October 14, 2016

OPINION MEMORANDUM

TO: Director, Department of Administration

FROM: Attorney General

SUBJECT: Compensation of Individuals Prior to Meeting Pre-Employment Requirements

This is in response to your letter dated June 3, 2016, requesting this Office's opinion on the following matter:

QUESTION / ANSWER

Whether the government of Guam is obligated to pay an individual for work performed prior to completion of all requirements for government employment that may include (but is not limited to) an approved GG-1, approved contract, completed application, rating, selection, approved personnel action, and any other mandatory pre-employment condition? The answer is NO.

DISCUSSION

In 1995, this office issued an Opinion stating that the government of Guam is obligated to pay an employee who reported to work prior to meeting the qualification requirements for the position. See Attorney General Opinion Ref. DOA 95-1020 (1995 AG Opinion). The 1995 AG Opinion determined that although the hiring in that case was “in contravention of law” and the employment was “unauthorized,” individuals hired in violation of personnel laws and rules “are entitled to the promised compensation as a matter of equity[.]” We disagree with the 1995 AG Opinion and rescind it in its entirety.

In your request to this Office you noted that since the issuance of the 1995 AG Opinion, Executive Order 95-29 was promulgated and Public Law 28-98 was enacted. Executive Order 95-29 requires applicants selected for and offered employment with the government of Guam to undergo and pass a mandatory drug test before being employed. Public Law 28-98 prohibits persons convicted of a sex offense under the provisions of Chapter 25 of Title 9 Guam Code Annotated, or an offense as defined in Article 2 of Chapter 28 of Title 9 Guam Code Annotated in Guam, or an offense in any jurisdiction which includes, at a minimum, all of the elements of said offenses, or who is listed on the Sex Offender Registry, from being employed in the government of Guam. After further discussion, you are seeking additional clarification of the government’s legal obligation to pay an individual who is allowed to work without completing all pre-employment requirements.
An individual is not authorized to begin work in the government without completing and submitting to all pre-employment requirements and conditions. See 4 G.C.A. § 4105; Department of Administration Personnel Rules and Regulations Rule 4.002;1 P.L. 28-98; E.O. 95-29. The government of Guam is not obligated to pay an individual who reported to work prior to meeting the pre-employment conditions, requirements and qualifications for the position, regardless of whether the individual relied upon information or assurances made by a government official to report for work. Such representations or assurances made by a government official, or representative of a government official, are legally unenforceable and are considered ultra vires, or in conflict with applicable law.

Ultra vires acts are those done “wholly without legal authorization or in direct violation of existing statutes.” Metro. Park Dist. of Tacoma v. State, 85 Wash.2d 821, 825 (1975). Guam courts have recognized that acts of government entities may be ultra vires. See, e.g. Gutierrez v. Guam Election Commission, 2011 Guam 3 (recognizing the general proposition that ultra vires acts are void, but holding that the challenged acts of the Guam Election Commission were not ultra vires.) A government official cannot bind the government by unauthorized ultra vires acts in direct violation of existing statutes. See Romano v. Retirement Bd. of Employees’ Retirement System of R.I., 767 A.2d 35 (2001) (holding that, because the alleged representations by State Retirement Board agents were ultra vires and in conflict with state law, a state retiree’s detrimental reliance on the agents’ advice did not stop the Board from suspending the retiree’s pension when it discovered the retiree was also working full-time for a municipality.) The Romano court further noted neither a government entity nor any of its representatives has any implied or actual authority to modify, waive, or ignore applicable state law that conflicts with its actions or representations.2 Id.

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1 Department of Administration Personnel Rules and Regulations Rule 4.002(A) states in pertinent part:

No person shall be appointed to or employed in, or paid for service in any classified position until that position has been established, funded, and allocated to its proper class by the appropriate authorities. Nor. shall any person be allowed to begin work before such person submits an employment application, is placed on an eligibility list as “eligible” for the position applied for and is certified, selected, and processed - competitive examination. At a minimum, this applies to all original, initial and promotional appointments.

Furthermore, Rule 4.002(C) provides that “Applicants selected for and offered employment with the government of Guam shall undergo and pass a mandatory drug test before being employed.” (Emphasis added.)

