Judiciary of Guam

Administrative Office of the Courts
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HON. ROBERT J. TORRES
CHIEF JUSTICE

HON. ALBERTO C. LAMORENA III
PRESIDING JUDGE

JOSHUA F. TENORIO
ACTING ADMINISTRATOR OF THE COURTS

February 20, 2014

32-14-1333
Office of the Speaker
Judith T. Won Pat, Ed. D.
Date 2.20.14
Time 4:05pm
Received by

Speaker Judith Won Pat
Mina'Trentai Dos Na Liheslaturan Guåhan
32nd Guam Legislature
155 Hesler Place
Hagåtna, Guam 96910

Re: Government of Guam Competitive Wage Act of 2014, P.L. 32-068:XI:2

Dear Speaker Won Pat:

Hafa Adai! I am writing to express concern regarding the Government of Guam Competitive Wage Act, P.L. 32-068:XI:2 (Sept. 11, 2013), which was intended to establish parity in compensation throughout the government. Salary increases pursuant to this law, however, have not been implemented in the Judiciary of Guam pursuant to the advice of legal counsel. Attached for your consideration is counsel's legal opinion, which expresses concern regarding the implementation of the Competitive Wage Act and the plan transmitted by the Department of Administration to *I Liheslaturan Guåhan* on January 15, 2014. A few issues were addressed in Bill 268-32 (COR); my testimony on this bill is attached for your review.

Furthermore, it would be imperative that the Judiciary receive additional appropriation to effectively implement the salary increases. Based on representations from the Executive Branch, the increases were effective January 26, 2014. Accordingly, to achieve parity with Executive Branch employees, we request the full amount of $506,815 necessary to implement increases beginning January 26, 2014 to the end of the fiscal year.

Should you require further information, please contact me at your convenience.

Senseramente,

JOSHUA F. TENORIO
Administrator of the Courts, Acting

Enclosures

cc: Governor Eddie Baza Calvo
All Senators

1333

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Robert J. Torres
Chief Justice

Alberto C. Lamorena, III
Presiding Judge
Joshua F. Tenorio
Acting Administrator of the Courts

CONFIDENTIAL MEMORANDUM

TO: Acting Administrator of the Courts

FR: Staff Attorney, Acting

DATE: February 19, 2014

RE: Legal Opinion re: Competitive Wage Act of 2014, Public Law 32-068:XI:2

A legal opinion was requested regarding the implementation, in the Judiciary of Guam, of the Government of Guam Competitive Wage Act of 2014, Public Law 32-068:XI:2 (Sept. 11, 2013). Salary increases have not been processed as to Judiciary of Guam employees, although the Executive Branch has already proceeded with increases for Executive Branch Government of Guam employees pursuant to the Department of Administration plan ("DOA plan") submitted to *I Liheslaturan Guåhan* on January 15, 2014. Because Judiciary employees deserve and are entitled to parity with the other employees in the Government of Guam, it is crucial to determine the issue of implementation of increases in the judicial branch.

However, there are serious concerns as to whether the process of implementing the salary increases pursuant to the DOA plan was effectuated in accordance with Public Law 32-068. There are three grounds to question the DOA plan: first, the effect of the Legislature's passage of Bill 268-32 (COR) and the later veto of this bill; second, the ambiguity created in reading Sections 2(b) and 2(e) of Chapter XI of P.L. 32-068; and third, an interpretation of Section 2(e) that results in a flawed delegation of legislative authority.

Furthermore, the language in Section 2(f) of Chapter XI of P.L. 32-068 reveals an interpretation of this provision that would support implementation of the Government-wide Position Classification, Compensation and Benefits Study Plan pursuant to Section 13 of P.L. 29-052 and Executive Order No. 2006-21, which is attached to Executive Order No. 2010-24 (Sept. 23, 2010).

In addition to these legal arguments, there is the practical consideration regarding the actual procedure of how the salary increases will be implemented for employees. In light of the lack of guidance, even to Executive Branch agencies, the Judiciary should be hesitant to begin the procedure. When more information regarding DOA's procedures

becomes available, then the Judiciary can be assured that the implementation for judicial employees results in the parity sought to be achieved.

Until these issues are resolved or clarified, it is recommended that the Judiciary not implement salary increases pursuant to P.L. 32-068:XI:2, and that any appropriation received from DOA to implement increases be held in trust. It is further recommended that this issue remain on the agenda of future Judicial Council meetings for discussion purposes until resolved.

Finally, this legal opinion will include a brief discussion on the issue of the salary of judicial officers.

I. Background

Section 2 of Chapter XI of Public Law 32-068, the FY 2014 Budget Act, provided for the funding and implementation of the Government-wide Position Classification, Compensation and Benefits Study ("the Hay Plan"). Section 2(b) stated: "The appropriation in this Section precedes transmittal by *I Maga'lahi* to *I Liheslatura* of a final, implementable plan to adjust compensation, classification and benefits for approval by *I Liheslaturan Guåhan*." Section 2(e) further provided that:

> The final, implementable plan to adjust compensation, classification and benefits *shall* be submitted by *I Maga'låhen Guåhan* to the Speaker of *I Liheslaturan Guåhan no later than* January 15, 2014. The implementation of salary increases due from said plan *shall* be effective 30 calendar days after receipt of the plan by the Speaker of the Legislature unless disapproved or amended. The Legislature may approve, disapprove or amend the plan prior to the effective date to ensure it is implemented fairly and consistent with appropriated amounts.

