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OAGLO: 2015-003

To : Isidro Seman, Director, Office of Personnel Management

From : Edward Manibusan, Attorney General

Subject: On the Exemption of the Office of the Public Auditor from 1 CMC § 8251

ATTORNEY GENERAL'S LEGAL OPINION NO. 15-02

The Office of Personnel Management (OPM), through its Director, has asked for a legal opinion on the issue of whether the Office of the Public Auditor (OPA) is exempted from the application of 1 CMC § 8251. The section restricts salary increases to no more than 10% of the preceding year's base salary for renewed contracts.

Question Presented: A close scrutiny of the statute and its legislative history raises a different issue from that raised by the OPM Director—was 1 CMC § 8251 intended to be temporary law that applied only to funds appropriated in FY 1988?

Short Answer: Yes. Section 8251 originates from the annual appropriations acts for Fiscal Year 1987 and 1988, and was enacted as temporary law. The subsequent annual appropriation act for FY 1989, PL 16-19—and all appropriation acts thereafter—omitted any reference to the 10% salary increase restriction. Thus, when PL 16-19 was signed into law on April 17, 1989, the restriction ceased to have any legal effect.

The Dispute

Sometime in 2014, OPA submitted to OPM Requests for Notification of Personnel Action (RFPAs) for the renewal of contracts for four employees. In a letter dated December 16, 2014, OPM returned the contracts to OPA because the proposed salaries for the four renewed contracts exceeded the 10% salary-increase ceiling set by 1 CMC § 8251. The Public Auditor responded to OPM claiming that OPA employees were not civil service employees and were exempt from the application of 1 CMC § 8251. OPM disagreed and requested a legal opinion from the Attorney General.

As explained below, 1 CMC § 8251 does not apply to OPA contract renewals, or any government-renewed contract. This conclusion rests on grounds entirely different from that offered by the Public Auditor.

Analysis

Appropriation statutes are temporary by nature. The 10% salary restriction set forth in 1 CMC § 8251 originates from the annual appropriation statutes for FY 1987 and FY 1988. *See* PL 5-31 (FY 1987), PL 6-3 (partial appropriations FY 1988) and PL 6-5 (partial appropriations FY 1988). The 10% restriction was not included in PL 6-19, the annual appropriation statute for FY 1989. As such, when PL 6-19 was approved on April 17, 1989, the 10% salary restriction was repealed by implication and ceased to have any legal effect. Therefore, 1 CMC § 8251 is not legally enforceable against OPA or any other government agency.

The Principles of Statutory Construction

The starting point of statutory construction to give effect to the plain meaning of language that is clear and unambiguous. *Aguon v. Marianas Pub. Land Corp.*, 6 NMI 233, 2001 MP 4 ¶ 30. When statutory language is unclear, the inquiry turns to discerning and giving effect to legislative intent by reading the statute as a whole. *Id.* Legislative intent may be "determined from relevant legislative history, including standing committee reports, which are highly persuasive evidence of legislative intent." *Id.*

Because 1 CMC § 8251 originated from appropriation statutes, interpretative principles pertaining to and the Commonwealth laws governing these statutes should also be considered when construing 1 CMC § 8251. Appropriation acts are generally viewed as temporary in nature and limited in duration at the time of their enactment. *See United States v. Van Den Berg*, 5 F.3d 439, 442-43 (9th Cir. 1993) (citing BLACK'S LAW DICTIONARY). They continue in force until the time of their limitation expires. *Id.* Unless language in the statute states otherwise, appropriation acts and their provisions retain their temporary character. *See Roccaforte v. Mulcahey*, 169 F. Supp 364-65 (D. Mass. 1958); *Calvert v. United States*, 37 F. 762, 763 (D.S.C. 1889).[1]

When successive appropriation statutes are enacted, a prior act is considered repealed by implication if the subsequent statute covers virtually the same subject as the prior one. The latter statute is deemed a substitute for the earlier act. *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503, S. Ct. 349, 352 (1936); *see also Magruder v. Petre*, 690 S.W.2d 830, 832 (Mo. Ct. App. 1985) (stating that "the failure to set out former statutory provisions in a later comprehensive enactment will operate to repeal the omitted provisions"); *Kemp by Wright v. State, Cnty. of Burlington,* 687 A.2d 715, 720-21 (N.J. 1997) (when a subsequent statute is clearly in conflict with an earlier statute on the same subject, courts will find legislative intent to supersede earlier law).

