



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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September 16, 1998

The Honorable Benjamin T. Manglona
Mayor of Rota
P. O. Box 537
Rota, MP 96951

Dear Mayor:

Subject: Final Letter Report on the Audit of Compliance with the Authorized Number of Full Time Employee Positions in the Rota Mayor's Office (Report No. LT-98-11)

This letter report presents the results of the Office of the Public Auditor's (OPA) audit of compliance by the Rota Mayor's Office (RMO) with the authorized number of full time employee (FTE) positions as of November 8, 1997. The objective of our audit was to determine whether RMO exceeded the authorized number of FTE positions set by the 1997 Appropriation and Budget Authority Act of 1997 (the 1997 Appropriation Act).

Section 505 of Public Law 10--41 provides that if vacancies occur in any FTEs authorized for RMO, such vacancies will expire, and be transferred to the Public School System in Rota for staffing the new Sinapalo Elementary School. Consequently, the Rota Mayor's Office should have transferred to the Public School System in Rota, or made available for transfer, 31 positions which became vacant. Our audit also showed that RMO exceeded its authorized FTE ceiling by at least 43 positions because it (1) improperly replaced 31 positions which became vacant during the year with new employees, and (2) hired an additional 12 new illegal employees although only two positions remained unfilled. This occurred because RMO improperly requested personnel in excess of its ceiling, and because the Office of Management and Budget (OMB), which was responsible for certifying the availability of FTE positions, did not reject the requests by RMO for additional personnel. As a result, an amount estimated at \$700,000 on an annualized basis is being spent for personnel in excess of the authorized FTE ceiling without authorization from the Legislature.

The two agencies involved, RMO and OMB, had been apprised of the restrictions from both an OPA audit (Audit Report No. LT-97-05) and a resulting letter from OMB to agency and department heads stating that such requests for additional personnel would not be processed. Despite this notice, RMO continued to request personnel in excess of its ceiling, both as

replacements and as new hires. OMB, in turn, processed these personnel action requests, thereby enabling RMO to exceed its authorized FTE ceiling.

BACKGROUND

On May 29, 1997, OPA issued an audit report concerning department and agency compliance with their authorized number of FTE positions. As a result of that audit, the Special Assistant for Management and Budget issued a written directive to all department and agency heads informing them that the OMB would thereafter reject all Requests for Personnel Actions (RPAs) which were in excess of the FTE ceilings. Despite these actions, we received information in November 1997 that the RMO was employing personnel in excess of those authorized. Consequently, we initiated this follow-up audit.

OBJECTIVE, SCOPE AND METHODOLOGY

The objective of this audit was to determine whether and to what extent RMO was hiring employees in excess of the number of its authorized FTE positions as set by the 1997 Appropriation Act. The scope of our audit covered FTE positions in RMO as of November 8, 1997. Our procedures included a review of existing laws and regulations on FTE ceilings, and a comparison of the number of actual FTE positions currently occupied by government employees in RMO with the maximum number of FTE positions authorized for RMO under the 1997 Appropriation Act. We also reviewed three subsequent payrolls to determine whether RMO was continuing to hire or replace employees.

We performed our audit and investigation at the Department of Finance and OMB in Saipan from November 23, 1997 to January 23, 1998. The audit was made, where applicable, in accordance with Government Auditing Standards issued by the Comptroller General of the United States. Accordingly, we included such tests of records and other auditing procedures as were necessary in the circumstances. As part of our audit, we evaluated the controls to ensure that authorized FTE ceilings were not exceeded. We found that internal controls in this area were adequate but had been ignored.

FINDINGS AND RECOMMENDATIONS

Authorized FTE Ceiling Exceeded by the Rota Mayor's Office

Under Public Law 10-41, the 1997 Appropriation Act, RMO was authorized an FTE ceiling of 84 positions for fiscal year 1997. This law contained a provision, §505(b), which provided that FTE positions would be reduced or transferred should vacancies occur. More specifically, it stated:

- that to ensure fiscal accountability and control, should a vacancy occur in any of the positions authorized, that position will expire, the vacancy will not be filled, and the number of positions will be reduced accordingly;
- however, any positions authorized for RMO would not be eliminated but would instead be transferred to the Public School System (PSS) for staffing the Sinapalo elementary school.

Pursuant to the Planning and Budgeting Act, the same provisions apply to fiscal year 1998 because no new budget act has been passed and the government is still operating under the previous year's budget level.

Consequently, RMO should have transferred to the PSS in Rota, or made available for transfer, 31 positions which became vacant. Our audit also showed, however, that RMO exceeded its authorized FTE ceiling by at least 43 positions because it (1) replaced 31 positions which became vacant during the year with new illegal employees and did not make the vacant positions available for transfer to PSS, and (2) hired 12 additional employees in excess of the 84 FTE ceiling. This occurred because RMO improperly requested personnel in excess of its ceiling and because OMB, which was responsible for certifying the availability of FTE positions, did not reject the requests for additional personnel by RMO. As a result, an amount estimated at \$700,000 on an annualized basis is being spent for personnel in excess of the authorized FTE ceiling for RMO without authorization from the Legislature.

Laws Governing FTEs

Under Public Law 10-41, RMO was authorized an FTE ceiling of 84 positions for fiscal year 1997. Of these 84 positions, only two positions remained unfilled at the time the law was enacted.

Article X, Section 7 (Government Employment) of the Commonwealth Constitution states:

“In the annual appropriation acts, the legislature shall establish ceilings on the number of persons that may be employed by each branch, department, agency, authority and public corporation of the Commonwealth to which public funds are appropriated. Except upon specific approval by joint resolution of the legislature, no public funds may be expended for personnel in excess of the ceilings so established.” (Emphasis added.)