The DOA timely submitted its implementation plan on January 15, 2014. This plan consisted of: a DOA Report and exhibits to include the General Pay Plan, Nurse Pay Plan, Educator Pay Plan, Attorney Pay Plan, and Executive Pay Plan, and salary recommendations for Rate of Pay Positions (which included elected positions and judicial officers), as well as certain miscellaneous recommendations ("Exhibit 7"). The DOA plan also includes a Classification Plan and a Classification List.[1]

On February 1, 2014, the Guam Legislature passed Bill 268-32, which approved the DOA implementation plan with modifications. It approved the General Pay Plan, Nurse Pay Plan, Educator Pay Plan, and Attorney Pay Plan; and Exhibit 7. Bill 268-32 also, *inter alia*, amended the recommendations for Rate of Pay Positions and repealed Title 4 GCA §§ 6201, 6202, and 6208.

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[1] Notwithstanding the inclusion of a Classification Plan and Classification Listing in the DOA plan, it is undisputed that the Judicial Council retains the authority to "reassign pay grades" as deemed necessary, pursuant to 4 GCA § 6302(b), and to "establish appropriate policies and procedures for implementing" the classification of positions, pursuant to 4 GCA § 6302(c).

On February 13, 2014, Governor Calvo vetoed Bill 268-32, and indicated in his veto message that "the government of Guam will now move forward with the implementation of the Hay Plan, as authorized by *I Liheslatura* to go into effect tomorrow, February 14, 2014." Accordingly, the Executive Branch began implementing salary increases pursuant to the DOA plan as it was originally submitted to the Legislature on January 15, 2014.

The Legislature convened on February 14, 2014 but did not obtain an override of the veto of Bill 268-32 (COR).

II. Question presented

Legal guidance was requested on the following question: Whether the Judiciary of Guam must implement salary increases pursuant to Public Law 32-068:XI:2?

Two grounds to question the validity of the DOA plan are: 1) the effect of the Legislature's passage of Bill 268-32 and the later veto of this bill; and 2) the ambiguity created in reading Sections 2(b) and 2(e) of Chapter XI of P.L. 32-068. Each of these grounds will be discussed in detail below.

A. Effect of Bill 268-32 and the gubernatorial veto

The process for implementing increases is established in Section 2 Chapter XI of P.L. 32-068, and specifically subsection (e) which states: "The implementation of salary increases due from said plan *shall* be effective 30 calendar days after receipt of the plan by the Speaker of the Legislature unless disapproved or amended." The plain words of the statute are sufficiently clear: the plan will not become effective if the Legislature disapproves or amends it.

"Statutory interpretation always begins with the language of the statute." *Guam Resorts, Inc. v. G.C. Corp.*, 2012 Guam 13 ¶ 7; *Sumitomo Const., Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶ 17 ("It is a cardinal rule of statutory construction that courts must look first to the language of the statute itself."). Furthermore, "the court's task is to determine if the language is plain and unambiguous." *People v. Lau*, 2007 Guam 4 ¶ 14.

Subsection (e) first states that the plan "*shall* be effective . . . unless disapproved or amended." It is undisputed that disapproval or amendment could only be by the Legislature. Subsection (e) next states that the Legislature "may approve, disapprove or amend the plan prior to the effective date to ensure it is implemented fairly and consistent with appropriated amounts." The language of subsection (e) makes clear that the Legislature retained the discretion to disapprove or amend the plan. "The plain meaning will prevail where there is no clearly stated legislative intent to the contrary." *Data Mgmt. Res., LLC v. Office of Pub. Accountability*, 2013 Guam 27 ¶ 17. According to the plain language of Section 2(e), the Legislature's amendment of the plan results in "extinguishment" of the original plan. In other words, the amended plan becomes the only plan "on the table." With this in mind, the next step involves examining the Legislature's actions.

After transmittal of the DOA plan on January 15, 2014, the Guam Legislature passed Bill 268-32 on February 1, 2014. Notwithstanding the caption of Bill 268-32 purporting "approval" of the DOA plan, and references in the body of the bill that it "approved" the Executive Pay Plan and Rate of Pay recommendations, it is disingenuous to interpret the Legislature's actions as anything other than amending the plan. Specifically, Bill 268-32 did the following: 1) approved the General Pay Plan, Nurse Pay Plan, Educator Pay Plan and Attorney Pay Plan; 2) amended compensation for positions in the Executive Pay Plan, placing these positions (except for the position of Deputy Administrative Director of the Courts) in a Performance Pay Plan; 3) amended the salary recommendation for Mayors and Vice Mayors, of an increase of $10,000 per annum; and finally, 4) amended the salary recommendations for the Governor, Lieutenant Governor, Attorney General, and Public Auditor, placing these positions in a Performance Pay Plan.