The time limits of annual appropriation acts are expressly provided for in the Commonwealth's annual appropriation law. Prior to 2009 (and during the time that PL 5-31, 6-3 and 6-5 were enacted), a new annual appropriation act superseded the earlier annual appropriation statute on the date of the new law's approval; until a new act was approved, the appropriated funds and administrative provisions contained in the prior statute remained in effect. 1 CMC § 7204(d)

[1] Legislatures may specify the time or circumstances when a statute ceases to have effect by clearly stating in the act itself or in a related statute. 2 SUTHERLAND STAT. CONSTR. § 34:4 (7th ed.)(expiration by occurrence of legislatively prescribed conditions).

(repealed by implication by HLI 16-11 in 2009). In 2009, the NMI Constitution was amended to mandate that an annual appropriation act for a specific fiscal year expire at the end of that fiscal year. *See* N.M.I. CONST. ART. II, § 5(a), and ART. III, § 9(a).

The Language of PL 5-31, as amended by PL 6-5

As stated, the disputed 1 CMC § 8251 originates from the annual appropriation statutes for FY 1987 and FY 1988.[2] In fact, § 307 of PL 6-3 and PL 6-5, modified the original language contained in PL 5-31 by adding the 10% ceiling for salary increases.[3] The disputed section states:

> Contract Renewal. Any government employee who is employed pursuant to a written employment contract shall not, upon renewal of the contract, receive a salary higher than that provided in the contract which is being renewed unless such increase is not more than 10% of the preceding year's base salary and the fund is provided for in the annual appropriation for the agency or department.

§ 307 of PL 6-3 and 6-5, codified as 1 CMC § 8251.[4]

The seemingly broad language in § 307 creates some ambiguity on whether the salary restriction was intended to be in effect only in FY 1988. However, when the appropriation acts for FY 1988 are viewed in their entirety and compared with the subsequent appropriation act for FY 1989, the temporary character of § 307 and its limited application become evident.

The title and purpose sections of both statutes express in clear and unmistakable terms the limited time and application of PL 6-3 and PL 6-5 to Fiscal Year 1988 appropriations. The short title in § 101 states that the act may be referred to as "the Government Partial Operations and Personnel Appropriations Act of 1988." In §102, the purpose section explicitly provides that the act appropriates funds "for the operations and activities of the [CNMI government] for Fiscal Year 1988." Clearly, the application of the appropriation acts was generally confined to FY 1988. There is nothing in the language of the acts that indicates that § 307 was excepted from the general temporary nature of the acts (*i.e.*, that it was intended to survive beyond FY 1988). Thus, like the FY 1988 appropriation acts in general, § 307 ceased to apply when the FY 1989 appropriation act was passed.

To be sure, the Legislature was aware of how to make § 307 effective beyond FY 1988.[5] Along with § 307, Chapter III of PL 6-5 contained several administrative provisions entitled "Administration of Appropriated Funds."[6] Several sections in Chapter III either repealed or amended specific sections

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[2] The commentary on 1 CMC § 8251 should have included PL 6-3 which contained the same § 307 as PL 6-5.

[3] PL 6-3 appropriated funds for the operation of public corporations, autonomous agencies, boards and commission, the Judicial Branch and the Saipan operations of the Department of Public Health and Environmental Services; PL 6-5 appropriated funding for the remaining operations for the Commonwealth Government, the Legislative Branch, the remaining operations of the Executive Branch departments and agencies, and the municipal governments.

[4] PL 6-3, the first partial appropriation for FY 1988, contained virtually the same language in its § 307.