Section 301 of Public Law 10-41, the 1997 Appropriation Act, states:

“Funds for the programs and activities of the Government of the Commonwealth of the Northern Mariana Islands, except for the Public School System, are hereby appropriated as per the attached appropriation worksheets, which are incorporated by reference in this Act. The FTEs identified therein are the maximum number of positions approved and authorized and shall not be exceeded unless authorized in accordance with Article X, Section 7 of the Commonwealth Constitution;” (Emphasis added.)

Section 505 of Public Law 10-41 states:

“To ensure fiscal accountability and control, in the event a vacancy shall occur in any of the positions (FTEs) authorized by this Act, if the position is within the office of the Mayor of Tinian or the Mayor of Rota, or the office of Governor’s Representative on Rota or Tinian, then *except as provided in paragraph (1) of this subsection, notwithstanding any other provision of law, that FTE shall expire, the vacancy shall not be filled, and the number of FTEs authorized by this Act shall be deemed reduced accordingly.*” (Emphasis added.)

Paragraph(1) of section 505 states:

“FTEs in the offices of the Mayor of Rota and Governor’s Representative - Rota which expire shall not be eliminated but shall instead be transferred to the Public School System of Rota for purposes of staffing the new Sinapalo elementary school.”

Finally, section 508 of Public Law 10-41 states:

“No person may be hired on a temporary, part-time, probationary, provisional, permanent, or other basis *unless a vacant FTE exists for that person* or the position filled is of a type specifically exempted by this Act consistent with Article X, Section 7 of the Commonwealth Constitution. (Emphasis added.)

These provisions of P.L. 10-41 remain applicable for fiscal year 1998 because no new budget act has been passed and the government is still working under the previous year’s budget level.

According to §301 of P.L. 10-41 cited above, the FTE ceilings established by the Legislature refer to the number of positions specified in the appropriation worksheets supporting the amounts set forth in the annual appropriation acts. A reasonable interpretation of Article X, Section 7 of the Constitution would conclude that the FTE ceiling was intended to limit the number of employees who may be hired by a particular department or agency. This intent is further indicated in discussions of the proposed provision by the 2nd Constitutional Convention (as recorded in the Journal of the Second Constitutional Convention, 3rd day, July 18, 1985, pp. 560-568) which debated the restrictive nature of the law on “executive department directors”² who may have an urgent need to increase their ceilings. Under the Constitution, the FTE ceiling can only be exceeded upon specific approval by joint resolution of the Legislature. Such approval has not been obtained.

¹ 1 CMC §7204(d) states:

“If the annual appropriations acts are not enacted into law prior to the beginning of the budget year, the appropriations levels, and such of the criminal penalties, and administrative provisions for government operations and obligations as are not inconsistent with the provisions of this [Planning and Budgeting Act] shall continue as provided in the annual appropriations acts of the current year....”

² Executive department directors are now called department secretaries, pursuant to Section 106 of Executive Order 94-3, effective August 24, 1994.

Excess FTE Positions

Our comparison of the number of FTE positions occupied (employees being paid) with the number of authorized FTE positions as of November 8, 1997 showed that RMO exceeded its authorized FTE ceiling by 43 positions. This occurred because RMO: (1) improperly replaced 31 positions which became vacant during the year with new employees, and (2) hired an additional 12 new employees although only two positions remained unfilled. Moreover, RMO should have transferred, or made available for transfer, the 31 positions which became vacant, as required by Public Law 10-41

The *actual* number of FTE positions occupied was based on the number of current employees on the Rota Mayor's Office payroll as of November 8, 1997. The number of *authorized* FTE positions for the Mayor's Office was based on (1) the number of originally budgeted employees still on the payroll and (2) the number of unfilled vacancies as per the budget worksheet incorporated in the 1997 Appropriation Act.

The hiring of personnel in excess of the ceiling occurred because RMO improperly requested personnel in excess of its ceiling, and because OMB, which is responsible for certifying the availability of FTE positions, did not reject RMO's requests for additional personnel. Under existing policies and procedures, the Mayor's Office is required to submit its RPAs to OMB for certification and approval. OMB reviews each RPA to determine if there are positions and funding available for additional personnel. If there is no basis for approval, OMB prepares a memo stating the reason(s) why the RPA cannot be processed. The memo is attached to the RPA and returned, in this case, to the Rota Mayor's Office. OMB's standard checklist for returning an RPA includes the following: no budgeted funds, no budgeted FTEs, unbudgeted pay level, anticipated funding shortfall, and hold until appropriation is passed. OMB, however, failed to reject the RPAs of RMO which had no additional FTE positions available. An OMB budget official stated that RMO continued to submit RPAs throughout fiscal year 1997 to the cutoff of audit work during 1998, and that usually they were approved as long as the number of employees on board did not exceed 84.

An OMB official disagreed with our view that *once any of the persons on the original list of budgeted positions attached to the 1997 Appropriation Act left, the position became vacant*. Citing 1 CMC §8135, the OMB official stated that a position must be unfilled for 180 days before it is considered a vacancy. §8135 reads as follows:

“Except for the Department of Education and the Department of Public Health and Environmental Service, any FTE (full time employee) positions that are not filled within 180 days shall be eliminated. In the event that a personnel action is submitted to Personnel Office and no action is forthcoming within 180 days, the personnel action will be deemed approved. Upon the elimination of an FTE position, the funds appropriated for such position shall revert back to the General Fund”

This provision was part of Public Law 5-31, an appropriation act which expired many years ago and would not be applicable to FTEs in fiscal years 1997 and 1998. However, one of the OMB officials stated that this provision had been incorporated into personnel law. An examination of CNMI legislation did not substantiate this assertion.