The plain words of Section 2(e) clearly provide that "implementation of salary increases . . . *shall* be effective 30 calendar days after receipt of the plan . . . unless disapproved or amended." Here, the Legislature, through Bill 268-32, amended the DOA plan. By virtue of this amendment, the original DOA plan was "extinguished" and thus, could not be effective in 30 calendar days. The subsequent veto of Bill 268-32 constituted a rejection of the Legislature's amended plan.

Thus, it appears that there is no valid plan in place to be implemented. It is recognized that DOA has begun implementing the plan originally transmitted; however, there is a serious concern as to the validity of the original DOA plan. Therefore, it is recommended that the Judiciary not implement the DOA plan at this time.

B. Ambiguity created by Subsections 2(b) and 2(e) of P.L. 32-068:XI

The second cause for concern regarding the implementation of the DOA plan is the ambiguity created by Subsections 2(b) and (e), which calls into question the process required for the DOA plan to become effective.

As stated previously, in statutory interpretation, the language of statute itself is the starting point. *See Sumitomo Const.*, 2001 Guam 23 ¶ 17. "The plainness or ambiguity of statutory language 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." *Id.* (quoting *Aguon*, 2002 Guam 14 ¶ 6 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))).

Subsection (b) states that appropriation "precedes transmittal . . . of a final implementable plan . . . for approval by *I Liheslaturan Guåhan*." The plain words of subsection (b) contemplate that the Legislature must ultimately approve of the plan. Subsection (e), however, states that the plan submitted by DOA "*shall* be effective 30 calendar days after receipt of the plan by the Speaker of the Legislature unless disapproved or amended." Use of the word "shall" creates the presumption that the transmitted plan is automatically approved, and absent legislative action, becomes effective 30 days after transmittal to the

Speaker. In short, it appears that under subsection (e), mere transmittal of the plan is all that is necessary.

Thus, analysis of the plain words reveals that the language of Section 2 is not plain and unambiguous. In fact, there is conflict regarding the process required before the plan may be implemented: subsection (b) calls for legislative approval, whereas subsection (e) contemplates automatic approval. Because of this conflict, there is an ambiguity in the interpretation of Section 2. "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:2 (7th ed. 2008 & Supp. 2013).

There is no clearer demonstration of this ambiguity, than the present situation regarding the implementation of the salary increases, and the disagreement between the legislative and the executive branches as to compliance with P.L. 32-068:XI:2.

The Guam Legislature passed Bill 268-32, amending the DOA plan, as contemplated by subsection (e). This bill was vetoed, and the Executive Branch announced the implementation of the DOA plan as it was submitted to the Legislature on January 15, 2014, or 30 days after transmittal of the DOA plan. The Executive Branch is apparently relying on the specific language contained in subsection (e), where the transmittal of the DOA plan – not approval by the Legislature – is the action that triggers effectiveness and implementation. Relying on this portion of subsection (e) is seen in the DOA memorandum included in the DOA plan, which states: "The DOA recommends full implementation of the Nurse Pay Plan (NPP), Education [sic] Pay Plan (EDU), Attorney Pay Plan (ATTY), inclusive of all employees who re both in the ***Classified and Unclassified*** service, effective upon approval by *I Liheslaturan Guåhan* or upon the expiration of thirty (30) days after transmittal to *I Liheslaturan Guåhan*. The DOA recommends a phased in approach to the full implementation of the [General Pay Plan]." Representations from the Executive Branch also reveal the Administration's reliance on this subsection. From the outset, the DOA's position was that it could proceed with implementation, notwithstanding the lack of legislative approval, so long as the 30-day timeframe has elapsed.

In light of the ambiguity created by the contradictory provisions within Section 2, it is necessary to examine "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341.

Review of the other subsections provides limited guidance as to whether the plan required legislative approval or was presumptively effective upon transmittal. Subsection (a) repealed P.L. 30-196:XI:7 (Sept. 1, 2010), the Government of Guam Competitive Wage Act of 2011, which implemented salary adjustments for Government of Guam employees in accordance with the Hay Plan. Subsection (c) required that the DOA plan include a recommendation for adjustments for either classified employees only, or both classified and unclassified employees. Subsection (d) appropriated funding, with specific percentages for branches and agencies. Subsection (f) stated that the adjustments would

apply only to full-time positions funded in FY 2014. Subsection (g) excluded the monthly allotments pursuant to 5 GCA § 1303 from the appropriation in subsection (d). Subsection (h) stated that Governor's transfer authority did not apply to the appropriation in subsection (d).

Review of P.L. 32-068 "as a whole," *Robinson*, 519 U.S. at 341, allows for an interpretation that might resolve the conflicting language of Section 2. In the "broader context of the statute as a whole," *Robinson*, 519 U.S. at 341, Section 2 was contained within Chapter XI ("Miscellaneous Appropriations") of the FY 2014 Budget Act. Other provisions in Chapter XI include appropriations for supplemental annuity benefits for Government of Guam retirees and their survivors, and disability supplemental annuity additions. The argument can be made that, because the Competitive Wage Act of 2014 was part of the FY2014 Budget Act, the implementation of the DOA plan was only for the duration of FY 2014, and was not meant to be permanent. Admittedly, this argument is not overwhelmingly compelling; there may be other reasons for including this particular provision in the annual appropriations act. But according to past executive orders that sought to implement the Hay Plan, more than $18 million was necessary for implementation. *See* Executive Order 2010-24 (Sept. 23, 2010); Executive Order 2010-25 (Oct. 29, 2010). The amount funded by P.L. 32-068 was less than half the previous amount. Thus, the argument can be made that, taking these facts all together, the appropriation in Section (d) was for the implementation of the Hay Plan only for the remainder of FY 2014. This interpretation does not resolve the ambiguity between subsections (b) and (e), but it does offer an alternative interpretation of Section 2, namely, that the appropriation and implementation of salary increases was intended only for FY 2014.

