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April 10, 2002

Chief Justice Miguel S. Demapan
Supreme Court
Commonwealth of the Northern
Mariana Islands
Saipan, MP 96950

Dear Chief Justice Demapan:

Subject: Law Revision Commission Reprogramming Authority and Actions

The following is in response to your November 14, 2001 request that we inquire into the allegations of Mr. David C. Andersen regarding reprogramming actions related to the Law Revision Commission (LRC). OPA apologizes for the delay in issuance of this report. Consideration of this matter required review of records from numerous offices and agencies and consultation with their employees on a number of issues. Such agencies, offices and employees included the Office of Management and Budget, the Department of Finance, the office of the Director of the Supreme Court, and the Law Revision Commission.

Mr. Andersen presented a number of questions to the Office of the Public Auditor. Mr. Andersen's questions encompass the issues raised in your letter of November 14, 2001. As such, we are providing you with the answers to the questions he presented to OPA. Please note that this compilation of information was not conducted in accordance with Government Auditing Standards issued by the Comptroller General of the United States and should not be considered an audit report.

Some of the questions presented in Mr. Andersen's letter are not clearly addressed by the available law on the matter. The responses to the questions that follow are OPA's interpretation of the laws that appear to be applicable to the issues involved.

1. Did the reprogramming of $48,000 in LRC personnel funds on September 5, 2001 to the Supreme Court to cover an over-expenditure of Supreme Court personnel funds violate 1 CMC § 7402? Specifically, did this reprogramming violate the prohibition against altering the total amount appropriated to the "department, office, agency, or instrumentality" listed in

1 CMC § 7402(c)(1) and if so, was the necessary additional reprogramming authority granted to the Chief Justice by the legislature to escape the 1 CMC § 7402(c)(1) restriction?

1 CMC § 7402(c) normally governs reprogramming of funds for judiciary accounts. It states:

> The public officials listed in 1 CMC § 7401(b) through (p) may reprogram funds appropriated by the annual appropriation acts for the operations and activities under their jurisdiction up to 10 percent cumulative and in total by line item; provided, that all reprogramming is reported within 30 days to the Special Assistant for Planning and Budgeting, the Chairman of the House Committee on Appropriations, and the Chairman of the Senate Committee on Fiscal Affairs; provided further, that reprogramming shall not be permitted if it will be used for the purposes prohibited by subsections (c)(2) and (3) of this section. The public officials listed in 1 CMC § 7401(b) through (p) may request additional reprogramming authority from the legislature by following the procedures required of the Governor in subsection (d) of this section.
>
> The heads of all executive departments, offices, and *agencies* of the Commonwealth to which funds are appropriated by annual appropriation acts may, with the written authority of the Governor and subject to such reporting requirements as the Governor may by regulation provide, reprogram funds within their jurisdiction in an amount not greater than 10 percent cumulative and in total by line item of the funds appropriated to the department, agency, or office; provided that departmental reprogramming shall not be permitted if it:
>
> > (1) Changes the total amount appropriated to the department, office, agency, or instrumentality;
> >
> > (2) Will be used to fund a new position established by an executive order or a new position not otherwise established by law; or
> >
> > (3) Will be used to reprogram funds appropriated for non-personnel expenses to personnel expenses, except where necessary to pay unexpected overtime or lump sum annual leave, merit increases or monetary awards for exceptional service. (emphasis added)

The first paragraph of this section applies to "public officials listed in 1 CMC §7401(b) through (p)." The second paragraph applies to "the heads of all executive departments, offices, and agencies of the Commonwealth."

The second paragraph of section 7402(c) applies to the LRC. 1 CMC § 3808 states that the "commission's budget shall be considered part of the budget of the judiciary . . ." It also states that the expenditure authority is vested in the chair of the commission. Section 1 CMC § 7401(e) specifies that the Chief Justice is the expenditure authority for the judiciary, but this does not apply to the LRC. 1 CMC § 3808 already addresses who the expenditure authority is for the LRC. While by virtue of both 1 CMC § 3808 and 1 CMC § 7401(e) the Chief Justice would be designated as the expenditure authority because the LRC commission is designated part of the judiciary, that is merely a coincidence for the purposes of 1 CMC § 7402(c). The later in time statute and more specific to the LRC is 1 CMC § 3808. Under 1 CMC § 3808 the Chief Justice is the expenditure authority by virtue of being the chairman of the LRC. However, if he elected to designate an alternative chair as he is able to do under 1 CMC § 3809(a), then it would be a different individual and that would conflict with the expenditure authority provision of 1 CMC § 7401(e). Because 1 CMC § 7401(e) does not govern who is the LRC expenditure authority, the second paragraph and not the first paragraph of 1 CMC § 7402(c) applies. In addition, the definition of "agency" pursuant to section 7103(b) encompasses commissions. As such, the restriction set forth in 1 CMC § 7402(c)(1) would apply.