OMB apparently believes that there were no “vacancies” in the RMO because no positions went unfilled for 180 days, citing 1 CMC §8135. The public law codified as 1 CMC §8135 was Section 413 of Public Law 5-31 which was the annual appropriation act for fiscal year 1987. Because there was no express statement in P.L. 5-31 showing that the Legislature intended the administrative provisions therein (including Sec. 413) to be part of the Commonwealth’s permanent laws, those administrative provisions were no longer in effect at the end of fiscal year 1987 unless subsequently enacted by later appropriation or other laws. No similar provision was enacted in the fiscal year 1997 Appropriation Act, P.L. 10-41. See Public Law 3-90, §10³.

Even if it were assumed, for argument’s sake, that 1 CMC §8135 is a permanent law, OMB’s interpretation cannot be reconciled with the language itself. OMB’s position seems to be that there is no vacancy unless an FTE position is unfilled for 180 days. But §8135 states that a position unfilled for 180 days “shall be eliminated,” so there can never be a vacant position (i.e., there is no vacancy for 180 days and no position thereafter). And if there can never be a vacant position, why then did the Legislature add the last sentence of §8135 dealing with filling a vacant position when a continuing resolution is in effect? We must conclude that the Legislature in passing P.L. 10-41 intended a more common sense interpretation of “vacancy,” that when a position was no longer filled in the Rota Mayor’s Office, it would be transferred to Rota PSS for staffing the Sinapalo Elementary School.

As stated previously, OPA issued an audit report in May 1997 about various Executive Branch agencies and departments which were exceeding their authorized FTE ceilings, and recommended that OMB issue a written directive to address the problem. As a result of our audit, OMB issued a letter notifying all agencies and departments that it would strictly comply with the mandates of the Commonwealth Constitution, Public Law 10-41, and the 1997 Appropriation Act to ensure that authorized ceilings were not exceeded. Further, all RPAs not complying with these laws would be returned without action.

However, even though agencies were apprised of this problem both during our earlier audit and by OMB’s letter, RMO continued to request personnel in excess of its ceiling, both as replacements and as new hires. At least 30 of these appointments (replacements or new hires) were made after the OMB letter dated 4/21/97 was sent to RMO. Consequently, RMO was well aware that it was not to submit RPAs where there were no FTEs available. OMB in turn, despite its own directive, processed these personnel action requests enabling RMO to exceed its authorized FTE ceiling.

³ P.L. 3-90, §10 states, in part:

- (a) All laws are permanent laws, except the following classes, which are temporary laws.
 - (1) All appropriation laws; ...
- (b) No temporary law shall repeal, modify, add to amend any portion of this Code or the general and permanent laws of the Commonwealth unless that intent is expressly stated within the law...

No expressed intent to permanently amend the Code appears in Public Law 5-31, the Appropriation Act for Fiscal Year 1987.

As a result, an amount estimated at \$700,000 on an annualized basis is being spent for personnel in excess of the authorized FTE ceiling without authorization from the Legislature. In view of the warnings given to RMO and OMB, responsible officials of both agencies should be held liable for the costs of this illegal hiring.

In our draft report, OPA concluded that RMO exceeded its authorized FTE ceiling established by the Legislature, and OMB approved the hiring of illegal employees where no positions existed, both in violation of CNMI Constitution and laws. These actions occurred even though each agency had been given adequate warning. Because the responsible officials of both agencies violated the provisions of P.L. 10-41, we believe they should reimburse the government for all expenses incurred in hiring 12 employees in excess of RMO's FTE ceiling.

Agency Responses and OPA Comments

Rota Mayor's Office

- **RMO Comment 1**

In responding to OPA's draft recommendations, the Rota Mayor's Office agreed with our draft *Recommendation 1* that it cease making appointments that would exceed the legally authorized ceiling. With regard to our draft *Recommendation 2*, where OPA stated that "the Mayor of Rota and the Special Assistant for Management and Budget should remove new hires and replacements not provided for on the original appropriation worksheets," RMO believes it is neither necessary nor legally prudent to remove any new hires or replacements from its payroll because the current administration is not accountable for the previous administration's defaults. As to draft *Recommendation 3*, RMO took the position that since none of the alleged unlawful or illegal activities took place during the current administration, it was responsible neither for those activities nor for costs arising from the hiring of unauthorized personnel and related legal fees.

OPA Comment 1

As concerns *Recommendation 2*, while we agree that the current RMO administration is not accountable for its predecessor's defaults, that does not absolve it from the responsibility to uphold the law—specifically by removing new hires and replacements not provided for in the original appropriation worksheets. As concerns *Recommendation 3*, we note that this recommendation by OPA was not directed to RMO, but rather to the Acting Attorney General.

- **RMO Comment 2**

As concerns the body of the report, RMO stated that most of the alleged FTE violations stem from the auditor's misplaced interpretation of PL 10-41 with respect to the term "vacant" or "vacancy." Citing 1 CMC §8135 as the authority for when an FTE becomes vacant, it concluded that RMO positions should remain vacant for 180 days before they are transferred to the Public School System.

OPA Comment 2

As to RMO's disagreement with our interpretation of the term "vacancy," we again point out that 1 CMC §8135 was codified from Section 413 of Public Law 5-31, the annual appropriation act for fiscal year 1987. Because there was no express statement in PL 5-31 showing that the Legislature intended its administrative provisions to be part of the Commonwealth's permanent laws, those administrative provisions were no longer in effect after the end of fiscal year 1987 unless subsequently enacted by later appropriation or other laws. PL 3-90, §10. No similar provision was enacted in the 1997 Appropriation Act--PL 10-41.