Even under this interpretation, the ambiguity created by the conflict between subsections (b) and (e) remains. In such instances, although not favored, the laws have been found to be invalid. In *Bank of Guam v. Reidy*, 2001 Guam 14, the Supreme Court of Guam found a statute to be "void for uncertainty in meaning," because "two sentences of the statute [we]re in obvious and direct conflict with each other." *Id.* at ¶ 20. The Texas Supreme Court held that "when the provisions of a statute are so inharmonious and conflicting as to render it impossible of execution, the courts have no alternative but to declare it inoperative and void." *S. Canal Co. v. State Bd. of Eng'rs*, 318 S.W.2d 619, 624 (Tex. 1958). As explained in detail by the Kentucky Supreme Court:

> But where the law-making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared to be inoperative and void. But this is done only where the court is unable by the application of known and well accepted rules of construction to determine with any degree of certainty the meaning and intent of an act of the legislature because of vagueness, incompleteness or irreconcilable conflict in its provisions.

Folks v. Barren County, 232 S.W.2d 1010, 1013 (Ky. 1950). *See also R.W. Dunteman Co. v. C/G Enters., Inc.*, 692 N.E.2d 306, 313 (Ill. 1998) ("A legislative act which is so incomplete or conflicting and inconsistent in its provisions that it cannot be executed will be declared inoperative and void."); *Matter of Bode's Estate*, 273 N.W.2d 180, 182 (S.D. 1979) ("Omissions, inconsistencies or uncertainness in a statute do not render that statute invalid unless the courts, by accepted rules of construction, are unable to determine what the legislature intended or find that the statute cannot be executed.").

Because it is not possible to resolve the ambiguity, the argument can be made that Section 2 cannot be executed, and may be found to be void.

C. Section 2(e) and the Unlawful Delegation of Legislative Authority

A third concern regarding the DOA plan is based on representations from the Executive Branch that the decision to implement the DOA plan is grounded in Section 2(e) of Public Law 32-068:XI. AIthough not precisely stated, it appears that the Administration is interpreting subsection (e) as the Legislature delegating to the Executive Branch the authority to implement the pay increases. More specifically, the argument that the Executive Branch was acting pursuant to its delegated authority would explain the belief that further action from the Legislature was unnecessary.

"[U]nder 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." *In re Request of Gutierrez*, 2002 Guam 1 ¶ 35; *se also People v. Wai Kam Ho*, 2009 Guam 18 ¶ 29 ("The separation of powers doctrine is violated 'only when the actions of a branch of government defeat or materially impair the inherent functions of another branch" and a branch of government does not necessarily violate the doctrine simply because it undertakes actions that affect such functions.'") (quoting *In re Rosenkrantz*, 59 P.3d 174, 208 (Cal. 2002)) . Assuming *arguendo* that Section 2(e) effected a delegation, however, it would be stricken as inorganic, as it violates the separation of powers doctrine.

Public Law 32-068:XI:2 instructed the Governor to transmit "a final, implementable plan to adjust compensation, classification, and benefits" for Government of Guam employees. Section 2(e) stated that implementation would occur "30 calendar days after receipt" by the Speaker. Indeed, 30 days after receipt, on February 14, 2014, the Executive Branch implemented the plan as submitted on January 15, 2014. The original DOA plan includes a General Pay Plan, four specialized pay plans, and salary recommendations for Rate of Pay Positions (which included elected positions and judicial officers).

The implementation of the DOA plan is cause for concern, as there are already existing statutes governing compensation of Government of Guam employees found in Title 4 GCA, Chapter 6, and specifically, the following provisions: 4 GCA § 6201 ("Compensation Schedule"); 4 GCA § 6202 ("Salary Increments"); 4 GCA § 6203 ("Merit Bonuses"); and 4 GCA § 6208 ("Government Attorneys Salaries"). Furthermore,

there has been no indication of legislation that would amend or repeal any existing statutes. Moreover, because the actual process for implementing the DOA plan has not been made public, it is not clear how existing law is to be reconciled with the plan. As one example, close examination of 4 GCA § 6201 reveals the difficulty in reconciling the existing law and the DOA plan. Section 6201 states in its entirety:

> **§ 6201. Compensation Schedule.**
>
> There is hereby established a unified pay schedule for positions identified in Volume III, Table II of the Hay Report, dated September 1990, and other such positions as may be subsequently determined, consisting of 19 Pay Grades A through V with Steps 1 through 10 per Pay Grade, and Pay Grades L6 through L1, an increment schedule consisting of at least Steps 11 through 20. The unified pay schedule identified as Attachment 1 to the Executive Branch Budget Act of 1992 is hereby incorporated herein.

