa and Marilou Lacson's unexpired terms, which had they not been "relieved of duty" would expired February 14, 2011 and February 4, 2012, respectively. According to Senator Ada's calculations, Tydingco's appointment would have expired August 14, 2011 because Tydingco should be considered to be filling Monte Mesa's unexpired term; and Benito's term would have expired on October 3, 2011 because he should be deemed to be filling the remainder of Marilou Lacson's unexpired term.<sup>5</sup>

If Senator Ada's calculations and interpretation of 12 GCA § 10103(a) are correct, then two of three current members of the board of directors of the Port Authority have been holding over in office without lawful authority. Unfortunately, it is at best educated guesswork to determine who that might be, as none of the Governor's appointment letters reflect that the appointments were designated to fill specific vacancies left by unexpired terms as contemplated by § 10103(a). The appointment letters simply identify the appointee and designate the term length as being submitted for three year terms. Moreover, because Ilao, Benito, and Tydingco were all three confirmed by the Legislature on the same date, January 21, 2011, there is nothing to indicate what order these three individuals were confirmed in, in order to determine which board member is intended to fill whose unexpired term. Nothing in any of the Legislature's confirmation reports suggests that anyone in the Legislature was contemplating that they were confirming limited appointments to fill unexpired terms of specific board members as provided by § 10103(a), as opposed to confirming new appointments for three year terms.

#### ANALYSIS

The first question to consider is whether the restrictions on the Governor's appointment authority contained in 12 GCA § 10103 are organic. Although an argument could be made that the Governor's Organic Act authority to terminate and appoint members to executive boards and agencies cannot be limited in the manner contemplated by the Legislature in § 10103 which here requires the maintenance of

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<sup>3</sup> Guam law provides, "Each Board or Commission, of which at least four (4) members are appointed by *I Maga'lahi*, shall include at least two (2) members from each gender." 4 GCA § 2105. Presumably, Mary Michelle Gibson and Christine Baleto were appointed to fill the vacancies created when Marilou Lacson and Jovyna Lujan were "relieved of duty." But there may be no way to know for certain whether either the Governor or the Legislature in fact had it in mind for Gibson and Baleto to replace Lacson and Lujan because of their sex. The constitutionality of this provision is not before us, and we express no opinion on it.

<sup>4</sup> For the reasons suggested in note 2, *supra*, it is unclear whether the Governor did in fact intend for Ilao to fill Camacho's vacancy.

<sup>5</sup> Senator Ada calculates the unexpired terms by applying the statutory holdover provision contained in 4 GCA § 2103.9(e) ("An appointed board or commission member *may* continue to serve for ninety (90) calendar plus three (3) legislative days in that persons [sic] position after that persons [sic] term has expired in an acting holdover capacity until that person, or another person, is appointed by *I Maga'laha*n *Guåhan* [Governor] and confirmed by *I Liheslaturan Guåhan* [the Legislature].") (third and fourth bracketed parentheticals and italics in the original).

fixed, staggered terms, appointments to vacancies restricted to the remainder of unexpired terms, and the restriction on termination for cause only, it is unlikely that courts would agree. In *Opinion of the Attorney General*, LEG-11-0199, “Organicity of P.L. 30-190 Relating to the Appointment to the Board of Trustees of the Guam Memorial Hospital Authority” (March 28, 2011), this Office determined that although denominated a “public corporation and autonomous instrumentality” within the government of Guam, the Guam Memorial Hospital Authority (“GMHA”) was in fact an executive or line agency subject to the Governor’s plenary authority under Guam’s Organic Act to “establish, maintain, and operate public health services in Guam, including hospitals, dispensaries, and quarantine stations, at such places in Guam as may be necessary,” 48 U.S.C. § 1421g(a). Construing revisions to GMHA’s statute in view of *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir. 1980); *Nelson v. Ada*, 878 F.2d 277 (9th Cir. 1989); and *Sablan v. Gutierrez*, 2002 Guam 13, this Office concluded that although GMHA may be described by statute as an autonomous instrumentality of the government of Guam, it is in fact not independent from the Governor’s executive authority to govern its operations. Accordingly, this Office determined that the provisions of GMHA’s revised statute limiting the Governor’s powers of appointment and removal of GMHA’s Board of Trustees were inorganic.