2 While Rhode Island courts appear to accept the possibility of estoppels being used against the government, equitable doctrines do not apply to the government of Guam under its unique situation. Guam’s sovereign immunity was created by the United States Congress and the power to waive that immunity lies exclusively with the Guam Legislature. 48 U.S.C. § 1421(a). The Guam Legislature has not waived immunity to allow Guam to be sued under equitable theories of recovery.
Further, the individual cannot recover based on equitable theories such as quantum meruit. See United States v. Borja, Case No. CV-02-0016-ARM (D.N.Mar.1.2005) (holding that in order to assert a claim for quantum meruit, a party must demonstrate it “acted in good faith and without fraud or collusion and [] the municipality had the power it sought to exercise but merely exercised it in an irregular manner or by unauthorized procedural means.”) The court in Borja distinguished strictly ultra vires acts with acts within the government's authority but exercised in an irregular or unauthorized manner. Id. Directing an individual to work without satisfying the statutory pre-employment conditions is strictly ultra vires, without equitable defenses, and therefore void.

The 1995 AG Opinion cited to a U.S. Supreme Court case, United States v. Flanders, 5 S.Ct 67 (1884), for the proposition that the government must compensate an individual for services performed at the government's direction and the government accepts those services. Upon review of the 1995 AG Opinion, and the Flanders case cited therein, we find that it does not stand for the proposition of general liability on the part of the government for ultra vires employment acts by government officials that has come to be known as “promised compensation.” The hiring of an individual in violation of the government's personnel statutes, rules and regulations is in contravention of law and ultra vires. Statutory restrictions preclude employment, and thereby compensation, prior to satisfying all pre-employment requirements, conditions and qualifications.

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3 Again, equitable doctrines do not apply to the government of Guam as the Guam Legislature has not waived immunity to allow Guam to be sued under equitable theories of recovery. The paragraph is meant merely to illustrate why the government is not obligated to pay ultra vires acts.

4 In United States v. Borja, Case No. CV-02-0016-ARM (D.N.Mar.2005), the court noted that “ultra vires contracts are not enforced because ‘if the municipality is allowed to disregard the formalities and the other contracting party is, nevertheless, permitted to recover for the property delivered or the services rendered . . . then it follows that the statute or charter provision can always be evaded.” (citing 10 McQuillen, Municipal Corporations § 29.02 (3d ed. 1999). According to Borja, “the reasoning behind the ultra vires doctrine is premised on the proposition that protection of taxpayers and residents of a municipality is of ‘more importance then [sic] the dispensation of justice to a private party in a particular case.” Id.

5 In United States v. Flanders, 5 S.Ct. 67 (1884), the U.S. Supreme Court said that compensation could not be paid until the tax collector employee took a statutorily required oath; however, when that requirement was met, he was entitled to compensation based upon when he started collections. The Court stated:

The compensation is given by the statute to the collector, when appointed, and is based wholly on the amount of moneys paid over and accounted for. If he is appointed, and acts, and collects the moneys, and pays them over and accounts for them, and the government accepts his services and receives the moneys, his title to the compensation necessarily accrues, unless there is a restriction growing out of the fact that another statute says that he must take the oath ‘before being entitled to any of the salary or other emoluments' of the office. But we are of the opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or appropriate the commissions as compensation, does not arise until he takes and subscribes the oath or affirmation, but that, when he does so, his compensation is to be computed on moneys collected by him, from the time when, under his appointment, he began to perform services as collector, which the government accepted, provided he has paid over and accounted for such moneys, This was, in substance, the charge given, and it was correct.

Flanders is distinguished from our situation in that the Court relied upon a statute that set the compensation and indicated the employee was entitled to it upon appointment and upon performing the functions of that office. It is distinguishable from violations of pre-employment mandates where the employment itself is invalid.
Any action to the contrary is void and non-compensable. Finally, the *Flanders* Court did not decide that case on principles of equity, as the 1995 AG Opinion suggests.

To the extent that the 1995 AG Opinion is relied upon as the basis for “promised compensation” in the pre-employment context, it is hereby rescinded in its entirety.

CONCLUSION

Guam law and Department of Administration Personnel Rules and Regulations require an individual to first satisfy all pre-employment requirements, qualifications, and mandatory pre-employment conditions before starting to work for the government. Any employment entered into without satisfying the requirements of Guam law is void, and the individual cannot rely on the mistakes of a government official to justify compensation of employment in violation of the law. The government of Guam is not obligated to pay an individual for work performed prior to complying with all pre-employment conditions, requirements and qualifications.

This Opinion hereby rescinds AG Memorandum (Opinion) DOA 95-1020.

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