- **RMO Comment 3**

RMO expressed its belief that the law did not intend that FTE slots should become lost just because a gap of a few days occurs, maintaining that positions must remain open for a reasonable period of time so that mayors are not denied the right to fill them in the event of a resignation, firing, death, or transition of administrations.

OPA Comment 3

We must point out that when a contract is renewed without a lapse, the employee has not left his position and there is no vacancy. Also, as long as contracts are in the process of renewal before they expire, a gap in processing does not cause a vacancy. However, it appears that when events such as resignation, death, or firing occur, a vacancy is created. In the case of a change of administrations, vacancies need not be created as it is customary that most employees in government employment continue on into the following administration.

- **RMO Comment 4**

RMO also stated that the Governor's veto of a portion of Section 505 prevents the Public School System from paying for any positions transferred to it.

OPA Comment 4

We disagree because any transfer of FTEs would also result in the transfer of the funds budgeted for those FTEs. This conclusion can be inferred from Section 505(b)(5) of P.L. 10-41 which states that:

"Upon the expiration or transfer of any FTEs as provided by this subsection, or the transfer of any funds pursuant to this subsection, this Act, and Public Law 10-34⁴ where applicable, shall be deemed automatically amended accordingly to reflect the lower level of authorized employment, new FTEs, increased funding, and decreased funding as the case may be."

- **RMO Comment 5**

Finally, the Rota Mayor's Office correctly pointed out in its response to our draft report that the Sinapalo Elementary School is still under construction.

⁴ Public Law 10-34 is the PSS Appropriation Act for 1997.

Office of Management and Budget

- **OMB Comment 1**

The Office of Management and Budget responded to our draft *Recommendation 1* by stating that it would not act on any new appointments pending resolution of the legal issues affecting FTE policies at the Rota Mayor's Office. In response to our draft *Recommendation 2*, OMB stated that only the Mayor of Rota has the authority to remove new hires and replacements not provided in the original appropriation worksheets. OMB agreed with this recommendation only as it concerns removal of appointees who were in excess of the original FTE ceiling.

OPA Comment 1

As concerns recommendation 2, we agree that OMB does not have the authority to remove new hires and replacements not provided in the original appropriation worksheets. This responsibility rests instead with the Office of Personnel Management.

- **OMB Comment 2**

As to the body of the report, OMB agreed that hiring personnel (*new hires*) in excess of RMO's authorized FTE ceiling was not in accordance with PL 10-41, but it disagreed with OPA concerning approval of "replacements." As reasons for disagreeing, OMB cited (1) its interpretation of the term "vacancy," and (2) its belief in the applicability of 1 CMC §8135 which indicates that a position must be unfilled for 6 months before a vacancy is created. OMB believes that §8135 was codified under "Division 8, Public Employment, Part 1, Chapter 3."

OPA Comment 2

We stand by our position, however, that 1 CMC §8135 is not part of current law because it was passed after the Commonwealth Code was published and therefore could not have been codified when the code was first enacted. Furthermore, as part of Title I of the Code, §8135 is not one of the provisions that was codified as positive law. See P.L. 3-90, §4, 2(b), 2(c). At best, §8135 would constitute only prima facie evidence of being a general and permanent law, but such inference is rebutted by the absence of any specific intent to make it permanent, as required by PL 3-90, §10.

OMB disagreed with OPA's interpretation of the term "vacancy" for a number of reasons.

- **OMB Comment 3**

It stated that PL 10-41 does not make any reference to "personnel worksheets" as suggested by OPA, as such reference was effectively rendered void by the Governor's line item veto of Section 505(b)(2).

OPA Comment 3

We must point out that the veto had nothing to do with eliminating all reference to the personnel worksheets which are the foundation for the appropriation worksheets from both a dollar and number perspective. Rather, the thrust of the veto was to delete reference to employees in the Governor's budget submission being offered employment for the duration of the fiscal year.

- **OMB Comment 4**

OPM asked “Why would PL 10-41 grant the RMO two(2) new FTEs (vacant FTEs) at the time of enactment of the law, and prohibit the expenditure authority from filling it up?”

OPA Comment 4

We point out that the statute restricting the hiring of FTEs is referring to future rather than present vacancies. PL 10-41 uses the words “shall occur” and “shall expire,” obviously looking to future vacancies and not present ones.

- **OMB Comment 5**

OMB also asked “What would happen to the Rota Mayors Office at the beginning of FY 1998, or soon thereafter, when at some point in time, all FTEs were actually vacated?” It suggests that RMO would be left with no FTEs, and this would be tantamount to closing a public office established by the Commonwealth Constitution.

OPA Comment 5

In a case involving the Governor’s veto of funds appropriated for the Office of the Public Auditor, a constitutionally created office, the court upheld the legitimacy of the veto, stating:

“the constitutional status of plaintiff’s office (OPA) does not shield it from legislative or gubernatorial regulation of appropriations under Article II, Section 7 of the Commonwealth Constitution.” Bradshaw v. Camacho, 1 CR 165, 174 (1981).

- **OMB Comment 6**

OMB maintained that any reference to names of persons for the purpose of establishing a vacancy cannot be made because no such personnel listing was attached to or made part of PL 10-41. Citing 1 CMC §8135 as authority, OMB asserts that *avacancy* shall expire before it can be eliminated, or in this case be made available for transfer to PSS. It states that a review of personnel action requests shows no “gap” between the last day of a previous contract and the effective date of the new contract for a particular FTE, which indicates the position was never vacated.