The text of Section 6201 is followed by the GovGuam Unified Pay Schedule. Assuming *arguendo* that the implementation of the DOA plan involves simply substituting the Unified Pay Schedule, then it would presumably be replaced with the General Pay Plan, and the specialized Nurse Pay Plan, Educator Pay Plan, Executive Pay Plan, and recommendations for Rate of Pay Positions. If so, then the text of Section 6201, which refers to the Hay Report of 1990 and incorporates the unified pay schedule from the "Executive Branch Budget Act of 1992," would be rendered erroneous; the new pay plans clearly are not the product of the 1990 Hay Report and are not part of the 1992 Budget Act. Therefore, it appears that the implementation would involve substituting Section 6201 in its entirety with the new pay plans.

Using the same analysis for the Attorney Pay Plan yields the same troubling outcome with regard to 4 GCA § 6208; reconciling the two would involve either the dramatic reinterpretation of existing law, or its wholesale substitution for the new plan. To illustrate: Section 6208 establishes four classes of attorneys (Attorney I to Attorney IV), with the determination of the relevant class dependent on the number of years of experience as an attorney. The statute can be summarized as follows:

Attorney I: zero to three years of experience as an attorney. Three steps in this class.

Attorney II: three years but less than five years of experience as an attorney, working under supervision of a senior attorney. Two steps in this class.

Attorney III: senior attorney with more than five years but less than eight years of experience as an attorney, working under minima supervision. Three steps in this class.

> Attorney IV: non-supervisory and program-supervisor attorneys, and includes the Chief Deputy Attorney General and Public Defender. Senior attorney with more than eight years of experience as an attorney. Six steps in this class.

Section 6208 also explains the procedure used by DOA of "slotting" attorneys into the appropriate step and pay grade.

The new Attorney Pay Plan (Exhibit 4 of the DOA plan), sets forth six classes of attorneys, Attorney I through Attorney V, and a separate class for Chief Deputy Attorney General. Attorney I includes only two steps, and the other five classes include ten steps. Further, a note to Exhibit 4 states that "Attorney Level 1 includes two steps with the expectation of moving to the Attorney Level 2 upon meeting the minimum requirements." To interpret the new pay plan harmoniously with Section 6208 would result in amending existing law as to the Attorney I through Attorney IV classes, and creating a new statutory provision to accommodate the Chief Deputy Attorney General position.

As these examples demonstrate, implementation of the DOA plan results in amendment and/or repeal of existing law. This result requires bears asking: Can the DOA pay plan, a unilateral Executive Branch action, supersede duly enacted statutes? The answer must be "No."

Courts are in agreement that the power to repeal or amend legislative acts cannot be delegated. The Supreme Court of Alabama held that the Legislature "cannot delegate the power to repeal, amend, or otherwise supplant an act of the Legislature. *Freeman v. City of Mobile*, 761 So.2d 235, 237 (Ala. 1999) (quoting *Heck v. Hall*, 190 So. 280, 287 (Ala. 1939)). Similarly, the Supreme Court of Washington found: "The Legislature is prohibited from delegating its purely legislative functions. These nondelegable powers include the power to enact, suspend, and repeal laws, and the power to declare general public policy." *Diversified Inv. P'ship v. Dep't of Soc. and Health Servs.*, 775 P.2d 947, 950 (Wash. 1989) (citations omitted). "It is elementary that the legislature . . . cannot delegate purely legislative power to any other body, person, board, or commission. . . . Pure legislative power, which can never be delegated, is the authority to make a complete law—complete as to the time it shall take effect and as to whom it shall apply—and to determine the expediency of its enactment." *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949) (footnote and citations omitted).

"The power to amend statutes belongs exclusively to the legislature." SINGER & SINGER § 22:2. The Legislature did not adopt the plan submitted on January 15, 2014 which is now being implemented. The Legislature approved an amended version that was subsequently vetoed. The plan being implemented is a creature of the Executive Branch, and as such, it cannot effectuate an amendment to existing law.

Similarly, the DOA plan cannot be interpreted as expressly repealing existing law; as recognized by the courts above, the power to repeal laws is exclusively legislative. *See Freeman*, 761 So.2d at 237; *Diversified Inv. P'ship*, 775 P.2d at 950.

Finally, the plan cannot be interpreted as an implied repeal. Repeals by implication are disfavored. *Sumitomo Const., Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶ 16. "An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)); *Sumitomo*, 2001 Guam 23 ¶ 16. *See also Topasna v. Superior Court*, 1996 Guam 5 ¶ 13 ("While repeals by implication are disfavored, such repeal may be found when a later statute, covers the whole situation of an earlier one and is clearly intended as a substitute.").

Interpreting the DOA plan harmoniously with the existing statutes would result in an impermissible delegation, because any interpretation of the DOA plan would inherently require amending and/or repealing existing statutes. Further, because the DOA plan primarily consists of pay plans found in Exhibits 1 through 6, the plan could not be reasonably interpreted as substituting the entirety of the statutes found in Chapter 6 of Title 4 GCA.

