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October 7, 2014

INFORMATION AND GUIDANCE (Confidential)

REF: 14-AG-0826

To: Director, Civil Service Commission

From: Deputy Attorney General
Civil Litigation/Solicitors Division

RE: Political Activity Guidance, CSC-No. 2014-31 (September 17, 2014)

CIVIL SERVICE COMMISSION
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Hafa Adai. This Office has reviewed the Civil Service Commission's guidance memorandum CSC-No. 2014-31 dated September 17, 2014 addressed to R. Happy Rons of this Office with respect to permissible political activities of non-prosecution personnel under Guam's mini-Hatch Act, 4 GCA § 5102. We respectfully offer the following comments.

At the suggestion of the Civil Service Commission Guam law was amended to add specific categories of employees who would be prohibited from certain political activities. The law now provides:

Employees of the following government entities are prohibited from the Speaker taking an active part in political management or political campaigns: Judith E. Won Pat, Ed.D

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- (1) the Guam Election Commission;
- (2) the Civil Service Commission;
- (3) the Office of Public Accountability;
- (4) the Criminal Investigation Unit of the Tax Enforcement Division of the Department of Revenue and Taxation;
- (5) the Sworn police officer¹; and
- (6) the Prosecution Division of the Office of the Attorney General. For the purposes of this Section, the term "active part in political management or in a political campaign" means to campaign for or against candidates, or otherwise engage in political activity in concert with a political party, a candidate for partisan political office, or a partisan political group.

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Received By: CARL SANCHEZ, MYE

P.L. 31-217 (June 15, 2012), codified at 4 GCA § 5102(b).

¹ A previous version of Bill 419-31 (COR) provided that this section would read "Guam Police Department," which editorially makes better sense. It is unclear in the legislative history of the bill how or why the term "Sworn police officer" was substituted in the final version.

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The legislative history of P.L. 31-217 reflects that these categories of restricted employees were borrowed from federal law at the suggestion of the Civil Service Commission. Compare 5 U.S.C.A. § 7323(b)(2) – (4); 5 C.F.R. § 734.401. The Commission has interpreted this part of the law to be restricted to partisan political campaigns. See, 4 G.C.A., Chapter 5 – *Political Activities of Employees of the Government of Guam* pamphlet, available at <http://csc.guam.gov/wp-content/uploads/2013/09/Pamphlet-2012.pdf> (“restricted employees are not permitted to take an active part in *partisan* political campaign or in *partisan* political management”) (emphasis added). According to the Commission, “An activity is partisan if it involves political parties.” *Id.*; cf., *Political Activity and the Federal Employee* (Dec. 2005), available at https://osc.gov/Resources/ha_fed.pdf.²

This interpretation – that this part of Guam’s mini-Hatch Act is limited in application to participation in *partisan* campaigns – is consistent with judicial decisions that have considered challenges to the federal Hatch Act and state mini-Hatch acts. See, e.g., *Callaghan v. City of South Portland*, 76 A.3d 348, 355 (Me. 2013) (“the Hatch Act as construed by the Supreme Court [and Maine’s mini-Hatch Act] by its explicit terms, apply to *partisan* political activity”) (emphasis in original); see, generally, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *United States Civil Svc. Comm’n v. National Ass’n of Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

Assistant Attorney General R. Happy Rons is a full-time classified employee in the Civil Litigation/Solicitors Division of the Guam Attorney General’s Office. She is not presently assigned to Prosecution Division of the Office of the Attorney General. Therefore, 4 GCA § 5102(b)(6) does not on its face apply to her. In its September 17, 2014 memorandum addressing Assistant Attorney General Rons’ request for guidance as to permissible political activities she may engage in the Commission posited the following question:

Will or does the Attorney General have the capability to re-assign you to the Prosecution Division? If the answer to this question is Yes, then the Commission would caution you that you may be in the more “restricted class” of employees which are prohibited from participating in political activities, pursuant to 4 GCA § 5102(b), item (6).

The Commission then proposed that the answer would depend on how the Attorney General and his management team view her position. This Office respectfully disagrees. We can discern no statutory authority for the Commission’s cautionary guidance that merely because Ms. Rons *could* be reassigned to the prosecution division that she should consider herself to be in the “restricted class.” If that were the case, the exception would swallow the rule, and it would very likely have a chilling effect on the employee’s exercise of otherwise protected constitutional rights particularly her First Amendment rights of free speech and assembly.

² Although not binding on the Guam Civil Service Commission’s interpretation of Guam law, this publication is consistent with the Commission’s guidance that the restrictions are limited to partisan political campaigns or partisan political management.

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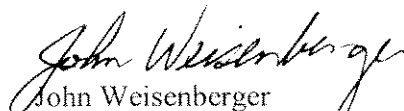
Unquestionably, the Attorney General has the capability to re-assign Assistant Attorney General Rons to the Prosecution Division. We suggest the better approach is to caution non-prosecution personnel that *if* they should become assigned to the Prosecution Division *then* the restrictions of 4 GCA § 5102(b) would apply. *Compare, Special Counsel v. Briggs*, 110 M.S.P.R. 1 (MSPB 2008 (federal employee was not entitled under the Hatch Act to continue political candidacy he started before beginning federal employment)).

We offer the following for the Legislature's future consideration. The federal Hatch Act has survived First Amendment as well as equal protection challenges. The courts are in general agreement that when considering an equal protection challenge only "rational basis" review applies. *See, e.g., Briggs v. Merit Systems Protection Board*, 331 F.3d 1307, 1317-18 (Fed. Cir. 2003). Cognizant that Guam's six classifications of "restricted" employees were borrowed from federal law, the Attorney General questions the Legislature's rationale for including employees of the Office of Public Accountability and the Prosecution Division of the Office of Attorney General. The reason is that, unlike their federal counterparts, both offices are by law non-partisan. *See*, 1 GCA § 1903 ("The Public Auditor is a non-partisan office. No candidate for the position of Public Auditor shall declare a political party affiliation. No candidate for the Office of Public Accountability shall seek the endorsement or receive directly or indirectly financial or material support from a political party."); and 5 GCA § 30101(b) ("A candidate for the position of Attorney General of Guam shall declare no political party affiliation.").

The rationale for restricting certain classes of federal employees of partisan offices from certain political activities does not automatically or necessarily attach to Guam employees of non-partisan offices in the same way. Guam's mini-Hatch Act restricts participation in *partisan* politics only, so it is unclear why employees of two offices which are *non-partisan* by law should be similarly restricted. Although prohibited from taking an active part in *partisan* political campaign or in *partisan* political management, we discern no prohibition on a "restricted" employee's participating in campaign activity involving non-partisan offices, including but not limited to the Attorney General and Public Auditor.

We hope this has been helpful.

Sensaramente,


John Weisenberger
Deputy Attorney General

cc: Hon. Judith Won Pat, Speaker
Guam 32nd Legislature
R. Happy Rons, Asst. Attorney General