In *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir. 1980), the question presented was “whether, when the Governor is specifically charged by Section 1421g(a) of the Organic Act with the responsibility for establishing, maintaining, and operating hospitals, the Legislature may, within the terms of that act, reduce his function with respect to the governance of the Hospital to the mere ministerial function of validating the appointments made by others to the Hospital’s governing body.” The Ninth Circuit Court of Appeals said it could not, and rejected the Legislature’s argument that Congress’ inclusion of the phrase “except as otherwise provided in this chapter or the laws of Guam” in § 1422c(a), as well as inclusion of the phrase “subject to the laws of Guam” in § 1421g(a) was intended to authorize the Legislature to limit the Governor’s general powers of appointment.

Defendants argue that the Governor’s general appointive power as set forth in Section 1422c(a), was clearly intended to be subject to legislative action, otherwise Congress would not have included the phrase “except as otherwise provided in this chapter or the laws of Guam”, and that his specific responsibility with respect to hospitals is restricted by the inclusion in Section 1421g(a) of the phrase “subject to the laws of Guam”. But they failed to recognize that legislative power is limited by Section 1423a to subjects “not inconsistent with the provisions of this chapter”. The legislature may, of course determine whether a hospital shall exist at all, where and how large it shall be, the size and qualifications for appointment to the governing body, and a wide variety of other matters establishing the laws of Guam “subject to” which the Governor perform his function with respect to the hospital, but it may not negate the command of the Organic Act that the ultimate responsibility for the governance of the Hospital be in the Governor. This is what it has purported to do by the disputed legislation. The Legislature has in effect, taken over the entire power to establish, maintain and operate the Hospital by dictating who the governing trustees shall be. The Governor is stripped of all power to have any voice in the policies, management or procedures of the Hospital, despite the mandate of the Organic Act to the contrary. The Legislature has exceeded its power.

*Bordallo*, 624 F.2d 934-35. Even though the Legislature’s power is in most respects plenary, it remains constrained “by Section 1423a to subjects ‘not inconsistent with the provisions of this chapter,’ ” *id.*, meaning, here in particular, the separation of powers doctrine expressed in § 1421a that “[t]he government of Guam shall consist of three branches, executive, legislative and judicial.”

In *Nelson v. Ada*, 878 F.2d 277 (9th Cir. 1989), the court held that legislation which provided that members of the school board be elected rather than appointed by the Governor violated the Organic Act, 48 U.S.C. § 1421g(b). This provision of the Organic Act provided that the “Governor shall provide an adequate public educational system of Guam, and to that end shall establish, maintain, and operate public schools at such places in Guam as may be necessary.” By the time the case was heard, § 1421g(b) had been amended to require that the “Government” rather than the “Governor” shall provide an adequate public educational system. But the amendment was held to apply prospectively only, so it was still necessary to answer the question whether the Legislature’s provision for an elected school board violated the Governor’s executive powers of appointment. Citing *Bordallo v. Baldwin* as dispositive, the appeals court held that when the Legislature created an elected school board, it undermined the Governor’s exclusive authority under the Organic Act to provide an adequate public educational system.

We held in *Bordallo v. Baldwin* that, because the governor was specifically charged by section 1421g(a) of the Organic Act with the responsibility for establishing, maintaining and operating hospitals, the legislature could not reduce his function to that of validating appointments to the Board of Trustees made by others. *Id.* at 934. We rejected the principal argument made by the legislature that it could enact a different process for selection, an argument similar to that made by petitioners here. That argument was that the governor’s powers of appointment under the Organic Act were qualified by section 9 of the Organic Act, 48 U.S.C. § 1422c(a), which stated that the governor’s power of appointment was limited and had to be exercised in accordance with the Organic Act and “the laws of Guam.” We also rejected the argument that the governor’s specific responsibility with respect to the hospital was restricted by the phrase in section 1421g(a) requiring that the governor exercise his authority over the public health system “subject to the laws of Guam.” *Id.*

*Nelson*, 878 F.2d 279.

In *Sablan v. Gutierrez*, 2002 Guam 13, the Guam Supreme Court was asked to determine whether legislation which required the Governor to appoint members of the Guam Election Commission from lists of candidates provided by the two main political parties on Guam violated the Governor’s appointment authority under the Organic Act. For two reasons, the Court said it did not.

