



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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April 25, 2002

The Honorable Juan N. Babauta
Governor, Commonwealth of the
Northern Mariana Islands
Capitol Hill, Saipan, MP 96950

The Honorable Paul A. Manglona
Senate President
Thirteenth Northern Marianas
Commonwealth Legislature
Saipan, MP 96950

The Honorable Heinz S. Hofschneider
Speaker of the House
Thirteenth Northern Marianas
Commonwealth Legislature
Saipan, MP 96950

Dear Governor Babauta, Senate President Manglona and House Speaker Hofschneider:

Re: Personnel Salaries in Excess of Statutory Salary Caps

The Office of the Public Auditor (OPA) has been requested to investigate various issues related to executive branch personnel salaries in excess of statutory salary caps and other restrictions under the law. The following details OPA's findings regarding the questions that have been raised. 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.

As part of this review, OPA communicated with staff from the Office of Personnel Management (OPM), the Attorney General's Office, and the Governor's Office. OPA also reviewed the various applicable statutory and case law. Finally, OPA conducted a review of regulations related to government employment. Because a comprehensive compilation of the Commonwealth Register has not yet been codified, review of applicable rules and regulations was somewhat uncertain. For this reason, OPA expresses some reservation regarding the

completeness of the analysis of such rules and regulations. Staff of the Law Revision Commission, which is currently undertaking the task of organizing and adopting a comprehensive codification of Commonwealth rules and regulations, was helpful in attempting to track the history of applicable rules and regulations.

1. Are there government employees who are being compensated in excess of the statutory salary caps?

The Compensation Adjustment Act, 1 CMC §8241 et seq. specifies the salary ceiling for non-civil service government employees who do not work for an agency that has been granted authority to independently set its salary schedules. It is organized by specifying specific caps for certain elected and appointed officials. There is a separate section for executive directors of government corporations, semi-autonomous and autonomous agencies and board members of government corporations and councils. The default provision limits salaries to \$50,000 per year.

Public Law 11-41 also contains various provisions which provide for higher caps for specified positions. For instance, section 524 of Public Law 11-41 raised the caps for various department heads and section 513 raised the caps for U.S. certified public accountants and licensed attorneys.

In addition, the definition of “wages” and “salaries” set forth in 1 CMC §8243(b) refers to the definition used in Revenue and Taxation Act at 4 CMC §1103(z) and includes “any compensation for services such as commissions, fees, compensation, education benefits, emoluments, bonuses, and every and all other kinds of compensation paid for, credited, or attributable to personnel services performed by an employee or other individual . . .” not including certain specifically listed items such as armed forces wages, medical expense payments, housing allowances, per diem, retirement benefits, student scholarships and social security taxes. This is a very broad definition and would clearly include standby pay, hazardous pay, differentials, and other bonus payments.

The enclosed list reflects executive branch non-civil service government employees currently compensated in excess of the statutory caps set forth in the 1984 Compensation Adjustment Act and Public Law 11-41. The list does not address employees in the judiciary, legislature, the Washington Representative’s Office, and autonomous agencies. They will be covered in the government-wide audit currently being conducted by OPA.

The list is divided into two parts: employees who must be certified pursuant to 1 CMC §8250(c), and employees who must be certified pursuant to 1 CMC §8248(b). The certification distinction will be described in greater detail in the next section. The employees who are certified under 1 CMC §8248(b) include:

[m]edical doctors, and dentists, whose primary responsibilities include giving

professional medical advice, U.S. or Commonwealth licensed engineers and architects whose primary responsibilities include practice within their profession, and professionals employed by the legislative branch.

The information on the list was obtained from the Office of Personnel Management.

2. What is the proper procedure to compensate an employee above the statutory salary caps?

There are two different certification procedures under the Compensation Adjustment Act. For employees who fall within the classification of 1 CMC §8248(b), which includes doctors, engineers and architects as indicated in the answer to question 1 above, all that is required is for the Governor to simply certify the excess salary to the presiding officers of the Legislature and the Civil Service Commission. For the remaining employees who are exceeding caps, 1 CMC §8250(c) requires a certification from the Governor

to the presiding officers of the legislature and the chairman of the Civil Service Commission *that, after a diligent effort, the Commonwealth is unable to recruit a professionally or technically qualified person to take an appointed position.*
(Emphasis added)

There also appear to be issues with certain employees regarding whether the certification that was provided to the Legislature complies with the requirement of 1 CMC §8250(c). Employees whose names are marked with an asterisk in the certification letter column fall within 1 CMC 8250(c) and have certification letters that fail to contain the required justification regarding the diligent effort and the inability to recruit another qualified person to take the position. For employees on the list who fall under 1 CMC §8248(b), which only requires a certification letter without a justification, OPA has not independently confirmed whether the employees hired in this category who have exceeded the cap meet the professional qualifications and work assignment requirements to be properly placed in this category. If there are employees who have been hired and certified under 1 CMC §8248(b) and who do not meet the qualification requirements for this category, they would default to the more stringent 1 CMC §8250(c) certification requirement. Because the certification requirement for 1 CMC §8248(b) employees is otherwise fairly minimal and only requires notice, OPA did not review their certification letters. If such a review is required, OPA will undertake it upon further request.

