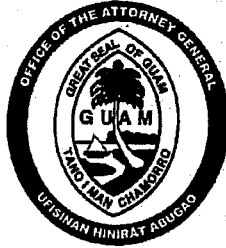


Leonardo M. Rapadas
Attorney General



Phillip J. Tydingco
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

March 28, 2011

HAND DELIVER

OPINION

Ref: LEG 11-0199

TO: Honorable Dennis G. Rodriguez, Jr., Senator
I Mina'trentai Unu Na Liheslaturan Guahan (31st Guam Legislature)

FROM: Attorney General

RE: Organicity of P.L. 30-190 Relating to Appointment to the Board of Trustees of the Guam Memorial Hospital Authority

Bill 386-30 (COR), titled "An Act to Repeal and Re-Enact Chapter 80 of Title 10, Guam Code Annotated, Relative to Establishing the Autonomy of the Guam Memorial Hospital Authority," was signed into law on August 28, 2010 (Public Law 30-190), and is codified at 10 GCA § 80101, *et seq.* The provisions of the Guam Memorial Hospital Authority's statute relating to the manner of appointment and removal of GMHA's board of trustees, 10 GCA §§ 80105.5 and 80107, are copied nearly verbatim from the University of Guam's enabling legislation, specifically 17 GCA §§ 16104.5 and 16106 with reference to how the University's Board of Regents is selected. Section 80105.5 creates a "Trustees Nominating Council" whose purpose is "to identify, recruit, evaluate and nominate all qualified candidates for membership on the Board of Trustees." The Council is composed of 11 members from the following organizations: a mayor-member appointed by the Mayor's Council; a member appointed from GMHA's Board of Trustees; two members appointed from GMHA's Executive Management Council; two members appointed from GMHA's Medical Executive Committee; two members appointed from the Guam Nursing Association; a member of the Allied Health profession; and two members from the community at large. It provides in operative part:

Duties.

(1) The Council *shall* develop a statement of the selection criteria to be applied and a description of the responsibilities and duties of a Trustee, and *shall* distribute this to potential candidates.

(2) In making its nominations, the Council *shall*: consider the needs of the Guam Memorial Hospital Authority; advertise; locate potential candidates; maintain a list of their names and contact information; match potential candidates

with projected vacancies; review candidates' qualifications and references; conduct interviews; and carry out other recruitment and screening activities as necessary.

(3) The Council *shall* be responsible for submitting a list of at least one (1) and no more than three (3) qualified candidates for every vacancy on the Board to *I Maga'lahañ Guåhan*.

(4) Nominations *shall* be made thirty (30) days prior to the expiration of a term, or within fourteen (14) days following an unforeseen vacancy. *I Liheslaturan Guåhan* [Guam Legislature] finds that it is critical that a vacancy on the Board be filled promptly. Therefore, *I Maga'lahañ Guåhan* [Governor] *shall* make the appointment of the qualified candidate from a list of candidates provided by the Council, which list *shall* contain at least one (1) and no more than three (3) qualified candidates submitted by the Council within forty-five (45) days of a vacancy, subject to the advice and consent of *I Liheslaturan Guåhan*.

If *I Maga'lahañ Guåhan* does not make the appointment within forty-five (45) days of a vacancy, the Speaker of *I Liheslaturan Guåhan* [Guam Legislature] *shall* make the appointment of the qualified candidate from the identical list submitted to *I Maga'lahañ Guåhan* [Governor] by the Council, subject to the advice and consent of *I Liheslaturan Guåhan*. Any appointment to fill a vacancy which is made by the Speaker of *I Liheslaturan Guåhan* pursuant to this Section *shall* not become void due to a later appointment by *I Maga'lahañ Guåhan* [Governor] to fill the same vacancy.

10 GCA § 80105.5(b) (emphasis on "shall" and editorial brackets in original).

Another provision of GMHA's amended statute now provides that board of trustee members may only be removed for cause in a public hearing.