Section 2101(a) [Title 3 GCA] directs the governor to appoint six members to the board of the GEC from recommendations made by the recognized political parties of Guam. The Governor failed to appoint any of the three persons recommended by the Republican party. The lower court held that the Governor’s failure to name the Republican nominees to the GEC board violated section 2101(a). The lower court’s decision rested on two alternative grounds. First, the board of the GEC is not a part of the executive branch, and thereby not within the Governor’s power of appointment as conferred by the Organic Act. Second, even assuming the GEC is an executive agency, the power of appointment is not exclusive to the Governor and can be limited by the legislature.

*Sablan*, 2002 Guam 13 ¶ 3. The Guam Election Commission is designated by law as “an autonomous instrumentality and an independent commission of the government of Guam.” 3 GCA § 2101(a). Without deciding the Commission’s status as either executive or autonomous, the Supreme Court assumed for purposes of decision that the Commission was an executive agency and proceeded to analyze whether limitations placed on the Governor’s appointment authority were inorganic.

Although section 2101(a) does not completely divest the Governor of his discretion in appointing the members of the GEC, it does place a limitation on his power of appointment by restricting his group of candidates to persons recommended by Guam's recognized political parties. Therefore, we must address the Governor's argument that any limitation placed on his power of appointment violates the Organic Act. The Governor's appointment authority is limited and set forth in 48 U.S.C. § 1422, which states that the Governor "shall appoint, and may remove, all officers and employees of the executive branch of the government of Guam, except as otherwise provided in this or any other Act of Congress, or under the laws of Guam...." 48 U.S.C. § 1422 (1950). Assuming *arguendo* that the GEC is an executive agency, the phrase "except as otherwise provided ... under the law[] ...." is an "unmistakable recognition of the authority of the lawmaking department to provide for the appointment of all officers whose appointment is not definitely regulated by the Constitution itself." *Driscoll v. Sakin*, 121 N.J.L. 225, 1 A.2d 881, 882 (N.J.1938).

*Id.*, 2002 Guam 13 ¶ 13 (editorial ellipsis by the Court). The Court distinguished the Governor's statutory responsibilities with respect to appointments to the Election Commission from his Organic Act authority with respect to Guam's public hospital discussed in *Bordallo*, and the board of Guam's public school system addressed in *Nelson*. The fact that the source of the Governor's responsibility with respect to governance of the public hospital and public schools was found in the Organic Act was dispositive of the question whether the Legislature can limit the Governor's power of appointment and removal.

Unlike the facts presented in *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir.1980), and *Nelson v. Ada*, 878 F.2d 277 (9th Cir.1989), no other provision within the Organic Act limits the manner in which the legislature may restrict the power of appointment with respect to the GEC. See *Bordallo*, 624 F.2d at 934-35 (finding that a statute rendering the Governor's power to appoint hospital trustees ministerial conflicted with the provision of the Organic Act that vested the Governor with authority to maintain Guam's health services); see also *Nelson*, 878 F.2d at 279-80 (finding that a statute divesting the Governor of his power to appoint school board members conflicted with the provision of the Organic Act that vested the Governor with authority to maintain Guam's public school system). Therefore, section 2101(a) is a legitimate exercise by the legislature of its express authority to determine how the members of a board it created are to be selected and appointed. See *Welch v. Key*, 365 P.2d 154, 157 (Okla.1961).

*Id.*, 2002 Guam 13 ¶ 14. Because the Legislature's authority with respect to the Election Commission was not constrained by the Organic Act in the way it was (and is) with respect to the hospital and formerly was with respect to public schools, the Supreme Court found that requiring the Governor to select his appointees to the Guam Election Commission from lists provided by each of the recognized political parties on Guam was a reasonable limitation on the Governor's appointment authority and was not in conflict with the Organic Act. The Court said, "Therefore, we find that the legislature can restrict the Governor's selection and appointment of the GEC board members to persons recommended by Guam's recognized political parties without being inconsistent with the Organic Act." *Id.*, 2002 Guam 13 ¶ 16 (citation omitted).