Section 526 of Public Law 11-41 imposes an additional mandate by requiring that the “sanction” of the Legislature must first be obtained before exceeding the salary caps set under the

Compensation Adjustment Act and various other salary cap laws.¹ “Sanction” appears to require some affirmative action by the Legislature, such as a joint resolution, in addition to the notification by the Governor required under 1 CMC §§8248(b) and 8250(c).² It seems clear that sanction is required to exceed the salary caps under 1 CMC §8250. It is not as clear whether such requirement applies to the employees who fall within 1 CMC §8245 but a conservative reading of the law leads to the conclusion that they would also be covered.³

¹ Public Law 11-41 is a budgetary act passed for FY 1999. Because a budgetary act has not been passed since Public Law 11-41, and the Commonwealth is still operating under a continuing resolution,

both 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 part, shall continue as provided in the annual appropriations acts of the current year.

(1 CMC §7204(d))

² This letter only addresses the salary issues related to the executive branch. However, the sanction requirement also appears to apply to various autonomous agencies. Section 526 of Public Law 11-41 refers to six public laws, 7-31 (the Salary Compensation Act), 8-6 (the Salary Amendment Act of 1992), 8-15 (the Judicial Branch Compensation Act of 1993), 9-25 (the Appropriations and Budget Authority Act of 1995), 10-35 (the CNMI Public School Reclassification and Compensation Act of 1996) and 10-85 (The School Administrators Reclassification Act of 1997) in its notification that salary ceilings must “be strictly adhered to” and sanction is required before implementing a salary in excess of the cap. An analysis of the interplay of these various laws and the autonomous agencies they apply to has not been included in this opinion, but will be part of the government wide compensation audit being conducted by OPA.

³ An additional issue with respect to the sanctioning requirement involves what effect Section 214 (e) and Public Law 13-1 may have on the sanction requirement. Executive Order 94-3 Section 214(e) states that

[n]otwithstanding any other provision of law, the function of taking any personnel action is, subject to the policies set forth by the Civil Service Commission, vested in the respective appointing authorities *and shall not require further approval*. Such action shall be documented by the Office of Personnel Management (or by any office or employee conducting personnel management functions pursuant to subsection (b) of this section), and a copy of such documentation forwarded to the Civil Service Commission. (Emphasis added)

While it is not completely clear what is intended by this section, it seems to say that all that is required to justify an action is the appointing authority’s approval. Public Law 11-41, requiring sanction to exceed a salary cap, was adopted in 1998. When Public Law 12-54 was passed in 2001, it repealed this section. When Public Law 13-1 was passed, it reenacted section 214. The questions are, first, when Public Law 13-1 reenacted section 214(e), did it take it forward in time to cancel out the effect of Public Law 11-41? And, if so, how does section 214 interact with the certification requirement of the Compensation Adjustment Act or is only intended to cover the processing of hiring? Because it is not clear 1) what the intention of this provision is, 2) whether or not Public Law 13-1 would take the provision forward in time to remove a legislative sanction requirement, and 3) what the legality of the provision is due to the effect of the *Sonoda* decision discussed later in this report, OPA recommends a conservative approach to assume that section 214(d) does not affect the requirement of Public Law 11-41, and to proceed on such grounds.

Therefore, to exceed the cap for the individuals included on the attached list two things are necessary. First, it is necessary to comply with the certification process applicable to the type of employee. Second, it is necessary to seek the “sanction” or approval of the Legislature pursuant to section 526 of Public Law 11-41.⁴ While many employees’ salaries have been certified, none of the employees identified appear to have been approved through the Legislative sanctioning process. Employees who are currently being compensated above salary caps, without proper certification and sanction, do not have proper approval to receive their elevated salaries and are therefore being improperly paid the amount that exceeds the cap.⁵

3. Do the salary caps apply to independent contractors?

While the general perception is that independent consultant contractors do not fall within the limitations of the salary cap provisions, 1 CMC § 8243 (a) includes them in the definition of “employee” for purposes of the Compensation Adjustment Act. However, section 307(b)(3) of Executive Order 94-3 states that “in order to implement any transfer or allocation made by paragraph (1) of this subsection, existing law is affected by changing the definition of “employee” in 1 CMC §8243 to exclude, rather than include, independent service contractors, consultants, and professional service contractors.” Paragraph 1 of section 307(b)(3) shifted the responsibility for procuring services of independent contractors from the Civil Service Commission or the Personnel Officer to the Secretary of Finance.

Although section 307 of E.O. 94-3 seeks to remove independent contractors from the definition of employee, OPA notes that there is some question as to the validity of section 307 that might warrant seeking legislative action to avoid problems in the future. There is a question as to the validity of section 307 because of uncertainty about the Governor’s ability to amend the law in an executive order beyond the allocation of offices and their functions and duties.

Article III, Section 15 of the Constitution grants the Governor the ability to:

⁴ The Public Law 11-41 sanction requirement would only apply to salaries that exceeded the cap after October 1, 1998, the effective date of Public Law 11-41. Public Law 10-41, the budget act for FY 1997 in effect prior to Public Law 11-41, did not contain a sanction requirement.