However, according to the Office of Management and Budget (OMB), the reprogramming that occurred on September 5, 2001 did not fall under 1 CMC § 7402(c) as a "agency" reprogramming. Rather it was a "Governor's" reprogramming under 1 CMC § 7402(b). While normally the Governor does not have authority under 1 CMC § 7402(b) to reprogram funds of the judiciary, in January 2001, the Commonwealth Legislature passed House Joint Resolution (HJR) No. 12-017 providing the Governor full reprogramming authority for FY 2001. The Governor's's 100% reprogramming authority under HJR No. 12-017 included the judiciary. Therefore, if this reprogramming is characterized as a Governor's reprogramming authority, it is permissible.

OPA would note that there seems to be some question as to whether the Governor can obtain 100% reprogramming authority over the judiciary in the form of a joint resolution. The second paragraph of 1 CMC § 7402(b) states "*[n]othing in this section* shall authorize the

Governor to reprogram funds allocated or appropriated by the annual appropriation acts for Covenant training funds or for *the operations and activities* listed in 1 CMC § 7401(b) through (p)." (Emphasis added). The reference to 1 CMC § 7401(e) in this section of the code is to the "operations and activities" and not the "public officials" listed in 1 CMC § 7401(e). As such, the judiciary, and the LRC which is a part of the judiciary for budget purposes, is removed from the Governor's reprogramming authority pursuant to this language. In addition, the words "nothing in this section" which follow the language referencing the ability of the Governor to seek broader reprogramming authority from the Legislature in the form of a joint resolution seem to exclude judicial funds from that type of expansion of authority.

2. Could the Supreme Court first expend the funds, and then reprogram the money afterwards? In addition, did the reprogramming violate 1 CMC § 7604(c)(4) by evading the mandatory decrease in Supreme Court quarterly allotments under the government-wide austerity measures and 1 CMC § 7402(a)(1) by spending the funds other than for the items specified in the appropriation?

As explained in our response to the first question above, these funds were reprogrammed under the unusual circumstances of a continuing resolution where the Commonwealth Legislature has granted the Governor 100% reprogramming authority, including over the judiciary. Because the LRC enabling legislation specifically includes the LRC as part of the judiciary budget, it is logical to conclude that the Governor's 100% reprogramming authority covered the LRC. As such, the authority to reprogram existed despite the restrictions of 1 CMC § 7604(c)(4) and 1 CMC § 7402(a)(1).

Based on discussions with Ms. Margaret Palacios, Supreme Court Director, the Supreme Court had sufficient budget to cover its personnel expenses based on Public Law 11- 41 (FY 1999 Appropriations Act). However, according to the Supreme Court Director, the Office of Management and Budget (OMB) computed its quarterly allotments for FY 2001 based on the average of the actual expenses of the previous year without taking into consideration the lapsed funds in personnel expenses. Additionally, she stated that OMB withheld 13.4% of the P.L. 11-41 appropriations of the total budget for the Supreme Court which includes personnel. According to the Supreme Court Director, these actions by OMB resulted in reduced allotments for personnel expenses during the first 3 quarters of FY 2001.

3. Why did the Supreme Court need to spend so much on personnel, how was the rest

of the shortfall covered, and did the Supreme Court stay within its FTE limits?

During fiscal year 2000, the Supreme Court salaries and wages expenditures (account 61100) totaled $772,634. During fiscal year 2001, this increased to $889,291, an increase of $116,637.

Based on our analysis of the Supreme Court payroll distribution sheets, the increase in salaries and wages is mainly attributable to an increase in the number of employees of the Supreme Court. In fiscal year 2000, the average number of Supreme Court employees per pay period was 15 employees. The Court initially started with 13 employees per pay period during this fiscal year which increased to 19 around the middle part of the fiscal year. In fiscal year 2001, the Supreme Court had an average of 18 employees per pay period. It basically maintained the number it had from the prior fiscal year. The Supreme Court stayed within its budgeted FTE of 21 employees. The most it had during the two fiscal years was 19 employees.

In addition, our analysis of the allotment records from OMB showed that, on September 17, 2001, $102,000 was "de-allotted" from the other operating expenses of the Supreme Court and then allotted to its personnel expenses. Of the total $102,000 "de-allotment", $54,000 was allotted to wages and salaries (account 61100) of the Supreme Court. This "de-allotment" and allotment action caused the decrease in the budgeted amounts for the other operating expenses and an increase in the budgeted amounts for personnel expenses. The question arose whether the "de-allotment" from the various Supreme Court operations accounts to the Supreme Court personnel accounts was appropriate.

Because these are Supreme Court accounts, the expenditure authority is the Chief Justice by virtue of 1 CMC § 3402. There is some question as to whether the first paragraph or the second paragraph of 1 CMC § 7402(c) applies to the Supreme Court because of the fact that the expenditure authority for the Supreme Court is set forth in 1 CMC § 3402 and 1 CMC § 7401(e). Unlike the situation with the LRC, in this instance it would always be the Chief Justice as there is no provision for an alternate designee. As such, it would seem logical to apply the first paragraph of 1 CMC § 7402(c). However, in this situation, the distinction is only academic as the outcome is not affected.