Unlike the Governor's authority with respect to Guam's public hospital and at one time public schools, there is no comparable mandate to be found in the Organic Act with respect to the Port Authority of Guam. And although there is no case squarely on point with respect to either the Port Authority or the A.B. Won Pat Guam International Airport Authority, the courts continue to distinguish between public corporations and autonomous agencies that are not subject to the Governor's plenary authority under the

Organic Act, *see, e.g., Guam Radio Services, Inc. v. Guam Economic Development Authority*, 2000 Guam 1; *Bordallo v. Reyes*, 763 F.2d 1098 (9th Cir. 1985), affirming *Bordallo v. Reyes*, 610 F.Supp. 1128 (D. Guam 1984); and *Laguana v. Guam Visitor's Bureau*, 725 F.2d 519 (9th Cir. 1984), and those executive agencies which are subject to the Governor's plenary authority under the Organic Act, *see again, Bordallo v. Baldwin* and *Nelson v. Ada*. Accordingly, and unlike the revisions to Guam Memorial Hospital Authority's enabling legislation considered in *Opinion of the Attorney General*, LEG-11-0199, "Organicity of P.L. 30-190 Relating to the Appointment to the Board of Trustees of the Guam Memorial Hospital Authority," this Office can discern no Organic Act infirmity in 12 GCA § 10103(a).

It is now necessary to determine precisely what the Legislature intended with respect to the terms of office of the Port Authority's Board of Directors created by 12 GCA § 10103.

Statutory interpretation always begins with the language of the statute. *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6. "In cases involving statutory construction, the plain language of a statute must be the starting point." *Bank of Guam v. Guam Banking Bd.*, 2003 Guam 9 ¶ 19. When the plain reading of a statute is "clear on its face" and yields to an unambiguous definition, we will not look past that plain reading. *Castino [v. G.C. Corp.]*, 2010 Guam 3 ¶¶ 29, 30 ("A plain reading construction is appropriate where the statute lays out specific requirements and indicates exactly what is necessary for compliance without ambiguous terms."). However, if the text of the statute is ambiguous or results in absurd or unworkable consequences, the "fair and reasonable" construction is applied. *Id.* ¶ 58 (internal quotation marks omitted); *see also Manvil Corp. v. E.C. Gozum & Co., Inc.*, 1998 Guam 20 ¶ 17 ("We adopt a fair and reasonable construction and application of our mechanics' lien statutes to the facts in each particular case, so as to afford materialmen and laborers the security intended by the legislation's remedial purpose. Where the statutes are clear on their face, however, we will not read further."). When examining the statute's language, the court must consider whether the language is "plain and unambiguous," which 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*, 2002 Guam 14 ¶ 6 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)); *see also Macris v. Guam Mem'l Hosp. Auth.*, 2008 Guam 6 ¶ 19 (quoting *Aguon*, 2002 Guam 14 ¶ 9) (stating that a statute "'must be examined within its context,' which 'includes looking at other provisions of the same statute and other related statutes'").

*Guam Resorts, Inc. v. G.C. Corp.*, 2012 Guam 13 ¶ 7.

A plain reading of the Port Authority's enabling legislation informs the reader that the Legislature intended (1) that individual members of the Port Authority's board of directors shall serve fixed three years terms; (2) that following the appointment of the Port Authority's first board of directors, board members' terms of office end on specific calendar dates; (3) that vacancies in office are to be filled by appointment and legislative confirmation, but limited to the remainder of the appointee's predecessor's unexpired term; and (4) that directors may only be removed by the Governor "upon charges," or for cause. These are all common characteristics of independent or "autonomous" agencies that distinguish them from executive agencies subject to the chief executive's plenary authority. *See, Lisa Schultz Bressman, Procedures as Politics in Administrative Law*, 107 Colum.L.Rev. 1749, 1806 (Dec. 2007) ("Independent agencies have features that affect political control, including limits on plenary presidential removal, bipartisan membership requirements, and fixed and staggered terms. Each prevents agency policy from shifting dramatically with new administrations, although the President still may influence policy by, for example, choosing a new commission chair.") (footnotes omitted); Lisa Schultz Bressman and Robert B. Thompson, *The Future of Agency Independence*, 63 Vand.L.Rev. 599, 610 (Apr. 2010) ("[I]ndependent

agencies are different in structure because the President lacks authority to remove their heads from office except for cause. Thus, these agencies are independent in the sense that the President cannot fire their leaders for political reasons and, consequently, cannot use this ultimate sanction to back up particular policy recommendations. [¶] Independent agencies have other structural features that distinguish them from executive-branch agencies. They are generally run by multi-member commissions or boards, whose members serve fixed, staggered terms, rather than a cabinet secretary or single administrator who serves at the pleasure of the President and thus will likely depart with a change of administration, if not before.”) (footnotes omitted); *id.*, 63 Vand.L.Rev. 611 (“At the broadest level, the structural characteristics of independent agencies are aimed at insulating them, to some degree, from politics.”) (footnote omitted); *see also*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 609-16 (Apr. 1984).