⁵ It is not clear whether employees whose salaries were lifted above the cap prior to October 1, 1998, are required to undergo the sanction process because the sanction requirement did not come into effect until after the effective date of Public Law 11-41 (October 1, 1998). This uncertainty is because the Compensation Adjustment Act is not clear whether re-certification is required upon renewal. 1 CMC §8250(g) states that renewed contracts are considered new contracts but it is uncertain whether the reference contained in that section is only intended to apply to a contract entered into prior to April 1, 1985 or to any contract. It is also not clear under Public Law 11-41 section 526 whether the sanction requirement applies to renewals. OPM has informed OPA that it has not re-certified employees upon renewal in the past.

make changes in the allocation of offices, agencies, and instrumentalities and in their functions and duties that are necessary for efficient administration. If these changes affect existing law, they shall be set forth in executive orders which shall be submitted to the legislature and shall become effective sixty days after submission, unless specifically modified or disapproved by a majority of the members of each house of the legislature.

While it seems clear that the Governor had the authority to transfer the administration of independent contracts from one agency to another, it is questionable if he had the authority to remove them from the compensation cap provisions set forth in the Compensation Adjustment Act because such a removal does not appear necessary to effectuate the shift in administrative responsibilities. This issue is further complicated by the decision in *Sonoda v. Cabrera*, Cert. No. 96-001(N.M.I. April, 9, 1997)(Slip Op.), which casts doubt on the extent of the Governor's ability to affect laws in an executive order reorganization.⁶

If the definition of "employee" in 1 CMC §8243(a) applies to independent contractors, then under 1 CMC §§ 8248(b) and 8250(c) of the Compensation Adjustment Act, compensation paid to independent contractors that exceeds the caps would have to go through the process outlined in section 2 above to be compliant with the law. If section 307(b)(3) of E.O. 94-3 is valid, then independent contractors can be compensated for whatever amount is otherwise properly authorized under their service contracts. The law that is currently on the books, pursuant to section 307 of the E.O., does not subject independent contractors to the Compensation Adjustment Act. However, to avoid any potential challenge and resolve any uncertainty regarding this issue, requesting the Legislature to amend the law to clarify this matter might be warranted to avoid future question.

4. What is the status of employees hired under the Office of the Governor and the Office of the Lt. Governor pursuant to Public Law 13-1?

The answer to this question is complex and requires a review of the history of Commonwealth laws relating to employment by the Commonwealth Government and its agencies.

Article III, Section 16 of the Commonwealth Constitution, as originally ratified, called for the

⁶ The *Sonoda* decision only addressed the validity of section 509(a) of the executive order. However, *Sonoda* does raise questions regarding the Governor's general ability to amend laws pursuant to an E.O.. The Governor is required by the Constitution to submit the executive order to the Legislature, which has the power to modify or disapprove the measure. This, in effect, requires at a minimum the implicit approval of the Legislature. Nevertheless, the Court found the effect of section 509(a) was to "enact law, in violation of Article II, section 5 of the Commonwealth Constitution, which vests the law-making power exclusively in the Commonwealth Legislature." (*Sonoda* Slip Opinion at 2).

establishment of a civil service system. On August 11, 1978, pursuant to a legislative override, Public Law 1-9 came into effect and created the Civil Service System. Public Law 1-9 also created the Personnel Office within the Civil Service Commission (1 CMC §8121).⁷ In addition, the law set forth those employees who fell within the Civil Service System and those who fell outside or were “exempt” from the system by stating:

Except as provided in this section, the civil service system shall apply to all employees of and positions in the Commonwealth government now existing or hereafter established. Unless this part is otherwise specifically made applicable to them, the following persons or positions are *exempt* from the civil service system:

- ...
- (6) Persons appointed by the Governor to fill the executive positions.
 - (7) Positions specifically exempted by any other law of the Commonwealth. . .
- (Emphasis added)

This section was codified as 1 CMC 8131. The manner in which the law handles inclusion in the Civil Service System is to say that everyone is included unless they are “exempted” in one of the listed ways.

Pursuant to Public Law 1-9, the head of the Personnel Office was titled “Personnel Officer” and assigned the following duties:

- (a) *To serve as the principal adviser to the Governor and his staff on all matters concerning personnel administration;*
- (b) *To administer the system of personnel administration for the executive branch of the Commonwealth government;*
- (c) To formulate and recommend to the commission policies and regulations to carry out the provisions of this part;
- (d) To establish and maintain a roster of *all persons in the government* setting forth, as to each, the class of position held, the salary or pay, any change in class, title, pay or status, and any other necessary data;
- (e) To encourage and exercise leadership in the development of effective personnel administration within the several departments in the government, and make available the facilities of his or her department to this end;
- (f) To foster and develop, in cooperation with management officials and others, programs to promote the public service and to improve employee efficiency;

⁷ The history surrounding this issue is lengthy and complex. OPA sought to simplify the review and focus on the more significant historical facts. This review does not cover the issues related to the 1980 challenges to the validity of various portions of Public Law 1-9 and former Governor Carlos Camacho’s executive order which abolished the personnel office and replaced it with a new personnel office fully within the executive branch.

- (g) To develop and maintain adequate position classification plans and compensation plans in accordance with the provisions of this part;
- (h) To develop adequate and reasonable selection instruments and procedures for recruiting employees for *the public service*, and to determine when employees meet specific qualification requirements for positions;
- (i) To administer a program for staff housing for the Commonwealth government;
- (j) To perform other duties assigned by the Civil Service Commission; and
- (k) *To perform any other lawful acts deemed by the Personnel Officer to be necessary to carry out the purposes and provisions of this part.* (Emphasis added)

This language was codified in 1 CMC §8124. Items (a), (b), (d), (h) and (k) seem to grant to the Personnel Office broader jurisdiction than just over matters falling under the Civil Service System. The words “all matters concerning personnel administration” found in subsection (a) and the language “[t]o administer the system of personnel administration for the executive branch of the Commonwealth government” found in subsection (b) seem to encompass management of any personnel issue related to the executive branch regardless of civil service status or otherwise.