Although this action is labeled a "de-allotment", it appears to actually be a reprogramming. "De-allotments" are not defined in the Planning and Budgeting Act, but they were described by the Department of Finance as adjustments made by OMB when an error is made and

excess funds are allotted. A "de-allotment" is the action taken to remove excess funds that were erroneously allotted. "De-allotments" are also processed by OMB to adjust allotments to conform with reductions in budgeted levels; this type of adjustment is normally processed when a reduced budget is passed after allotments are made for a quarter. Neither of those situations appear to be present here and we have confirmed with OMB that there appears to have been an error made in calling the adjustments to the all other expenses accounts and the personnel accounts "de-allotments". If they were not "de-allotments", then the question is whether the reprogramming comports with 1 CMC § 7402(c)(3) and its restriction against reprogramming funds "appropriated for non-personnel expenses to personnel expenses."

This action took funds from Supreme Court accounts for professional services, printing and photocopying, cleaning services, books and library materials, fuel and lubricant, and office equipment, and reprogrammed these funds to three personnel accounts (wages and salaries - ungraded, retirement contributions, and lump sum annual leave) for the Supreme Court. Reprogramming of funds from non-personnel expenses to personnel expenses is prohibited under 1 CMC § 7402(c)(3) unless "necessary to pay unexpected overtime or lump sum annual leave, merit increases or monetary awards for exceptional service." The funds in question were not characterized as being of this nature.

While this type of reprogramming would normally not be permissible, given the 100% reprogramming authority granted to the Governor in January 2001 under HJR No. 12-017, OMB has characterized this reprogramming as Governor's reprogramming because it came through OMB, which falls under the Office of the Governor. Therefore, if this is characterized as a Governor's reprogramming, it is permissible under HJR No. 12-017. However, OPA again notes that there is a question as to whether the Governor can obtain 100% reprogramming authority over the judiciary in the form of a joint resolution as specified in item 1 above.

4. Can the funds in the revolving fund established under 1 CMC § 3809(c) be used for Supreme Court expenses?

1 CMC § 3809(c) restricts the use of the revolving fund to "printing or photocopying commission publications or for compiling such publications in electronic media." These funds are not "appropriated funds" pursuant to the Planning and Budgeting Act and section 3809(c) specifically exempts them from title 1, division 7, part 1, chapter 1 through 7 [1 CMC

§ 7101 et seq.] The Chairman of the LRC, as the expenditure authority over the revolving fund, is restricted to using the fund as contemplated in 1 CMC § 3809(c) and has no authority to divert the fund to Supreme Court accounts for Supreme Court use.

From the minutes of the November 8, 2001 board meeting, there also seems to be a misconception that the funds in the revolving account lapse. The enabling legislation and the section which creates the revolving account exempts the funds from title 1, division 7, part 1, chapter 1 through 7 [1 CMC § 7101et seq.] This is the cite for the Planning and Budgeting Act. The provision in the Planning and Budgeting Act which requires that funds which are not expended within a budget year revert to the general fund or "lapse" is 1 CMC § 7708. This section is in title 1, division 7, part 1, chapter 7. The revolving fund is therefore not subject to this provision.

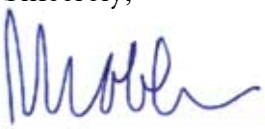
5. Can the Chief Justice change the signature lines on the Bank of Guam account without proper approval from the LRC?

The expenditure authority for the Bank of Guam account (the imprest fund and the revolving fund) is the Chief Justice. The Chief Justice is the expenditure authority of the imprest fund by virtue of 1 CMC § 7401(e). 1 CMC § 3808 and section 2-1 of the LRC Bylaws. The Chief Justice is the expenditure authority of the revolving fund by virtue of being the chair of the LRC pursuant to 1 CMC § 3809(b). The LRC enabling statute is silent as to the process required for the expenditure authority to spend the funds in the imprest account or the revolving account. It does not require approval of the members of LRC for the expenditure authority to pay expenses. As expenditure authority, the Chief Justice has the ability to "expend, obligate, encumber, or otherwise commit public funds." 1 CMC § 7401. As the expenditure authority he is ultimately responsible for the funds in the accounts being properly spent and maintained. As such, it seems that he has control over the accounts and is able to change the signature line on the accounts at his discretion.

This answer only speaks to what the Commonwealth Code requires to expend funds. It does not address what the Bank of Guam may require to alter a signature line on an account. That matter should be addressed to the bank directly as it has its own procedures for proper change of signatures on accounts.

OPA has been informed that litigation has been initiated which encompasses some of the issues addressed in the report above. I hope that this sufficiently responds to your inquiries. Please let us know if we can provide any further assistance.

Sincerely,



Michael S. Sablan, CPA
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