OPA Comment 6

In OPA’s view, this logic is incorrect as neither PL 10-41 nor 1 CMC 8135, cited previously by OMB, state that *vacancies* expire. They state only that an FTE position expires or is eliminated. Also it should be noted that Section 508 of PL 10-41 states that “no person may be hired *unless a vacant FTE* exists for that person or the position filled is of a type specifically exempted by the Act consistent with Article X, Section 7 of the Commonwealth Constitution.” (Emphasis added.) Therefore, if no positions were vacant as OMB claims, OMB would have been prohibited from approving the hiring of personnel via RMO’s Requests for Personnel Action unless positions were exempted (they were not.)

Conclusions and Recommendations

Because RMO hired 12 employees in excess of the 84-FTE ceiling established by the Legislature, and because OMB approved the hiring when no positions existed, both agencies violated the CNMI Constitution and laws. Accordingly, we believe that the Attorney General should consider action to collect from the former heads of both agencies the costs associated with such hiring.

There is a difference of opinion as to whether or not RMO complied with the 1997 Appropriation Act when it replaced 31 FTEs whose positions had been vacated and were to be transferred to PSS to operate the Sinapalo School. The 1997 Appropriation Act did not define or explain when a vacancy exists. The definition of vacancy in the Commonwealth Code needs clarification because the only definition of the term “vacancy” is a term in an appropriation act which was applicable only to fiscal year 1987 and was only a temporary law. Furthermore, the 1997 Appropriation Act did not provide clear guidance on applying the provisions dealing with FTE vacancies and transfers. For example:

- What happens to the vacant FTE positions before the Sinapalo Elementary School becomes operational? Does RMO forfeit the FTEs or can it hire replacements until such time as the school opens?
- If an employee resigns from a position for which RMO still has need (for example the mayor’s secretary), does RMO lose the ability to obtain a replacement?
- What would happen if the FTE level of 84 were reduced to 20 at the close of the fiscal year and a continuing appropriation occurs. Did the Legislature intend that the vacant 64 positions be transferred outright to PSS so that RMO would be left with only 20 FTEs?

Accordingly, we are revising the recommendations in our draft report and adding new recommendations in an effort to clarify the issue on “FTE vacancies” and “transfers.” We recommend that:

1. The Mayor of Rota make no appointments that will result in RMO exceeding the FTEs authorized by the appropriation act.
2. The Mayor of Rota and the Office of Personnel Management remove new hires and replacements not provided for in the original appropriation worksheets attached to the 1997 appropriations act.
3. The Attorney General consider civil action to collect from responsible RMO and OMB officials the costs of hiring 12 personnel in excess of RMO’s authorized FTE ceiling.
4. The CNMI Legislature enact legislation to clarify the issues relating to “FTE vacancies” and “transfers.” More specifically, the legislature should:
 - a. define an FTE vacancy.

We question the applicability of 1 CMC §8135 for use in defining the term “vacancy” because the provision was enacted by an appropriation act which was a temporary law. It would be helpful if the legislature would define the term “vacancy” and affirm it as a permanent part of CNMI law, thereby giving the definition a firm legal basis.

- b. clarify legislative intent with respect to the transfer of FTEs from RMO to PSS.

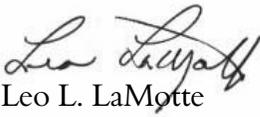
Because the Sinapalo Elementary School is still under construction, the Legislature should state whether RMO may retain or must forfeit vacated FTEs, and at the same time provide by law the authorized number of FTEs for RMO. Having a specified number of FTEs would enable government agencies to more readily comply with laws and regulations, especially when vacancies and transfers are subject to a certain event occurring, such as the opening of a school.

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Our Office has implemented an audit tracking system. All audit recommendations will be included in the tracking system as open or resolved until we have received evidence that the recommendations have been implemented. An *open recommendation* is one where no action or plan of action has been made by the client (department or agency). A *resolved recommendation* is one in which the auditors are satisfied that the client cannot take immediate action, but has established a reasonable plan and time frame of action. A *closed recommendation* is one in which the client has taken sufficient action to meet the intent of the recommendation or we have withdrawn it.

Please provide us the status of recommendation implementation within 30 days along with documentation showing the specific actions that were taken. If corrective actions will take longer than 30 days, please provide us additional information every 60 days until we notify you that the recommendation has been closed.

Sincerely,



Leo L. LaMotte
Public Auditor, CNMI

cc: Governor
Lt. Governor
Eleventh CNMI Legislature (27 copies)
Attorney General
Secretary of Finance
Special Assistant for Management and Budget
Office of Personnel Management
Public Information Officer
Mayor of Rota
Press



COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
OFFICE OF THE MAYOR
ROTA, MP 96951



HON. BENJAMIN I. MANGLONA
Mayor

By Facsimile: 234-7812

30 March 1998



Mr. Leo LaMotte
Public Auditor
P.O. Box 1399
Saipan, MP 96950

Dear Mr. LaMotte:

Re: Comments on Draft Audit Report – Rota Mayor's Office Compliance With
Authorized Number of Full Time Employment Positions

Regards from Rota. Thank you for the opportunity to comment on your draft
audit. We applaud the good work done by the Auditor on this important topic.
Your diligence and professional approach is much appreciated.