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court of the United States held, “Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.[¶] The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him.” *Id.*, 5 U.S. at 163. In *United States v. Perkins*, 116 U.S. 483, 485 (1886), the Court held, “We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.” And in *Myers v. United States*, 272 U.S. 52, 126 (1926), the Supreme Court stated that “[i]n the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal.”

By contrast, in *Humphrey's Executor v. United States*, 295 U.S. 602, 631-32 (1935), the Court held, “Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.” And in *Wiener v. United States*, 357 U.S. 349 (1958), explaining its holding in *Humphrey's Executor*, the Court said that it “drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President’s constitutional powers, and those who are members of a body ‘to exercise its judgment without the leave or hindrance of any other official or any department of the government,’ as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference.” *Id.*, 357 U.S. 556 (citation omitted).

In particular, fixed, staggered terms, and limitations proscribing removal except for cause are intended not merely to promote stability and continuity of institutional knowledge, but to insulate autonomous agencies from the political influence from the appointing authority. *Compare, United States v. Wilson*, 290 F.3d 347, 359 (D.C. Cir. 2002) (“Thus it is evident that in staggering the membership



(among other features), Congress was insulating the Commission from carte blanc replacement at any given time.”); *Watson v. Pennsylvania Turnpike Commission*, 386 Pa. 117, 125, 125 A.2d 354, 357 (Pa. 1956) (“The purpose of the foregoing provision as to the terms of office of the Commissioners (i. e., those first to be appointed and thereafter their successors) is patent. It was designed so that, by the prescribed rotation, the terms of three of the four appointed members of the Commission would always be current ... Were the Commissioners to be held removable at the pleasure of the Governor, the carefully expressed scheme of term rotation would be effectually nullified.”); *Bowers v. Pennsylvania Labor Relations Board*, 402 Pa. 542, 551, 167 A.2d 480, 484 (Pa. 1961) (“The legislature has shown that, when it creates an administrative agency and provides that its members shall be appointed for fixed terms with staggered expiration dates, the intent thereby evidenced is that such members are not removable by the appointor at his pleasure.”); *Patterson v. DeCarbo*, 46 Pa.D&C.4th 148, 162 (Pa.Com.Pl. 2000) (“In conclusion, the standard for removing an appointed official from a legislatively created public office, as it evolved from a long history of Pennsylvania Supreme Court case law, is that the inclusion of a method of removal of the appointed officer in the pertinent legislation, by either providing for staggered fixed terms of appointment or a specific mode of removing the official prior to the expiration of his term, indicates a legislative intent that ... the official may not be removed at the pleasure of the appointing authority.”); *Board of Supervisors of Prince William County v. Wood*, 213 Va. 545, 548, 193 S.E.2d 671, 674 (Va. 1973) (“All these statutes, nevertheless, evince a continuing legislative interest in cushioning the shock to the public school system from sudden changes in local government. Staggered terms afford some continuity in the operation of school boards. But the continuity is subject to abrupt disruption if the appointing body may at will replace an entire board....”); *Jackson v. Hubbard*, 256 Ala. 114, 120, 53 So.2d 723, 728 (Ala. 1951) (“The change made by the legislature in 1943, providing for staggered terms, seems to us to indicate a clear legislative intent to make free from any doubt the permanency and independence of the status of the members of the board of directors.”); *In re Sedacca v Mangano*, 18 N.Y.3d 609, 615-16, 965 N.E.2d 257, 260, 942 N.Y.S.2d 30, 33 (N.Y. 2012) (“This design may frustrate the most recent expression of the electorate’s mandate, but it is meant precisely to avoid a wholesale change of membership of the ARC upon the installation of each successive administration...Removing the commissioners without cause under Nassau County Charter § 203, as respondents urge, would frustrate the legislative intent by nullifying the requirements of the RPTL and rendering the staggered statutory terms of office in RPTL 523-b superfluous.”).

As described by the Chief Justice of the Supreme Court of Pennsylvania, it is of no small consequence when the Governor usurps the prerogative of the Legislature by purporting to exercise a power not reserved to him in the Constitution, or in the case of Guam its Organic Act.