With respect to the other areas of government, 1 CMC §8124(d) mandates the Personnel Office, “to establish and maintain a roster of *all persons in the government* setting forth, as to each, the class of position held, the salary or pay, and any changes in class, title, pay or status, and any other data.” (Emphasis added). 1 CMC §8124(h) directs OPM to “develop adequate and reasonable selection instruments and procedures for recruiting employees for *the public service*, and to determine when employees meet specific qualification requirements for positions.” (Emphasis added).

The use of the language “all persons in the government” in 1 CMC § 8124(d) and “public service” in 1 CMC §8124(h), rather than the words “civil service”, seems to contemplate the administration by the Personnel Officer of government-wide personnel issues. Furthermore, subsection (k) instructed the Personnel Officer to perform any other lawful acts necessary to carry out the purpose and provisions of this part. Included in the part referred to is 1 CMC §8131, the section that specifies that certain employees are to be handled outside of the civil service system.⁸

Following passage of Public Law 1-9, the Civil Service Commission adopted the Proposed Personnel Service System Rules and Regulations in the November 15, 1983 Commonwealth

⁸ Although the court was not ruling specifically on the issue addressed in this memorandum, it is worth noting that in a related matter, the District Court in its opinion in *Dyack v. C.N.M.I.*, (Civil Action No. 01-0003, N.Mar.I. Dist. Ct., Feb. 7, 2002)(Slip opinion at 7), recognized the authority of the OPM over exempted/excepted service employees and stated “[t]he Office of Personnel Management, not the Civil Service Commission, oversees excepted service contracts under 1 N.Mar.I.Code §8131.”

Register, following public notice of the intent to adopt the regulations published in the August 31, 1983 Register.⁹ In the July 16, 1984 Register, the Personnel Officer promulgated emergency regulations for the Standards of Conduct for Excepted Service Employees of the Commonwealth Government.¹⁰

In 1985, Amendment 41 of the Second Constitutional Convention repealed Article III, Section 16, and adopted Article XX. Article XX again called for the existence of a civil service commission and set the terms of the board members. It states that the Commission's authority

shall extend to positions other than those filled by election or by appointment of the governor in the departments and agencies of the executive branch and in the administrative staffs of the legislative and judicial branches. *Exemptions* from the civil service shall be as provided by law, and the commission shall be the sole authority authorized by law to *exempt* positions from civil service classifications. (Emphasis added)

Therefore, as of 1985 there clearly existed the following:

- (1) a Civil Service System within the Commonwealth Government which was responsible for management of the personnel issues related to its members;
- (2) A Personnel Office with its head being a Personnel Officer who was responsible for the day-to-day administration of the Civil Service System;
- (3) A Civil Service Commission responsible for overseeing the operation of the Personnel Office (1 CMC §8116), overseeing appeals filed by its members, and handling the overall policy issues related to the Civil Service System; and
- (4) employees of the Commonwealth Government who were "exempt" and recognized as not being a part of the Civil Service System.

What is not so clear is who was responsible for management of the personnel issues affecting the "exempt" employees and what set of rules and regulations governed their employment

⁹ The Personnel Officer issued Interim Regulations concerning Personnel Service System Rules and Regulations in March 1982 pursuant to his authority to do so under Section 5 of Public Law 3-1, pending the confirmation of the Civil Service Commission.

¹⁰ It is interesting to note that in the initial set of regulations adopted for the Excepted Service in July of 1984, the entity identified as promulgating the regulations was the Personnel Officer. However, in the October 22, 1986 Register, the Civil Service Commission was the entity adopting the Excepted Service Personnel Regulations published at that time.

relationship with the Commonwealth Government. As stated above, the language in 1 CMC §8124 seems to imply that the Personnel Officer had broader responsibilities than just the Civil Service System. Its wording seems to contemplate that responsibility for management of non-civil service employees of the Executive Branch also lay within its jurisdiction.

On June 24, 1994, former Governor Froilan Tenorio issued Executive Order 94-3 (E.O. 94-3) reorganizing the Commonwealth Government. Section 214 of E.O. 94-3 abolished the Personnel Office and transferred its functions to the Office of Personnel Management (OPM) established within the Office of the Governor. The head of OPM was designated the Director of Personnel. Following the implementation of the E.O., responsibility for the exempt employees shifted to OPM.

On April 30, 2001, pursuant to override by the Commonwealth Legislature of a veto, Public Law 12-54 became law. Section 3 of Public Law 12-54 repealed sections 214 and 509 of E.O. 94-3 and restored to law those provisions of law that were affected by the E.O. As such, OPM ceased to exist and the Personnel Office came back into existence renamed as the Office of Personnel Management but placed under the Civil Service Commission again. At the same time, all the provisions that accompanied the initial Personnel Office, such as 1 CMC §8124, came back into effect. Therefore, the old Personnel Office with the new name OPM, regained authority to manage the day to day administration of the Civil Service System and *seemingly* the authority to manage the personnel issues related to all non-civil service executive branch employees.¹¹

Prior to the implementation of the E.O., pursuant to 1 CMC §§ 2052 and 2103, staff of both the Governor's and Lt. Governor's Offices were designated within the Civil Service System. Section 509 of E.O. 94-3, among other things, exempted from the Civil Service System employees 1) in any position in the Governor's and Lt. Governor's Offices except administrative staff of OPM, 2) any position which includes direct involvement in government policy making, and 3) any position which requires a confidential relationship with an official appointed by the Governor or with a person appointed to a position which involves policy-making.