Comments on Auditor's Findings

With regard the conclusions and recommendations:¹

- 1) We agree that the Rota Mayor should cease making appointments that would exceed the legally authorized ceiling.
- 2) The policy of this administration is to follow the law. Our oath of office requires no less. Your audit covers the period to November 8, 1997. This means you audited the previous mayoral administration. The previous administration must answer for its legitimate defaults. We are not the judge of those defaults. But our administration, the present administration, is not aware that it has violated any laws. We also do not intend to violate laws by breaching employment contracts. We therefore find it neither necessary nor legally

¹ Found on page 8 of your Draft Audit, sent to us with your cover letter of March 3, 1998.

"Na' Gabo Rota"

prudent to remove any new hires or replacements from our payroll.²

3) The scope of the audit covered FTE positions in the Rota Mayor's Office as of November 8, 1997. Our administration did not take office until January of 1998. Therefore, none of the alleged unlawful or illegal activities have taken place under our administration. We could not in any sense be considered responsible for the alleged violations raised in your audit. We deny any responsibility for the costs of hiring unauthorized personnel and related legal costs.

Disagreement Over Legal Interpretation "Vacancy"

Most of the alleged FTE violations stem from the Auditor's misplaced interpretation of Public Law 10-41, and more specifically, the term "vacant." Public Law 10-41, Section 505 provides that if a "vacancy" occurs in the Rota Mayor's Office, that particular FTE will be eliminated from the Mayor's Office and transferred to the Public School System. In all due respect, we join with the Office of Management and Budget in disagreeing with your conclusion about the meaning of "vacancy." Public officials have interpreted the law differently from the Public Auditor.³ That interpretation is entitled to considerable weight.

You say "once an individual leaves his position, a vacancy occurs, the position must be transferred to PSS ... and the position is then no longer available to the Mayor's Office." You make no provision for a reasonable time period for the vacancy. A certain, reasonable time must go by before it can be assumed, legally, that a mayor does not intend to fill an FTE. To find otherwise, would deny the right of the mayors to fill vacancies because of resignation, firing, death, or in what has just happened in Rota, a transition of administrations.

Take our case for example. We have just been through a transition of government. As is the case in such events, all employees in the previous mayoral administration were terminated or they tendered their resignations. All persons working in our administration were hired anew, with new personnel actions. Under your analysis, there would have been 84 vacancies in the Rota

² Article I, Section 1 of the CNMI Constitution provides that no law shall be made impairing the obligation of contracts.

³ In construing their own statutes the courts should take judicial notice of contemporaneous circumstances and usage. "In addition, the use of contemporary and practical interpretation provides certainty in the law and justifies reliance upon the conduct of public officials. *Sutherland, Statutory Construction*, §49.03, page 7. In looking to see that the Legislature meant by "vacancy" in Section 505(b), the courts may consult the interpretation of an administrative agency like OMB. *Camacho v. N.M.I. Retirement Fund*, 1 N.M.I. 362, 369 (1990).

Mayor's Office with all staff transferred to the Sinapalo elementary. The improbable result would be that a constitutional office could not function. If nothing else, the defense of "legal impossibility" would be available to us. But there is also a fuller legal explanation for our position. Please consider the following.

Section 505(b) of the Appropriations and Budget Act of 1997⁴ provides that:

"... in the event a *vacancy* shall occur in any of the positions (FTEs) authorized by this Act, if the position is within the office of ... the Mayor of Rota ... then except as provided in ... this subsection ... that FTE shall *expire*, the vacancy shall not be filled, and the number of FTEs authorized by this Act shall be deemed reduced accordingly." (*Emphasis supplied*)

And subsection (1) of 505(b), speaking to vacancies, provides that:

"FTEs in the office of the Mayor of Rota ... which shall *expire* shall not be eliminated but shall instead be transferred to the Public School System for purposes of staffing the new Sinapalo elementary school." (*Emphasis supplied*)

If we follow the language of Section 505(b), under what circumstances will the Rota Mayor's Office lose FTEs? In other words, when does an FTE become "vacant?" Our position would be that FTE positions must be vacant for 180 days before they would be lost to the Public School System.

Analysis

Looking to our Commonwealth law, we see that an FTE becomes "vacant" if the Mayor fails to fill the position within a certain number of days. The number of days a position stands empty is the crucial test for "vacancy." A substantial period must pass before it can be assumed the Mayor does not intend to fill the position. If this were not so, we would have the absurd situation of the Mayor's entire FTE allotment evaporating when there was: (1) a transition of administrations; or (2) when all the employment contracts reached the anniversary date. Or the equally improbable situation of the mayors losing FTEs when employees resign without notice or suddenly pass away.

Normally, almost all the Mayor's staff are on one year contracts. When expiration time approaches, personnel actions are filed in advance so that employees are "renewed" and go on to another year's contract without a "gap."

⁴ Public Law No. 10-41 -- Approved by the Governor subject to line-item veto December 9, 1996

Despite timely efforts, however, there are sometimes "gaps" of a few days while the Personnel Office completes its paper work. Are the FTE slots lost to the Mayor because a "gap" of a few days appears? The Auditor's analysis seems to say, yes. But we must, in all due respect, say no. Certainly the law did not intend an absurdity.

Vacancy Must Last 180 Days

How many days, then, must pass before the position is "vacant" within the terms of Section 505(b)? We must look to existing Commonwealth statutes for the answer. We look, therefore, to Title 1, CMC, §8135, a Commonwealth statute that tells us when FTEs become vacant. This statute tells us that an FTE position in the Rota Mayor's Office becomes "vacant" if not filled within 180 days. The law says that:

"Except for the Department of Education and the Department of Public Health and Environmental Services any FTE (full time employee) positions that are not filled within 180 days shall be eliminated."

So the Mayor's FTE positions would be eliminated or expire only if vacant for more than six months.