It is implicit in the American form of government, as ordained by the Constitution of both the United States and Pennsylvania, that the government consist[s] of three coordinate branches, legislative, executive and judicial, and that one branch should not impinge on the province of another. Any interference by a member of the executive department of government with the tenure of an incumbent member of a quasi-judicial board or commission would plainly offend against this basic constitutional concept. The Supreme Court has twice declared that the President of the United States lacks power to remove without cause an appointed member of an administrative agency which possesses and exercises judicial powers. *Wiener v. United States*, 1958, 357 U.S. 349, 352, 78 S.Ct. 1275, 2 L.Ed.2d 1377; *Humphrey's Executor v. United States*, 1935, 295 U.S. 602, 627-628, 55 S.Ct. 869, 79 L.Ed. 1611. For the same reasons, the Governor of Pennsylvania may not remove without cause an appointee to an administrative board or commission which, as authorized by law, is invested with judicial powers and duties. Nor is it of presently material significance that the Constitution of the United States, under which the cases above cited arose, does not contain a provision such as Article VI,

Section 4, of the Pennsylvania Constitution. The controlling governmental principle of a division of powers among equal and independent legislative, executive and judicial departments, with the attendant salutary checks and balances, inheres in, and is the essence of, both our Federal and State Constitutions.

*Bowers v. Pennsylvania Labor Relations Board*, 402 Pa. 542, 552-53, 167 A.2d 480, 484-85 (Pa. 1961).

Having determined that the Port Authority's statute suffers no facial Organic Act infirmity that would prevent the Legislature from creating a "public corporation and autonomous instrumentality of the government of Guam" whose directors hold office by staggered, fixed terms, and who can only be removed for cause, the conclusion is inescapable that the Governor was without authority to "relieve" the former members of their offices on board of directors. Had any of those members who still had unexpired terms challenged their removal from office it is more than likely that the courts of Guam would be compelled to order their return to office to fill the remainder of their terms. But none challenged their removal from office prior to the expiration of their terms, and the Legislature having confirmed their successors without question, that matter is now moot.

The next question is whether vacancies on the board of directors may only be filled for the remainder of the officeholders' unexpired terms, or whether an argument can be made that the new appointees began new three year terms from the date of their confirmation by the Legislature. For all that appears, the Legislature failed to consider whether they were confirming appointments to fill the remainder of unexpired terms, but simply assumed that appointments were being confirmed for new three year terms. However, the fact that the Governor and the Legislature may have unwittingly given the appointees and the public the impression that directors had been confirmed to serve new three year terms commencing on the date of their confirmation is not dispositive. "The appointment and the commission are distinct acts, and the terms of the commission cannot change the effect of the appointment as defined by the statute." *Quackenbush v. United States*, 177 U.S. 20, 27 (1900). Thus, it does not matter what the Governor's appointment and transmittal letters said with respect to the effective date or the length of the appointees' terms, nor does it matter what the Legislature did or did not say in its notices of confirmation as to when any particular board members' terms began and ended. What matters is what the law says.

Any construction of the Port Authority's enabling statute that suggests that when a vacancy on the board of directors occurs prior to the expiration of their fixed three year term, the Governor is permitted to make an appointment that commences a new three year term would render the phrase "[a]ny director vacancy shall be filled by the Governor, with the advice and consent of the Legislature, for the unexpired term" superfluous, a nullity.<sup>6</sup> "As a rule of statutory construction, a statute should be construed in such a way that 'no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Guam Resorts, Inc. v. G.C. Corp.*, 2012 Guam 13 ¶ 15 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). "A statute should be construed to give effect to all of its provisions so that no part would be superfluous or insignificant." *Macris v. Richardson*, 2010 Guam 6 ¶ 15 (citations omitted); accord, *Sablan v. Guam Land Use Com'n*, 2011 Guam 29 ¶ 19. Therefore, in order to "give effect to all of its provisions so that no part would be superfluous or insignificant," the members of the Port Authority's current board of directors who were confirmed following vacancies left unexpired terms, ordinarily due to death or

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<sup>6</sup> We note that another provision of Guam law applicable to vacancies in office separately provides, "Whenever a vacancy occurs in any office the term of which is fixed by law, such vacancy shall be filled as provided by law for the balance of the unexpired term thereof." 4 GCA § 2102.

voluntary resignation,<sup>7</sup> serve only for the remainder of their predecessor's unexpired term.<sup>8</sup> In order to answer the question when those terms begin and end, we return to the statute.