However, on April 9, 1997, an opinion from the N.M.I. Supreme Court in *Sonoda v. Cabrera*, on a certified question from the U.S. District Court for the CNMI, held that section 509(a) of E.O. 94-3, which stated that all officials at or above the level of division director would be appointed by and serve at the pleasure of the Governor, essentially removing them from the civil

¹¹ On September 15, 1998, former Governor Pedro Tenorio issued Governor's Directive No. 206 stating that pursuant to Article XX and 1 CMC §8131(a) of the Civil Service Act, jurisdiction over the "Excepted Service Personnel System" fell within the responsibility of the Governor and his designees, not the Civil Service Commission. Accordingly, he designated OPM as the government entity charged with promulgating and administering Excepted Service regulations, contracts, and policies on behalf of the Commonwealth Government.

service, violated N.M.I. Const. Art. XX §1. Article XX, quoted above, vests the Commonwealth Legislature with plenary authority to exempt employees from the Civil Service System.

On February 13, 2002, Public Law 13-1 was approved. It repealed Public Law 12-54 and reinstated Section 214 of E.O. 94-3. At the same time, it sought to resolve the deficiencies noted in *Sonoda* by mandating that employees of the Offices of the Governor and Lt. Governor and the other employees identified in section 509 of the E.O. are “exempt” from the Civil Service System. In doing so, it also amended 1 CMC §§ 2052 and 2103 to specifically “exempt” the employees of the Governor’s and Lt. Governor’s offices from the Civil Service.

The Civil Service System clearly still has jurisdiction over those employees who have not been “exempted” from the Civil Service System. OPM also clearly has responsibility for the day-to-day administration of the Civil Service System employees. With respect to those employees who fall outside of the Civil Service System because they have been “exempted” by laws that are compliant with Article XX of the Constitution, again OPM *seems* to have jurisdiction over the administration of their employment relationship with the Commonwealth Government.

Currently, there appear to be three types of employees: 1) those within the Civil Service System, 2) those who are not or are “exempt”, and 3) those who work for an agency which Commonwealth law has specifically authorized to govern its own independent personnel system. The list of agencies with statutory authority to independently administer their own personnel systems and to adopt their own personnel rules and regulations includes the following:

The Commonwealth Utilities Corporation	4 CMC §8133(c)	“The staff of the corporation shall be exempt from the application of the Commonwealth Civil Service Act, title 1 division 8, part 1 (1 CMC §8101 et seq). . . . The corporation shall develop, adopt, and administer a merit personnel system that rewards . . . The board shall establish rules and regulations governing the selection, promotion . . . The corporation may set its own compensation, wage and salary scales”
The Commonwealth Ports Authority*	2 CMC § 2130	“The board shall establish rules and regulations governing the selection, promotion, performance, evaluation, demotion, suspension, dismissal, and other disciplinary rules for employees of the authority.”

The Office of the Public Auditor	<p>1 CMC 2305(a), as amended by Public Law 12-65</p> <p>and</p> <p>1 CMC §2305(b), as amended by Public Law 12-65</p>	<p>“All personnel employed by or contracted for by the Office of [the] Public Auditor shall be exempt from the application of the Commonwealth Civil Service Act (1 CMC §8101 et seq.) The Office of the Public Auditor shall set its own compensation, wage and salary scales.”</p> <p>“The Public Auditor may establish supplemental personnel regulations including a code of ethics for the employees of the office. . . .”</p>
Marianas Visitors Authority	<p>4 CMC 2124(g)</p> <p>and</p> <p>4 CMC §2143(b)</p>	<p>“They [the employees] shall be exempt from the application of 1 CMC §8101 et seq., the Commonwealth Civil Service Act, except as provided in 4 CMC §2121(c). The MVA may set its own compensation and wage and salary scales to be approved by a joint resolution of the Legislature. The wage and salary scales shall be commensurate with those paid by the Commonwealth requiring comparable education, training, and experience.”</p> <p>“The personnel rules and regulations now applicable to the employees working for the Marianas Visitors Bureau shall be applicable to the MVA until the MVA adopts its own personnel rules and regulations.”</p>
Public Lands	Public Law 12-71, Section 2	“The Board of Directors may select, employ, promote and terminate employees . . . “

The Public School System*	CNMI Constitution Article XV(b) and 1 CMC §2268(b) and 1 CMC §1181-1183	<p>“The board of education shall formulate policy and exercise control over the public school system through the superintendent. Other matters pertaining to its operations and duties shall be provided by law.</p> <p>“To establish and revise as necessary for its own or through its agents, rules, regulations and policies for the operation of the Public School System, including policies relating the appointment, promotion, and removal of all Public School System, staff, health and welfare benefits, financial affairs and budgeting. “</p> <p>“The board shall establish a uniform system of evaluation and assessment of the performance of all certificated personnel within the Public School System”</p>
Northern Marianas College*	3 CMC § 1316(m)	<p>“To appoint and to terminate the president, officers, faculty employees and staff of the college, and consistent with its adopted rules and regulations, to specify their responsibilities and authority, and to set classifications and salaries.”</p>