Could the Personnel Office conspire to create a vacancy? That is, what if the Mayor has submitted a request to Personnel to hire for one of his "vacant" FTEs and Personnel fails to act? If the request for action has been pending for 180 days, it will be deemed approved and the Mayor will not lose his FTE.

"In the event that a personnel action is submitted to [the] Personnel Office and no action is forthcoming within 180 days, the personnel action will be deemed approved." (Title 1, CMC, §8135).

Shifting FTEs In Middle of Budget Year Unconstitutional

At all events, Section 505 is unconstitutional. Section 505's attempt to automatically transfer the Mayor's FTEs to PSS, sometime in the middle of the budget year violates the CNMI Constitution. The court in *Inos v. Tenorio* said that a legislative attempt to unilaterally shift appropriations in the middle of the fiscal year from one executive branch office to another, without executive approval, "implicates separation of powers issues of the highest order."⁵ The Governor should have agreed. In part, he did.

⁵ *Inos v. Tenorio*, Civil Action No. 94-1289, Order Clarifying Status of Count Five, June 6, 1996, page 6, lines 20 through 27. We should keep in mind that this part of *Inos v. Tenorio* dealt with

The Governor exercised his line-item veto over much of Section 505.⁶ He line-item vetoed Section 505(b)(2)-(4) because he thought the provisions "unclear." He also thought it bad budgetary practice to shift "FTEs from one agency to another." He might have added that all of Section 505 should fall on separation of powers grounds. Instead the Governor vetoed only certain lines in Section 505, rendering the Section impossible to carry out.

Line-Item Veto Makes FTE Shift Impossible

If the Mayor were to lose an FTE because of a vacancy and the FTE position is shifted to PSS by virtue of Section 505(b)(1), how will PSS pay for the position? The answer is it cannot. The Governor has line-item vetoed Section 505(b)(3) which had provided a method for PSS to pay for the shifted FTE.⁷ The Governor's line-item veto has made a muddle of Section 505 and basically rendered it inoperable and impossible to carry out.

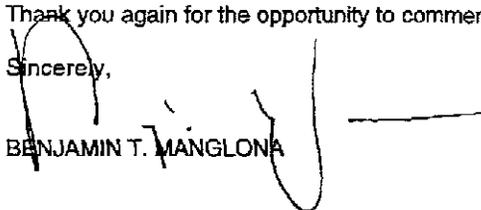
CONCLUSION

By the language of the Budget Act's administrative provision we must conclude that a "vacancy" occurs in one of the Mayor's FTE positions, if the Mayor does not fill an open slot within 180 days. It is doubtful a court would enforce Section 505. A court would find the entire administrative provision either unconstitutional as a violation of separation of powers principles or, simply, impossible to carry out because of the Governor's line-item veto.

By the way, it is not the lack of employees for the Sinapalo school which delays its opening. The school could not have opened in August 1997 and nothing any mayor has done on the FTE question has the least bearing on the opening. The school is still under construction. We add, though, that we hope to have it in full operation in the summer of 1998.

Thank you again for the opportunity to comment.

Sincerely,


BENJAMIN T. MANGLONA

the power of a legislative Joint Resolution to shift FTEs and budget authority from the Rota Governor's Representatives Office to the Rota Mayor's Office.

⁶ Governor's transmittal letter of December 9, 1996, page 2, numbered paragraph five.

⁷ "...funds which lapse or will lapse as a result of elimination of a FTE in the office of ... the Mayor of Rota ... by operation of this subsection shall be and hereby are transferred to the Public School System on Rota ..."



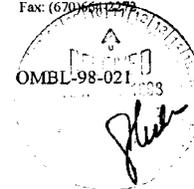
OFFICE OF MANAGEMENT & BUDGET
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April 22, 1998

Mr. Leo L. LaMotte
Public Auditor
Commonwealth of the Northern Mariana Islands
2nd Floor, J. E. Tenorio Building, Middle Road
Gualo Rai, Saipan, MP 96950



Dear Mr. LaMotte,

The Office of Management and Budget hereby responds to your Draft Audit Letter Report - Audit of Compliance with the Authorized Number of Full Time Employment Positions by the Rota Mayor's Office. Our response focuses on a number of issues which are contained in your said letter relative to certain provisions of PL. 10-41, and related portions of the Commonwealth Code, as follows:

- (1) OMB agrees with OPA's correct quotation of PL. 10-41, Section 505; however, OMB disagrees on OPA's conclusion. The misunderstanding begins with the interpretation of the term "vacancy."

To get a better perspective of what is contemplated under Section 505, it is important to read the section in question in its entirety, without isolating subsection (a) or (b) or paragraph (1).

First, a report shall be made by the Mayor's Office concerned to the Presiding Officers of the Legislature as to whether these FTEs so assigned to other departments are planned to be continued or terminated in the 1998 Fiscal Year. To our knowledge, no such report was ever received.

Secondly, there has to be a determination of when a vacancy occurs in an FTE.

You suggested that once an individual leaves his position, a vacancy occurs. (See second paragraph, page 5 of your draft report) The question is "What individual?" PL.10-41 does not include, nor refer to any personnel worksheets, as suggested by OPA on paragraph two, page 6 of the draft report. It refers only to the "attached appropriation worksheets" and to no

other. (See section 301.) Any reference to "personnel worksheets" was effectively rendered void through the Governor's line item veto. (Section 505(b)(2).

OMB also agrees with OPA that the law did not intend some kind of absurdity. However, we believe that if OPA's interpretation of the term "vacancy" is to be followed, a glaring inconsistency would result.