In light of this analysis, the apparent reliance on subsection (e) as automatically effectuating the DOA plan upon the passing of 30 days would result in an impermissible and inorganic delegation of the legislative power to amend and repeal statutes. The Executive Branch, though the implementation of the original DOA plan, cannot supersede duly enacted statutes.

III. Section 2(f) of Chapter XI of P.L. 32-068

The preceding discussion of P.L. 32-068 examined the grounds by which the DOA plan may be found to be invalid. An analysis of subsection (f) offers an alternative interpretation of legislative intent for Hay Plan increases.

Subsection (f) states in its entirety:

> The use of funds appropriated in Subsection (d) of this Section *shall* be used *only* for salary adjustments of personnel filling authorized full-time equivalent (FTE) positions funded in the department or agency's Fiscal Year 2014 budget in this Act and as recommended in the Comprehensive Government-wide Positions, Classifications, and Benefits Study Plan pursuant to Section 13 of Public Law 29-52, and Executive Order 2006-21, or as submitted by *I Maga'låhen Guåhan* to *I Liheslaturan Guåhan* and modified by *I Liheslaturan Guåhan*, if necessary, prior to its adoption.

In simpler terms, subsection (f) limits the $7,055,357 appropriation in subsection (d) to be expended only in accordance with either: the 2010 Hay Plan adopted in Executive Order No. 2010-24 (which was authorized by Executive Order No. 2006-21 (Aug. 31, 2006)); or the plan to be submitted by DOA before January 15, 2014.

If the DOA plan is invalid, then the appropriation may be used for the 2010 Hay Plan, which is attached to Executive Order 2010-24. (Although Section 2(a) of P.L. 32-068:XI repealed P.L. 30-196 which implemented the 2010 Hay Plan, this plan nonetheless exists separate and apart from the legislative enactment). The 2010 Hay Plan is virtually identical to the DOA plan submitted to the Legislature; in fact, it is arguably more comprehensive, as it included the DOA Compensation Study Implementation Policies and Procedures, which set forth the detailed process of transitioning to the new pay plans and rates of pay, for both incumbents and new appointments. The DOA plan, as explained above, consisted primarily of a memorandum, pay plans, a one-page exhibit of recommendations and facts (Exhibit 7), and classification lists. In contrast, the 2010 Hay Plan attached to Executive Order 2010-24 included the Pay Plans and information specific to implementing each plan, as well as detailed policies and procedures such as the "slotting" of employees. Moreover, the 2010 Hay Plan only addressed both classified and unclassified employee positions; the implementation was limited to only classified positions pursuant to the later enactment of Public Law 30-196:XI:7 (Sept. 1, 2010).

Consequently, notwithstanding the conclusion that the implementation of the original DOA plan is flawed, and therefore it should not be implemented in the Judiciary, the argument stands that implementation of the 2010 Hay Plan may be permitted under subsection (f), which provides that the appropriation may be used for this purpose.

IV. Superior Court Non-Presiding Judges' salary recommendation

An issue that was not addressed in the DOA plan is the salary recommendations for judicial officers, found in Exhibit 6 (Rate of Pay Positions). According to the DOA plan, the recommended pay for Superior Court Judges is $128,685, an increase from the current salary of $121,664. However, apart from the DOA plan, or any government-wide evaluation of compensation, classification, and benefits, there is no mechanism to authorize an increase to judges' compensation, absent the enactment of a new Guam law.

Authority to increase a judge's salary was found in Title 7 GCA § 3106.1, entitled "Annual Adjustment of Judges' Compensation," which has since become void by operation of law. Section 3106.1 was added by P.L. 28-137:4 (July 11, 2006), and as enacted, stated in its entirety:

> (a) Annually, prior to May 1, the Judicial Council may, with reference to Title 7 GCA, Chapter 4, § 4101 (e), adjust the annual compensation of the judges of the Superior Court, except the Presiding Judge, for the next fiscal year by an amount not in excess of four percent (4%) more than the previous fiscal year's annual rate of compensation.
>
> (b) The annual compensation of the Presiding Judge shall be One Thousand Dollars ($1,000) more than the salary of the judges.
>
> (c) Funding for a salary increase shall be included in the Judicial Council's annual budget request submitted on May 1 pursuant to 7 G.C.A., Chapter 2, § 2102.

This law also stated that the "initial implementation of the salary adjustment procedure . . . may be accomplished by the Judicial Council prior to October 1, 2006, instead of May 1, 2006, if the Supreme Court promulgated "governing effective dispatch of Superior Court's business." P.L. 28-137:10 and :1.

On September 28, 2006, the Judicial Council approved the first four percent (4%) adjustment to the annual compensation of Superior Court judges, effective October 1, 2006. Judicial Council Resolution No. JC 06-023 (Sept. 28, 2006). Pursuant to subsequent Judicial Council action, the salary was gradually increased. Section 3106.1 was later amended by Public Law 30-061:1 (Nov. 25, 2009) as follows:

> (a) Annually, prior to October 1, the Judicial Council may, with reference to Title 7 GCA, Chapter 4, § 4101 (e), adjust the annual compensation of the Judges of the Superior Court, including the Presiding Judge and the Justices of the Supreme Court, for the next fiscal year by an amount not in excess of four percent (4%) more than the previous fiscal year's annual rate of compensation.
>
> (b) Funding requirements for any adjustment approved by the Judicial Council should be contained within its approved fiscal year budget, provided, however, that if the salary adjustments are not directly cited in the budget, then any funding requirements shall be absorbed from its approved fiscal year budget.
>
> (c) Funding for a salary increase should be included in the Judicial Council's annual budget request submitted to *I Liheslaturan Guahan.*
>
> (d) The annual adjustment of the judicial salaries affected pursuant to this § 3106.1 shall take effect and be implemented at the beginning of the subsequent fiscal year following approval by the Judicial Council.