There are some agencies, such as the Retirement Fund, that the law has not clearly addressed.¹² In addition, the agencies marked above with an asterisk have language which grants them authority to independently or differently handle their employees, but language specifically exempting them from the Civil Service System is missing. Nevertheless, for the most part, the language in the above listed laws goes further than just exempting the employees from the Civil Service System. It also contains reference to the authority of the agency to create its own system,

¹² 1 CMC § 8422 states, “[n]ew employees hired by the Northern Marianas Retirement Fund to administer the government life and health insurance programs shall be exempt from civil service pursuant to the fund’s general exemption from civil service.” However, there is no provision of law which generally exempts the fund from the Civil Service System. As a result, the Fund has been processing its contracts through OPM and following the provisions of the Excepted Service Regulations.

set independent salary scales and/or adopt rules and regulations permitting the same.

However, while Public Law 13-1 “exempted” the employees of the Governor’s Office and the Lt. Governor’s Office identified in Section 4 of Public Law 13-1 from the Civil Service System, it did not provide those offices the ability to create a separate personnel system for these employees.

Employees who are within the Civil Service System are governed by the laws and the rules and regulations applicable to the Civil Service System. Those who work for an agency which has been granted specific authority to implement its own personnel system are governed by the set of rules and regulations that it has adopted to govern itself.

The more complex question is: what set of rules governs the employment relationships of the employees who fall outside of the Civil Service System but who work for departments or agencies that have not been granted specific authority to manage their own personnel system? The answer to this question is not clear from the law. However, given the broad mandate of responsibility assigned to the Personnel Office, as set forth in 1 CMC §8124, it seems that OPM currently has the responsibility to provide service to the personnel in the Executive Branch of the Commonwealth Government.

As noted above, in 1984 the Personnel Officer adopted the initial set of Excepted Service Rules and Regulations. Since then, all revisions have been adopted by the Civil Service Commission.¹³ There have been long-standing questions regarding the authority of the Civil Service Commission to adopt regulations over a group of individuals who, by statute, it has no authority to govern.

Public Law 1-9 did not provide authority to the Personnel Office to adopt regulations. It did, however, direct the Civil Service Commission to “prepare reasonable rules and regulations to carry out the provision of *this Act*.” (1 CMC §8117)(Emphasis added). Within the Act referred to is the section that distinguishes which employees fall within and which fall outside of the system. Also in the Act is the section that directs the Personnel Office to administer essentially a government-wide personnel system. The law also provides guidance to the Civil Service Commission on the content of the rules and regulations it is directed to prepare, stating that they shall “regulate appointments, promotions, removals *and other personnel matters*.” (Emphasis added) Although this language is somewhat tenuous, it is not unreasonable to find that the Commission had authority to adopt the Excepted Service Rules and Regulations.

The initial excepted service regulations were adopted as Emergency Regulations. The notice accompanying the regulations published in the register explained that they had been promulgated

¹³ It is unclear why the word “excepted” rather than “exempted” was used to define the regulations.

pursuant to 1 CMC §9104(b) and 1 CMC §8124(b). It also explained that they were adopted on an emergency basis because it was an oversight not to have included them in the regulations that were adopted for the civil service, and there was a need to adopt regulations to govern the “ethical conduct of those employees exempted from Civil Service System under *1 CMC §8131(a)*.” (Emphasis added)

The language in the introduction to the current regulations is not as thorough but does contain sufficient reference to the scope of employees intended to be covered to lead to the conclusion that the regulations cover any employee who was not included in the Civil Service System and was exempt but not covered by any other agency’s regulations. Section 1.1 of the Introduction to the Regulations states that they are intended to cover “government service employees who are excepted from the Commonwealth Personnel Service System pursuant to 1 CMC Subsection 8131 and Amendment 41 [Article XX of the Constitution] of the Constitution of the Northern Mariana Islands.” Section I.1 of Part I of the Regulations states that the regulations address various issues for “persons excepted from the personnel service system.” While section 1.1 initially appears to limit itself to 1 CMC 8131 exempted employees, by mentioning Article XX of the Constitution, it arguably brings in any employee who has been exempted by any other law due to the fact that Article XX provides that other exemptions can be created “by law”. Section I.1 does not limit itself to any particular group of exempted employees and basically states that it covers any employee who is not in the Civil Service System.

The employees identified in Public Law 13-1 are simply “exempted” with no language authorizing an independent or alternative treatment of their personnel status. In view of the apparently broad coverage given the Personnel Office (now OPM) and the Commission to adopt regulations under Public Law 1-9, and the fact that this law has not been challenged and remains good law after many years not having been overturned by a court or subsequent legislation, the employees listed in Public Law 13-1 are under the management of OPM and the provisions set forth in the Excepted Service Rules and Regulations apply to these employees.