- 1.) Why would PL.10-41 grant the Rota Mayor's Office two (2) new FTEs (vacant FTEs) at the time of the enactment of the law, and prohibits the expenditure authority from filling it up? Is this not absurdity?
- 2.) What would happen to the Rota Mayor's Office at the beginning of FY 1998, or soon thereafter, when at some point in time, all FTEs were actually vacated? If OPA's interpretation of the term "vacancy" is to be followed, the Rota Mayor's Office would be left with no FTEs to operate. This would tantamount to a closure of a public office which was established by the Commonwealth Constitution. It is unthinkable that an Appropriation Acts or the Legislature that enacted such law intended to do that.

OMB submits that there must a better, more logical interpretation of the term "vacancy."

While Section 505(b), PL. 10-41, provides that "in the event a *vacancy* shall occur in any of the positions (FTEs) authorized by this Act, if the position is within the office of the Mayor of Rota . . . then except as provided in paragraph (1) and (4), that FTE shall *expire*, the vacancy shall not be filled, and the number authorized by this Act shall be deemed reduced accordingly."

In addition, subsection (1) of Section 505(b) provides that " FTEs in the Office of the Mayor of Rota . . . which shall *expire* shall not be eliminated but shall instead be transferred to the Public School System for purposes of staffing the new Sinapalo Elementary School."

It is submitted herein that a vacancy shall expire first before it can be eliminated (in this case, it shall be transferred to PSS). 1 CMC §8135 provides for the conditions when an FTE can be considered expired. It provides "Except for the Department of Education and the Department of Health and Environmental Services, any FTE (full time employee) positions that are not filled within 180 days shall be eliminated..."

A review of the pertinent Requests for Personnel Action indicated that there was no time "gap" between the last day of the previous contract and the effective date of the new contract for a particular FTE. The FTE position was never vacated. There were

“renewals” made, or “replacements” hired. The reference to names of persons, for purposes of determining the existence of a vacancy, cannot be made because no such personnel listing was attached to, or made part of, PL 10-41. Only appropriation worksheets were attached to the Appropriation Acts.

- (2) There is a difference of opinion on the applicability of 1 CMC §8135 to the case at hand. While OPA’s assertion that this code provision comes from PL. 5-31 is not being disputed, the Commonwealth Code, on page ii, states that “This two-volume publication of the Commonwealth Code is intended to be a complete restatement of the general and permanent statutory laws having force and effect within the Commonwealth of the Northern Mariana Islands. As set forth in PL. 3-90, those portions of the Commonwealth Code listed in Section 2(b) and (c) of that law have been codified as positive law. Those portions of the Code are legal evidence of the law contained therein. All other portions of the Commonwealth Code establish prima facie evidence of the general and permanent laws of the commonwealth.”

The Commonwealth Code “codified” 1 CMC § 8135 under Division 8, Public Employment, Part 1, Chapter 3.

3. The second part of the allegation states that the Rota Mayor’s Office, other than the “replacements” of FTE, exceeded its authorized FTE ceiling. A perusal of the file copy of the Requests for Personnel Action referred to indicates that the required initials of both the Budget and Financial Analysts, who reviewed the documents before final approval by the Special Assistant for Management and Budget are lacking. Any such action (approval) is not in accordance with OMB’s established document handling procedures and policies. This may have happened because the required review of documents was not done before approval was made, or that the approval was done in spite of unfavorable findings made during the review process. (The reviewer does not affix his/her initials if there is reason to believe that the action requested cannot be approved).

OMB relied on the Commonwealth Code in interpreting the term “vacancy being expired” before the FTE position can be (eliminated) transferred to PSS pursuant to PL. 10-41.

Based upon the facts and circumstances mentioned above, OMB believes its action in approving the Requests for Personnel Action, except those in excess of eighty three (83) authorized FTE ceiling which is contrary to law, for the Rota Mayor’s Office is within the bounds of PL. 10-41, and not as alleged.

OMB now responds to OPA’s recommendations as follows:

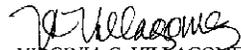
4. Pending resolution of the legal issues affecting FTE policies on the Rota Mayor’s Office, OMB will not act on any new appointments.

5. The Mayor of Rota, not OMB, has the authority to initiate OPA's recommendation no. 2. As indicated elsewhere, the reference to the appropriation worksheets (personnel listing) is rendered void by the Governor's line-item veto of certain portion PL 10-41, Section 505. However, we agree with the recommendation, if what is referred to are appointments in excess of the original 83 FTE ceiling.

Currently, there are 76 filled FTE positions at the Rota Mayor's Office.

If you have any questions, please do not hesitate to call me.

Sincerely,


VIRGINIA C. VILLAGOMEZ

STATUS OF RECOMMENDATIONS

Recommendations	Agency to Act	Status	Agency Response/ Additional Information or Action Required
1. The Mayor of Rota should make no appointments that will result in RMO exceeding the number of FTEs authorized by the 1997 Appropriations Act.	Mayor of Rota	Resolved	This recommendation will be considered closed once the Mayor issues a formal directive.
2. The Mayor of Rota and the Office of Personnel Management should remove new hires and replacements not provided for in the original appropriation worksheets attached to 1997 Appropriations Act.	Mayor of Rota & Office of Personnel Management	Open	No action has been taken to address the recommendation. Both the Mayor of Rota and the Office of Personnel Management should consider and implement the recommendation.
3. The Attorney General should consider taking action to collect from responsible former RMO and OMB officials the costs of hiring 12 personnel in excess of RMO's authorized FTE ceiling.	Attorney General	Open	For review by the Attorney General.
4. The CNMI Legislature should enact legislation to clarify the issues relating to "FTE vacancies" and "transfers."	Legislature	Open	For consideration by the Legislature.