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MEMORANDUM (Opinion)

To: Attorney General

From: Deputy Attorney General

Subject: Governor's Power to Dismiss Port Directors

The recent termination of a port director by the Governor has raised a question as to the legal authority of the Governor to take such action without notice or a hearing, as required by statutory law. This action raises a potential conflict between the powers of the Governor, as chief executive of the Territory of Guam under the Organic Act, and the authority of the legislature to regulate those powers.

The Organic Act of Guam limits the Governor's powers to terminate executive employees in certain circumstances to statutory limits contained in any relevant provision of Guam law. Because the Port Directors are executive employees, and since there is a specific provision of Guam law that requires notice and a hearing before terminating a Port director, the requirement of notice and hearing before terminating a Port director is required by statute, and possibly by constitutional due process.

The Organic Act provisions regarding the powers of the Governor are found at 48 U.S.C. §1422 and provide 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...*" [Emphasis added].

The law of Guam that establishes and regulates the Port Authority is found at 12 GCA Chapter 10 as:

§ 10102. Authority.

(a) There is hereby established the Port Authority of Guam as a public corporation and autonomous instrumentality of the government of Guam,

The Board of Directors is appointed for staggered terms and:

§10103 (b) Any director may be removed *upon charges, and after hearing*, by the Governor. (Emphasis added).

The Governor removed the Chairman of the Board without filing "charges" and without a hearing. Thus, the action of the Governor was not in compliance with this statutory requirement Guam law. Moreover, a statutory provision pertaining to a public officers right to notice and a hearing implicate their Due Process rights, but only if there is no overriding Organic Act provision..

However, this raises a conflict because Guam case law has established that the Governor's executive powers are broad enough to support the exercise of unfettered power in terminating executive branch employees without being subjected to the Guam legislature. A leading case in this area is *Myers v. U.S.* 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926), which held that Congress could not limit the ability of the President of the United States to remove an executive officer, based upon the constitution, stating:

As he [the President] is charged specifically to take care that they [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. Fisher Ames, 1 Annals of Congress, 474

This case was limited by *Humphrey's Executor v. U.S.* 295 U.S. 602, 55 S.Ct. 869 (1932), where the court said, in dicta, that where judicial positions, even in territories, were concerned the President did not have unlimited power to remove judges, because in their judicial functions the judges were not supervised by the President.

The Organic Act contains similar language to that in the U.S. Constitution regarding executive powers. This has been recognized by our Courts, who have held that the Guam Legislature may not enact a law encroaching upon the Governor's authority and powers as mandated by the Organic Act. The Appellate Division of the District Court, in *Territorial Prosecutor v. Superior Court*, 1983 WL 30224 at p. 5 noted:

The effect of the ruling in *Bordallo v. Baldwin*, supra, is clear; the legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act. If we were to permit the legislature to do so, not only would it render the concept of the separation of powers meaningless and be inconsistent with mandate of the Organic Act, but it could possibly result in the Governor being divested of his executive authority and power at the whim of the legislature.

Earlier, the court pointed out that in both this case and *Baldwin*, the operative language was the phrase "subject to the laws of Guam".

In the other Guam case to consider this issue, the Court was not considering the power of removal of members of the commission, and further, the issue was the partisan nature of the appointments. Thus, the Guam Supreme Court did not address the *Territorial Prosecutor* case. Also, the Guam Supreme Court emphasized that the nature of the Election commission was such that bi- or multi-partisan representation was a necessary part of its make-up. *Sablan v. Gutierrez*, 2002 Guam 13 ¶¶14, 15. In this, the Guam court was following the logic of *Humphrey's Executor*.

In the case of the Port, we have an instrumentality of the government, designated so in its creating law, which performs nothing but executive functions - the operation of the Commercial Port and other port facilities on Guam. It is neither quasi-legislative nor quasi-judicial, nor is it a part of those two branches. It is a purely "executive" office. The Organic Act, 48 U.S.C. §1421, contains both the limitation on the Governor's power of appointment and his responsibility for the execution of the laws of Guam. But if the legislature adopts laws that restrict the executive, Organic powers such laws may be deemed "inorganic".

Request of Governor Felix P. Camacho, In re, 2004 WL 1293239 (Guam Terr. 2004) [citing to *People v. Perez*, 1999 Guam 2, ¶17 (citations omitted)]. Under this standard, the Court developed a two-part test for determining whether a separation of powers violation has occurred, stating: "(1) whether the statutory provision prevents the accomplishment of constitutional functions and (2) if so, whether the disruptive impact is justified by any overriding constitutional need." *Id.* (emphasis added). Thus, if the statutory provision in question does not prevent the Governor from accomplishing his constitutional functions, there was no need to consider part two of the test and no separation of powers concern. But if the power of the Governor to remove a member of Port commission is deemed a restriction of his constitutional (ie "Organic") powers, then the next issue would be where there is an overriding need to promote the legislature's objectives.

There are genuine legal issues presented by the termination of the Port director without charges or a hearing that implicate the Governor's executive powers. While the legislature has adopted a statute that requires certain steps to be taken prior to removal of a Port director by the Governor, the Governor has constitutional powers that cannot be usurped by the legislature.

Here, there is a definite impediment on the Governor's power to see that the laws, the effectiveness of the Port as mandated by the Legislature, are carried out if he cannot remove director when he believes it is necessary.

Ultimately, this issue must be settled in the courts so that we have a clear understanding of just what are the powers of the Governor and the legislature under the Organic Act in the important matters of appointing and removing public officers.

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Approved:

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