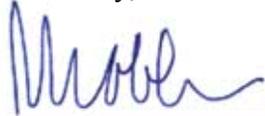
Review of this issue is a complex, difficult task given the numerous changes that have occurred in Commonwealth laws addressing the employment relationship of public service employees over the past several years.¹⁴ One of the most significant conclusions of this review is that there are significant inconsistencies in the legislation covering the issue, and that implementation has been occasionally haphazard as a result of the confusion surrounding the status of employees, the

¹⁴ This review also does not analyze the issues related to whether OPM was properly placed under the Office of the Governor. There are apparently issues that have been raised regarding the authority to place OPM in the Governor’s office rather than under the Civil Service Commission, given certain historical language related to the Second Constitutional Convention and the language in section 214(g) of the E.O. In reviewing this issue, OPA operated on the assumption that the location of the office in either the Governor’s Office or the Civil Service would not affect the issues covered in this opinion, given the existence of severability clauses in the various pieces of legislation involved.

office which manages personnel affairs, and the laws that govern the relationship and terms and conditions of public service. Because of the importance of having a clear understanding of the rules that govern the employment relationship between the Commonwealth and its employees so as to avoid further conflict and confusion, OPA recommends strongly that immediate consideration be given to drafting legislation that clearly sets forth the status of the various employees of the Commonwealth Government. OPA further recommends that any such legislation gather together in one place all the various laws that have been passed regarding the different agencies and specifically address the authority of the various agencies to control employment matters, adopt rules and regulations, and handle other issues related to the employment relationship. Because of the numerous laws that address salary caps for Commonwealth Government employees, OPA also suggests consideration of a bill which comprehensively addresses the salary caps applicable to the various agencies.

We hope that this report provides information useful in resolving issues relating to salary caps. We would appreciate it if you would provide a copy of our report to the appropriate individuals within your respective offices. We would be willing to review and discuss any concerns you might have.

Sincerely,



Michael S. Sablan, CPA
Public Auditor

enclosure

cc: Lt. Governor Diego T. Benavente
Robert T. Torres, Attorney General
Juan I. Tenorio, Acting Personnel Officer, OPM
Vicente M. Sablan, Chairman, Civil Service Commission
Frank B. Villanueva, Acting Secretary, Department of Finance
Members of the Senate
Members of the House of Representatives

LISTING OF EMPLOYEES EXCEEDING SALARY CAPS

I. Employees (Appointed and Contracted) January 2002 to Present:

Employee Name	Organization	Position Title	Salary	Salary Cap	Cap Authority	Cert. Ltr.	Sanction	Eff. Date
Babauta, Celina	Office of Governor	Executive Secretary	\$45,000	\$30,000	1 CMC §8245	Yes**	No	12/16/01
Towai, Tracy	Office of the Governor	Executive Secretary	\$35,000	\$30,000	1 CMC §8245		No	01/14/02
Schwalbach, Robert J.	Office of the Governor	Senior Policy Adv.	\$65,000	\$50,000	1 CMC §8248	Yes**	No	01/14/02
Taitano, Francisco I.	Office of the Governor	Spec. Asst. to Gov.	\$60,000	\$50,000	1 CMC §8248	Yes**	No	01/14/02
Castro, Juan I. Jr.	DEQ, Office Governor	Director, DEQ	\$55,000	\$50,000	1 CMC §8250	Yes**	No	02/14/02
Villagomez, Virginia C.	OMB, Office of the Governor	CIP Administrator	\$54,000	\$50,000	1 CMC §8250	Yes	No	07/26/99
Pua, Rudolfo M.	EMO, Office of the Governor	Director, EMO	\$54,000	\$40,800	1 CMC §8245		No	01/14/02
Rosaio, Joseph	DPW	Deputy Secretary	\$50,000	\$42,000	1 CMC §8245		No	02/02/02
Camacho, Edward C. <i>(Senate Confirmation)</i>	DPS	Commissioner, DPS	\$64,800*	\$54,000	1 CMC §8245		No	01/28/02
Tudela, Santiago F.	DPS	Dpty. Commissioner	\$50,000 + 20% diff.	\$42,000	1 CMC §8245	Yes**	No	Pending

April 2002

Babauta, Franklin R.	DPS	Dpty. Commissioner	\$50,000 + 20% diff.	\$42,000	1 CMC §8245	Yes**	No	Pending
Untulan, Pedro T.	DPH	Special Assistant	\$50,000	\$45,000	P.L. 11-41		No	10/30/00
Reksid, Franz	DPH	Special Assistant	\$50,000	\$45,000	P.L. 11-41		No	Pending
Taitano, Joaquin	DPH	Deputy Secretary	\$50,000	\$42,000	1 CMC §8245		No	6/18/00
Conner, Kimberly C.	DPH	Administrator, Facil.	\$70,000	\$50,000	1 CMC §8250	Yes***	No	01/17/01
Ince, Vanessa J.	DPH	Clinical Psychologist	\$59,600	\$50,000	1 CMC §8250		No	01/20/98
Brenn, Adrian C.	DPH	Clinical Psychologist	\$66,150	\$50,000	1 CMC §8250		No	07/03/96
Schrack, Robert	DOF	Special Assistant	\$50,000	\$45,000	P.L. 11-41		No	07/09/97

* Salary includes 20% differential which causes it to exceed statutory cap.

** The certification letters for these employees are deficient because they fail to certify that a diligent effort was made to recruit a professionally or technically qualified person willing to accept the salary within the caps. (1 CMC 8250(c)).

*** There is a letter justifying the need for the employment of this individual but it lacks language regarding the recruitment efforts.