Title 12 GCA § 10103(a) again provides,

The Authority shall be directed by the Board which shall consist of five (5) directors appointed by the Governor with the advice and consent of the Legislature. Directors shall be appointed and their names transmitted to the Legislature within thirty (30) days of the effective date of this Chapter. The five (5) directors first appointed shall classify themselves by lot so that their terms shall expire respectively as follows: One (1) on December 31, 1976, Two (2) on June 30, 1977 and Two (2) on June 30, 1978. Their successors shall be appointed each for a term of three (3) years to commence on the date of their confirmation by the Legislature.

As discussed previously, the first sentence of § 10103(a) evidences the Legislature's intent to establish staggered terms for the Port Authority board of directors, a common enough attribute among autonomous agencies, intended to promote continuity in governance and to insulate autonomous agencies from political interference by the appointing authority and his or her successor.

Senator Ada interprets the phrase, "to commence on the date of their confirmation by the Legislature" to mean that directors' three year terms begin on the date they were confirmed.<sup>9</sup> On its face

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<sup>7</sup> Although inapplicable to the facts before us, the practice of requesting "courtesy" resignations is expressly disallowed under Guam law. See 4 GCA § 2103.7 ("The practice of requiring or submitting undated resignations to be accepted at a later date by the appointing authority or any other person is hereby declared to be contrary to public policy for any position within the government of Guam. Neither the Governor of Guam nor any other person may request an undated resignation letter or courtesy resignation from any officer or employee of the government of Guam, whether or not the position held by such person is subject to the advice and consent of the Legislature; and no officer or employee of the government of Guam shall submit such an undated resignation letter, and any such undated courtesy resignation letter submitted in violation of this section shall be void.").

<sup>8</sup> Compare, *Romanoff v. State Com'n on Judicial Performance*, 126 P.3d 182, 191 (Colo. 2006) ("The plain language of subsection (1)(b) indicates that when a commissioner is appointed to fill an unexpired term, he or she serves the remainder of that term."); *United States v. Wilson*, 290 F.3d 347, 355 (D.C. Cir. 2002) ("Staggered terms must run with the calendar, rather than with the person, to preserve staggering. Thus, taken with the history and background against which Congress was legislating ... it simply makes more sense to read § 1975(c) as creating terms of office running with the calendar from the date of expiration of a predecessor's term. That being the case, any appointment to fill a vacancy for an unexpired term, such as Ms. Wilson's appointment, must only be for the duration of that unexpired term.").

<sup>9</sup> We note that the phrase "to commence on the date of their confirmation by the Legislature" found in the Port Authority's enabling act is nowhere else to be found in the Guam Code Annotated. The members of the A.B. Won Pat Guam International Authority's board of directors do not serve staggered terms. See, e.g., 12 GCA § 1106(a) ("All powers vested in the Authority, except as provided herein, shall be exercised by the Board, which shall consist of seven (7) members, called directors, who shall be nominated and appointed by the Governor, by and with the advice and consent of the Legislature. Each director shall serve a term of three (3) years from the expiration of the term for which such director's predecessor was appointed, and until a successor is appointed and qualified, or in the case of a director

that is a perfectly reasonable interpretation, one that may even be shared by the rest of the Legislature and by prior administrations. But to sustain the construction of the sentence in that way would require it to be viewed in isolation from the preceding sentence. This would allow either the Governor or the Legislature to control and de-stagger board members' dates of service by delaying appointment or confirmation. And that would too easily destabilize the continuity of governance and insulation from politics the Legislature originally intended when it established date-specific staggered terms.<sup>10</sup> In our opinion neither Senator Ada nor Governor Calvo's construction of the statute is correct. Rather, and in order that the "statute should be construed to give effect to all of its provisions so that no part would be superfluous or insignificant," *Macris*, 2010 Guam 6 ¶ 15, the better reasoned view, consistent with the purpose and practice of staggered terms found elsewhere in the Guam Code and throughout the nation, is that staggered three year terms cycle by calendar date beginning from the expiration of the initial appointments to the board originally established by the Legislature: one on December 31, 1976; two on June 30, 1977 and two on June 30, 1978. Cycling through the calendar to present day, focusing on the terms of office defined by calendar date in order to effectuate the Legislature's original intent as opposed to the date of confirmation of any particular board member's predecessor, the resulting terms of office are as follows: the first term commences January 1, 2010 and ends December 31, 2012; the second and third terms commence July 1, 2010 and end June 30, 2013; and the fourth and fifth terms commence on July 1, 2011 and end June 30, 2014.<sup>11</sup>

What remains then is to determine which members of the current board are holding which terms of office. Working backwards from the most recently confirmed board members to the first, we find that Christine Baleto holds the office of director for the term July 1, 2011 to June 30, 2014; and Mary Michelle Gibson and Daniel J. Tydingco hold the offices for the terms July 1, 2010 to June 30, 2013. We believe Tydingco holds office for this particular term because although he was confirmed on the same

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appointed to a newly created membership in the Board, such director shall serve a term of three (3) years from the date of initial appointment, and until a successor is appointed and qualified.").