Section 3106.1, however became void by operation of law as of October 1, 2010, pursuant to the sunset provision in P.L. 28-137:7. Accordingly, this statutory mechanism to increase the salary of judicial officers no longer exists.

In summary, even in the event of another government-wide compensation, classification, and benefits study, it will literally require an act by the Guam Legislature, and the approval by the Governor, in order to adjust the salary of a judicial officer.

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Joshua F. Tenorio
Acting Administrator of the Courts

January 31, 2014

Vice Speaker Benjamin J.F. Cruz
Chairman
Committee on General Government Operations & Cultural Affairs
Mina' Trentai Dos Na Liheslaturan Guåhan
32nd Guam Legislature
155 Hesler Place
Hagåtña, Guam 96910

Re: Testimony on Bill No. 268-32(COR)

Dear Vice Speaker Cruz:

Hafa Adai! Thank you for providing the Judiciary of Guam with the opportunity to provide testimony on Bill No. 268-32(COR), AN ACT TO APPROVE THE DEPARTMENT OF ADMINISTRATION'S IMPLEMENTATION PLANS OF THE 'GOVERNMENT OF GUAM COMPETITIVE WAGE ACT OF 2014', TO REQUIRE A PERFORMANCE-BASED STANDARD FOR DIRECTORS AND DEPUTY DIRECTORS OF LINE AGENCIES AND *I MAGA'LAHEN AND I SEGUNDU MAGA'LAHEN.*

My comments will be focused on the portions of the legislation which would affect the employees of the Judiciary of Guam.

The Judiciary of Guam is in support of Section 3 of this legislation, which would approve the General Pay Plan (GPP) contained in Exhibit 1 and the Attorney Pay Plan (ATTY) contained in Exhibit 4. The last part of Exhibit 4 should be corrected to read: "POSITIONS COVERED BY ATTORNEY PAY PLAN (ATTY)." To fully effectuate adopting these pay plans and to remove any conflict with existing law, it is necessary for *I Liheslaturan Guåhan* to repeal and reenact certain provisions found in Title 4, Chapter 6 of the Guam Code Annotated ("Compensation of Public Employees") which effectuate that Uniform Position Classification and Salary Administration Act of 1991. These are as follows:

1. **4 GCA § 6201, Compensation Schedule (Government of Guam Unified Pay Schedule)** must be repealed given the provision contained in Section 3 of Bill 268-32(COR).

2. **4 GCA § 6202, Salary Increments** should be *amended* to recognize the additional Pay Grades W and X and to reflect the language submitted by the Department of Administration contained in Item (1) of Exhibit 7. Miscellaneous Compensation-related Recommendations and Facts as follows:

   "**§ 6202. Salary Increments.** Every classified employee in Pay Grades A through ~~V~~ X shall be entitled to a one step salary increment for satisfactory performance. Employees at Steps 1 through 6 shall be entitled to an increment after twelve (12) months of satisfactory performance. Employees at Steps 7 through 9 shall be entitled to an increment after eighteen (18) months of satisfactory performance. Employees at Step 10 shall be entitled to an increment ~~equivalent to 3.5% of an employee's based salary~~ after twenty-four (24) months of satisfactory performance~~; the Director of Administration shall prepare an increment schedule consisting of at least Steps 11 to 20 to implement the 3.5% increment policy~~."

3. **4 GCA § 6203, Merit Bonus** must be *amended* either to include the additional Pay Grades W and X for the payment of Merit Bonuses or to reflect the recommendation to suspend the program as stated in Item 4 of Exhibit 7 of the Department of Administration Implementation Plan. However, the recommendation does not contemplate a process or a timeline in which suspension could be lifted.

4. **4 GCA § 6208, Government Attorneys Salaries** must be repealed given the provision contained in Section 3 of Bill 268-32(COR).

The Department of Administration Implementation Plan also recommended an increase in the salary of Superior Court – Judge from $121,664 to $128,685. Likewise, the Attorney General's salary was also recommended to be increased from $109,498 to $128,685, the same amount. However, the proposed Exhibit 6 appended to Bill 268-32(COR) only includes the salary increase for the Attorney General and not Superior Court – Judge. I am requesting that you restore the increase for Superior Court – Judge to $128,685 by adding a new item (d) to Section 5 to read as follows:

"(d) The salary of a Judge of the Superior Court of Guam shall be raised from One Hundred Twenty-one Thousand Six-hundred Sixty-four dollars ($121,664) to One Hundred Twenty-eight Thousand Six-hundred Eighty-five Dollars ($128,685)."