A member of the Board may be removed by a vote of five (5) members for malfeasance in office or for persistent neglect of, or inability to discharge, duties, or for offenses involving moral turpitude, and for no other cause. However, no member of the Board shall be removed from office before a written bill of particulars shall have been given to the accused and before an investigation and an open and public hearing shall have been had. Any member who removes his residence from Guam shall be deemed to have vacated his office, thereby creating a vacancy on the Board.

10 GCA § 80107.

The provision restricting the Governor's removal authority set forth in § 80107 unquestionably violates the rule set forth in *Myers v. United States*, 272 U.S. 52, 126 (1926), that "[i]n the absence of any specific provision to the contrary, the power of appointment to executive

office carries with it, as a necessary incident, the power of removal.” *Compare Humphrey's Executor v. United States*, 295 U.S. 602, 631-32 (1935) (distinguishing *Myers* on the basis of the nature of the office) (“The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.”).

In *In re Request of Governor Camacho*, 2004 Guam 10 at ¶¶ 72 – 80, the Supreme Court of Guam discussed the Governor’s removal authority with respect to employees of the Guam Clearinghouse, established by the Legislature as an office within the Office of Lieutenant Governor. The Court discussed that part of Guam’s Organic Act which provides that “[the Governor] shall appoint, and may remove, all officers and employees of the executive branch and of the government of Guam, *except as otherwise provided* in this or any other Act of Congress, *or under the laws of Guam*.” 48 U.S.C. § 1422 (emphasis added). The Court upheld the Governor’s removal authority under the statute which created the Clearinghouse on the basis that “that the Governor’s authority to appoint or remove has not been ‘otherwise provided’ for by the Legislature.” *In re Request of Governor Camacho*, 2004 Guam 10 ¶ 80.

Here, of course, the Legislature has “otherwise provided” for the removal of executive officers. Notably, however, the Court in *In re Request of Governor Camacho* expressly reserved judgment with respect to the question presented here. “In so holding we do not, at this time, address the extent to which the Legislature may otherwise provide for the appointment and removal of executive branch employees.” *Id.*, 2004 Guam 10 ¶ 80 n. 13. The Guam Supreme Court therefore has not yet had the opportunity to decide the precise question decided by the United States Supreme Court in *Myers* and *Humphrey's Executor*. Nevertheless, we believe the Guam Supreme Court would have little difficulty applying the rule in *Myers* and *Humphrey's Executor* to the analysis in *Bordallo*, *Nelson*; and *Sablan* discussed below to find that the limitations on the Governor’s removal power with respect to the GMHA Board of Trustees in 10 GCA § 80107 are inorganic.

The provisions of 10 GCA § 80105.5(b) limiting the Governor’s appointment authority to a list of names submitted by the “Trustees Nominating Council” and establishing an irrevocable power of appointment in the Speaker of the Legislature in the event the Governor fails to timely nominate someone to the board of trustees require more in-depth analysis.

In *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir. 1980), the issue presented was “whether, when the Governor is specifically charged by Section 1421g(a) of the Organic Act with the responsibility for establishing, maintaining, and operating hospitals, the Legislature may, within the terms of that act, reduce his function with respect to the governance of the Hospital to the mere ministerial function of validating the appointments made by others to the Hospital’s governing body.” The Ninth Circuit Court of Appeals said it could not, and rejected the Legislature’s argument that Congress’ inclusion of the phrase “except as otherwise provided in

this chapter or the laws of Guam” in § 1422c(a), as well as inclusion of the phrase “subject to the laws of Guam” in § 1421g(a) was intended to authorize the Legislature to limit the Governor’s general powers of appointment.