[5] Appropriation acts may be used to modify prior statutes. *Friends of the Earth v. Armstrong*, 485 F.2d 1, 9 (10th Cir. 1973) (holding that the absence of funding for certain projects authorized by prior statute in subsequent appropriation acts indicated Congress's choice not to authorize the projects to be built).

[6] Section 329 of PL 6-5, provided that the administrative provisions of PL 6-5 superseded those of other prior appropriation acts.

of the Commonwealth Code. Section 312 was specifically referred to as a "repealer" of 1 CMC § 8250(d). Section 313 specifically referred to its provisions as an "amendment" to 1 CMC § 8250(a), (c), (e), and (f). By indicating that such sections were either repealers or amendments to existing law, rather than temporary suspensions of such laws for FY 1988, those sections were intended to be permanent law.[7] Further , none of the sections designated as repealers or amendments in PL 6-3 reappear in PL 6-5. Their absence in PL 6-5 demonstrates legislative intent to enact those sections as permanent law by inserting them only in the first appropriation act for FY 1988.

In contrast, § 307 was not drafted as a repealer or an amendment of existing law. No reference or statement is made that a specific public law or the Commonwealth Code would be permanently affected by its enactment. In drafting § 307, the Legislature could have stated that § 307 was an amendment to the Compensation Adjustment Act or another part of the Commonwealth Code.[8] There is no such statement that indicates the Legislature intended to make § 307 permanent law. As such, we are left with the inescapable conclusion that § 307's application was limited to the appropriated funds for FY 1988.

Further bolstering this conclusion, the history of the 10% salary ceiling for renewed contracts bears out the temporary character of the provision. The partial appropriation acts for FY 1988, both contained an identical § 307. Had the legislature intended § 307 to be permanent when it was enacted in PL 6-3, why did it include the same § 307 in PL 6-5, the second partial appropriations act for FY 1988? The Legislature must have intended for § 307 to be temporary having force and effect only for the duration of FY 1988, but not beyond the end of the fiscal year. The salary restriction's appearance in PL 5-31, reappearance in modified form in PL 6-3 and in PL 6-5, and then its disappearance altogether in PL 6-19 and subsequent statutes, tellingly demonstrates the temporary character of § 307.[9] Repealed by implication, § 307 ceased to have any legal effect on April 17, 1989, when PL 6-19 was enacted.

Conclusion

In sum, OPM may not use the 10% salary-increase restriction set forth in 1 CMC § 8251 as a basis for rejecting the four RFPAs from OPA. That section, which originated from FY 1988 appropriation statutes, was repealed on April 17, 1989, when PL 6-19, the subsequent annual appropriation act,

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[7] The Legislature has inserted permanent law as riders in other appropriation statutes. In PL 13-24, the annual appropriation statute for FY 2003, § 602 contained language that the amendment to the Compensation Adjustment Act would remain in effect until subsequently amended or repealed. Accordingly, Law Revision Commission incorporated the amendments into 1 CMC §8243(a), even though they were enacted through an appropriation statute.

[8] When a legislature modifies or repeals some statutes in newly enacted legislation, but leaves other statutes intact, the conclusion to be drawn is that the legislature made a determination not to change those unaffected statutes. *See United States v. Jordan*, 915 F.2d 622, 627-28 (11th Cir. 1990).

[9] The Conference Committee Report No. 6-5, on H.B. 6-130 which was signed as PL 6-19, stated that the draft was "as clean as possible, and matters previously presented as "riders" have been made [the subject] of separate legislation." CCR No. 6-5 at 2.

was approved. The salary restriction in 1 CMC § 8251 has no force and effect against OPA or any other government agency.[10]

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[10] Even though 1 CMC § 8251 has no legal effect, there are other restrictions in the Planning & Budgeting Act, as amended, and in appropriation statutes that may dictate whether salaries should be increased and by how much. The reality of the Commonwealth's economic condition requires that the Commonwealth Government be guided by fiscal constraint, prudence and discipline in its spending.