Alternatively, you can add Superior Court – Judge to the list in Exhibit 6 with the previous information inserted.

We share the view of the Executive Branch that implementation of the Government of Guam Competitive Wage Act of 2014 be applied to both classified and unclassified employees. Based on this policy, the Judiciary expects to receive its 6.7% share ($470,592.31) of the appropriation contained in Public Law 32-068:XI:2(d).

To ensure that these amounts will be expended consistent with Bill 268-32 (COR), we recommend Sections 3 and 5 be amended as follows:

> "**Section 3. Approval of the General Pay Plan (GPP), Nurse Pay Plan (NPP), Educator Pay Plan (EDU) and Attorney Pay Plan (ATTY).** Appropriations contained in Chapter XI, Section 2(d) of the General Appropriations Act of 2014 *shall be* used for classified and unclassified employees pursuant to Section ~~§1~~2(e) of Chapter XI of Public Law 32-68, *I Liheslatura* hereby approves the General Pay Plan (GPP) contained in Exhibit 1 appended hereto, the Nurse Pay Plan (NPP) contained in Exhibit 2 appended hereto, the Educator Pay Plan (EDU) contained in Exhibit 3 appended hereto, and the Attorney Pay Plan (ATTY) contained in Exhibit 4 appended hereto."
>
> "**Section 5. Approval of the Salary Recommendations for Rate of Pay Positions.** Appropriations contained in Chapter XI, Section 2(d) of the General Appropriations Act of 2014 *shall be* used for classified and unclassified employees pursuant to Section ~~§1~~2(e) of Chapter XI of Public Law 32-68, *I Liheslatura* hereby approves the Salary Recommendations for Rate of Pay Positions contained in Exhibit 6 appended hereto, except that:
>
> (a) ....."

Since the Judicial Council maintains autonomy over the administration of classification, pay, and benefits for judicial branch employees, as set forth in Guam law, we request that the appropriation made to implement these salary increases be further clarified with the following:

> "**Section __ . Appropriation to the Judiciary of Guam.** The sum of Four Hundred Seventy Thousand Five Hundred Ninety Two Dollars and Thirty One Cents ($470,592.31) appropriated from the General Fund to the Unified Judiciary in Public Law 32-68, Chapter XI, Miscellaneous Appropriations, Section 2, Subsection (d)(1) to pay for the implementation of the Government-wide Position Classification, Compensation and Salary Benefits Study is deappropriated and said sum of $470,592.31 is reappropriated herein from the General Fund to the Judiciary of Guam for the purpose of paying the salary adjustments to non-law enforcement classified and unclassified employees of the Judiciary affected in this Responsible Competitive Wage Implementation Act as determined by the Judicial Council of Guam."

However, this amount will not be sufficient for the Judiciary to fully implement these salary increases prescribed. The $470,592.31 appropriation provided to the Judiciary in the General Appropriations Act of 2014 only funds approximately 53% of the required amount necessary for full implementation for the remainder of FY2014 for eligible locally funded positions.

The Judiciary calculates that for the remainder of FY 2014, the fiscal impact to Judiciary operations would total $1,033,515 including $891,151 for locally funded eligible positions, $119,758 for eligible federally funded positions and $22,606 for eligible positions from other fund sources.

The parameters used by the Judiciary to calculate the fiscal impact of implementing salary increases mandated in the Public Law 32-068 are:

(1) Law enforcement personnel are not eligible for any compensation adjustments;
(2) The slotting of all eligible classified and unclassified employees is consistent with slotting policies and procedures used by the Judiciary in 2011;
(3) All eligible employees will receive no less than a 3.8% increase from current base salary;
(4) All eligible employees are slotted based on Grades, Steps and Salaries contained in the January 15, 2014 Department of Administration memorandum HRD NO.: OG-14-0160, Exhibits 1, 4, 5 and 6 to the Governor of Guam;
(5) No eligible employees are awarded compression pay;
(6) Full implementation from the effective date;
(7) Effective date of salary increases is February 15, 2014.

On an annual basis, the fiscal impact to Judiciary operations would be $1,665,107; $1,435,743 for locally funded eligible positions, $192,944 for federally funded eligible positions, and $36,420 for eligible positions funded by other fund sources.

We also remain very concerned about the future sustainability of full implementation of the salary increases mandated for law enforcement officers in Public Law 29-105, and for other employees in Public Law 32-068. The Judiciary has not yet received the funding required to implement the salary increase for law enforcement officers for FY 2014 in the amount of $900,000.

Full implementation for all mandated salary increases will require an estimated additional cash outlay of $2,821,987 to existing funding levels or an 11.4% increase not including any increases to the Unfunded Actuarial Accrued Liability Rate and other benefits such as life and health insurance. It is critical that the Legislature consider this during the upcoming FY 2015 budget deliberations to ensure the required funding is provided to the Judiciary in order to comply with implementing these salary increase mandates.

Should you require further information, please contact me at your convenience.

Senseramente,

JOSHUA F. TENORIO
Administrator of the Courts, Acting

cc: Senator Michael F.Q. San Nicolas
Senator Frank B. Aguon, Jr., Chairman, Committee on Guam US Military Relocation, Homeland Security, Veteran's Affairs and Judiciary