II. Employees (Appointed and Contracted) 1998 -2002 Who Exceeded the Cap

Employee Name	Organization	Position Title	Salary	Salary Cap	Cap Authority	Cert. Ltr.	Sanction	Eff. Date
Guerrero, Gregorio	Office of Governor	Director, EMO	\$48,900	\$40,800	1 CMC §8245		No	09/29/99
Cruz, Donna	Office of Governor	Paralegal****	\$45,000	\$30,000	1 CMC §8245		<i>Not Required*</i>	03/25/90
Villagomez, Virginia C.	OMB, Office of the Governor	CIP Administrator	\$54,000	\$50,000	1 CMC §8250	Yes	No	07/26/99
Babauta, Celina	Office of Governor	Executive Secretary	\$35,000	\$30,000	1 CMC §8245		<i>Not Required*</i>	01/10/96
Sablan, Josephine	DPH	Director, Comm. Guid.	\$50,000	\$45,000	P.L. 11-41	Yes	<i>Not Required*</i>	07/23/98
Kevin Villagomez (<i>Senate Confirmation</i>)	DPH	Secretary	\$60,000 + 20% diff.	\$60,000	1 CMC 8245		<i>Not Required*</i>	05/28/98
Ince, Vanessa J.	DPH	Clinical Psychologist	\$59,600	\$50,000	1 CMC §8250		<i>Not Required*</i>	01/20/98
Conner, Kimberly C.	DPH	Admin., Facil.	\$70,000	\$50,000	1 CMC §8250	Yes***	No	01/17/01
Taitano, Joaquin	DPH	Deputy Secretary	\$50,000	\$42,000	1 CMC §8245		No	6/18/00
Untulan, Pedro T.	DPH	Special Assistant	\$50,000	\$45,000	P.L. 11-41		No	10/30/00
Arriola, Ned S.	DPH	Deputy Secretary	\$50,000	\$42,000	1 CMC §8245	Yes	<i>Not Required*</i>	07/22/98
Ingram, Charles (<i>Senate Confirmation</i>)	DPS	Commissioner	\$64,800	\$54,000	1 CMC §8245		No	03/02/99
Schrack, Robert	DOF	Special Assistant	\$50,000	\$45,000	P.L. 11-41		No	07/09/97

April 2002

Furey, Eloise	Dept. of Comm. & Cultural Affairs	Director, DYS	\$48,900	\$42,000	P.L. 11-41		<i>Not Required *</i>	05/02/95
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(Employees who continue to exceed the cap are Pedro T. Untulan, Joaquin Taitano, Robert Schrack, Vanessa Ince, Kimberly C. Conner, Virginia Villagomez and Celina Babauta)

*** This individual was certified under 1 CMC §8248(b) due to his position as the DPH Plant Engineer/Facilities Administrator but it does not appear that this employee's plant engineer certificate/license constitutes an engineering license under 1 CMC 8248(b). As such, this employee should have been certified under the 1 CMC §8250 process with the recruitment certification.

**** While Ms. Cruz was classified as a Paralegal, there are questions regarding whether this was an appropriate classification given that she essentially worked as the Governor's executive secretary from October 1, 1998 until her retirement in December 2001.

*Not Required**: It is not clear whether employees whose salaries were lifted above the cap prior to October 1, 1998 are required to undergo the sanction process as the sanction requirement did not come into play until after the effective date of Public Law 11-41 (October 1, 1998). This uncertainty is because the Compensation Adjustment Act is not clear whether re-certification is required upon renewal. 1 CMC §8250 does state that renewed contracts are considered new contracts, but it is uncertain whether the reference contained in that section is only intended to apply to a contract entered into prior to April 1, 1985 or to any contract. It is also not clear whether the sanction requirement under Public Law 11-41 would have required legislative approval upon renewal. Most of the employees noted above held two-year excepted service contracts which would have been renewed some time after October 1, 1998.

III. EMPLOYEES WHO FALL WITHIN THE 1 CMC 8248(B) CERTIFICATION BUT WHO HAVE NOT OBTAINED LEGISLATIVE SANCTION

In addition, all DPH physicians currently paid in excess of the cap are required to obtain Legislative sanction pursuant to a strict reading of section 526 of Public Law 11-41. The same is true for physicians, architects and engineers hired from October 1, 1998 to January 2002.

Physicians:

Curtis, Charles Ricco
Rankin, Ricardo Jose
Ventura, Alberto B.
Brostrom, Richard James
Hocog, Larry B.
Toskas, James William
Ada, Norma Seman
Ariyo, Olakekan
Beiling, Friedrich Christoph
Bottone, Anthony Andrew
Claassens, Francois Phillippus
Conrad, Michael John
Courtney, John William
Fenton, Carole Yerkovich
Foltz, Michelle
George, Robert J.
Harrison, Reid Chambers
Hofschneider, James U.
Iqbal, Muhammad Sami
Kometani, Sydney Maile
Lowrance, David Witherspoon
Macariola, Demetrio R. Jr.
Mackay, Rory Colin
Macleod, Ian Donald
Montanez, Emma P.
Negrete, Hilmer O.
Patel, Roopal M.
Pollock, Stewart Young
Ramsey, Garry Griffin
Reyes, Jose Ariel B.
Rohringer, Martin Philip
Samoyloff, Stephan D.
Sawer, Benjamin Arthur
Suleiman, Ehab
Takano, Angela Maria
Tessen, Jacqueline-Ann
Untalan, Peter B.
Voros, Judit G.
Wilgus, Jana Bryson
Wiltshier, Mar L.
Zahid, Imran
Henry, Sean
Mahmoudi, Artin
Human, Gideon P.
Lebamoff, Stephan J.

April 2002

Architects and Engineers:

Cody, Richard N.

Casiano M. Bostre

Lemieux, Stephen P.

Bearden, Brian Gaines

April 2002