<sup>10</sup> Compare, *United States v. Wilson*, 290 F.3d 347, 360-61 (D.C. Cir. 2002) ("Finally, we observe that our interpretation, unlike that urged by appellees, avoids anomalous results. As noted above, the creation of staggered terms was one of several structural features adopted in the 1983 Act to establish the Commission as an independent, bipartisan entity, to insulate it from political influence, and to protect its integrity and credibility. The district court contended that its decision would not result in "the complete elimination of all staggering," but acknowledged that its decision would result in the 'absence of uniformly staggered terms.' The district court further contended that 'there is little, if any, substantive difference between those two.' We disagree. There is a substantial difference in having predictable terms ensuring that membership will turn over in a periodic and foreseeable manner, and having unpredictable vacancies that permanently disorder member terms. Not the least difference is the diffusion of appointment authority across presidential administrations. Moreover, there is no apparent reason Congress would originally create fixed, staggered terms; as it did under the 1983 Act, only to have them become unpredictably de-staggered over time as some members of the Commission resign, retire, are removed, or die.").

<sup>11</sup> We do not believe that this interpretation, which it may be argued tends to minimize the emphasis on the phrase "to commence on the date of their confirmation," runs afoul of the rule that "[a] statute should be construed to give effect to all of its provisions so that no part would be superfluous or insignificant." *Macris*, 2010 Guam 6 ¶ 15. Rather, viewing the paragraph as a whole the purpose of the phrase "to commence on the date of their confirmation" is to emphasize that – when filling vacancies created prematurely before the expiration of a director's term – "acting" directors are not authorized, and that the "advice and consent of the Legislature" is still required, *before* they may commence their service.


date as Michael Benito and Eduardo Ilao, Tydingco's appointment letter to the Legislature was submitted later in time, making his the more recent submission of the three. What we cannot ascertain with certainty is which seat on the board of directors belongs to Benito and which seat belongs to Ilao.<sup>12</sup> Nevertheless, it is the considered opinion of this Office that the current members of the Port Authority's board of directors are all, at this time, holding office in a *de jure* capacity.<sup>13</sup>

### Conclusion

We summarize our opinion as follows: First, the limitations on the Governor's appointment and removal authority imposed by 12 GCA § 10103(a) – which provides for fixed, staggered terms for the board of directors and further provides that directors may only be removed for cause – is a lawful exercise of the Legislature's authority under Guam's Organic Act. Second, the Governor's removal of the former members of the Board of Directors was not authorized by the Organic Act; however, the former directors' failure to challenge their removal prior to the expiration of their terms and confirmation of their successors by the Legislature renders that question moot. Third, in order to effectuate the Legislature's original intent when it established fixed and staggered terms and provided that directors may only be removed for cause, the purpose of which is to provide continuity in the governance of the Port Authority and to insulate the directors from political interference, the rules of statutory construction require the conclusion that terms begin and end based on fixed calendar dates. Fourth, the current members of the board of directors are lawfully holding office in a *de jure* capacity.



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<sup>12</sup> As noted earlier in this opinion, the Governor having "relieved of duty" the former board members without Organic Act authority there is no contemporaneous evidence reflecting his intent at the time of his first three appointments as to which vacancies he intended to fill. He was, of course, without the benefit of this opinion at that time. Factoring in 4 GCA § 2103.9(e), either Ilao or Benito's term formally expired on December 31, 2012, in which case whoever it may be is permitted to serve in a *de jure* holdover capacity for ninety (90) calendar plus three (3) legislative days, and the other director's term will expire June 30, 2013 plus, if necessary, an additional ninety (90) calendar plus three (3) legislative days. We anticipate that Governor Calvo and future governors will be specific in their future transmittals as to which term of office is being filled.

<sup>13</sup> Because the current members of the board of directors are holding office *de jure*, it is unnecessary to discuss the *de facto* officer doctrine adopted with approval by the Guam Supreme Court in *Gutierrez v. Guam Election Com'n*, 2011 Guam 3 ¶¶ 54-73.