Defendants argue that the Governor’s general appointive power as set forth in Section 1422c(a), was clearly intended to be subject to legislative action, otherwise Congress would not have included the phrase “except as otherwise provided in this chapter or the laws of Guam”, and that his specific responsibility with respect to hospitals is restricted by the inclusion in Section 1421g(a) of the phrase “subject to the laws of Guam”. But they failed to recognize that legislative power is limited by Section 1423a to subjects “not inconsistent with the provisions of this chapter”. The legislature may, of course determine whether a hospital shall exist at all, where and how large it shall be, the size and qualifications for appointment to the governing body, and a wide variety of other matters establishing the laws of Guam “subject to” which the Governor perform his function with respect to the hospital, but it may not negate the command of the Organic Act that the ultimate responsibility for the governance of the Hospital be in the Governor. This is what it has purported to do by the disputed legislation. The Legislature has in effect, taken over the entire power to establish, maintain and operate the Hospital by dictating who the governing trustees shall be. The Governor is stripped of all power to have any voice in the policies, management or procedures of the Hospital, despite the mandate of the Organic Act to the contrary. The Legislature has exceeded its power.

Bordallo, 624 F.2d 934-35. Thus, even though the Legislature’s power is generally considered to be plenary, it remains always constrained “by Section 1423a to subjects ‘not inconsistent with the provisions of this chapter,’ “ *id.*, meaning, in particular, the doctrine of separation of powers expressed in § 1421a that “[t]he government of Guam shall consist of three branches, executive, legislative and judicial.”

In *Nelson v. Ada*, 878 F.2d 277 (9th Cir. 1989), the court held that legislation which provided that members of the school board be elected rather than appointed by the Governor violated the Organic Act, 48 U.S.C. § 1421g(b). This provision of the Organic Act provided that the “Governor shall provide an adequate public educational system of Guam, and to that end shall establish, maintain, and operate public schools at such places in Guam as may be necessary.” When the case was heard, § 1421g(b) had been amended to require that the “Government” rather than the “Governor” shall provide an adequate public educational system, but the amendment was held to apply prospectively only. It was still necessary to answer the question whether the Legislature’s elected school board violated the Governor’s executive powers of appointment. Citing *Bordallo v. Baldwin* as dispositive, the court of appeals held that when the Legislature created an elected school board, it undermined the Governor’s exclusive authority under the Organic Act to provide an adequate public educational system.

We held in *Bordallo v. Baldwin* that, because the governor was specifically charged by section 1421g(a) of the Organic Act with the

responsibility for establishing, maintaining and operating hospitals, the legislature could not reduce his function to that of validating appointments to the Board of Trustees made by others. *Id.* at 934. We rejected the principal argument made by the legislature that it could enact a different process for selection, an argument similar to that made by petitioners here. That argument was that the governor's powers of appointment under the Organic Act were qualified by section 9 of the Organic Act, 48 U.S.C. § 1422c(a), which stated that the governor's power of appointment was limited and had to be exercised in accordance with the Organic Act and "the laws of Guam." We also rejected the argument that the governor's specific responsibility with respect to the hospital was restricted by the phrase in section 1421g(a) requiring that the governor exercise his authority over the public health system "subject to the laws of Guam." *Id.*

Nelson v. Ada, 878 F.2d 279.

In *Sablan v. Gutierrez*, 2002 Guam 13, the Guam Supreme Court was asked to determine whether legislation, which required the Governor to appoint members of the Guam Election Commission from lists of candidates provided by the two main political parties on Guam, violated the Governor's appointment authority under the Organic Act. For two reasons, the Court said it did not.

Section 2101(a) [Title 3 GCA] directs the governor to appoint six members to the board of the GEC from recommendations made by the recognized political parties of Guam. The Governor failed to appoint any of the three persons recommended by the Republican party. The lower court held that the Governor's failure to name the Republican nominees to the GEC board violated section 2101(a). The lower court's decision rested on two alternative grounds. First, the board of the GEC is not a part of the executive branch, and thereby not within the Governor's power of appointment as conferred by the Organic Act. Second, even assuming the GEC is an executive agency, the power of appointment is not exclusive to the Governor and can be limited by the legislature.

Sablan, 2002 Guam 13 ¶ 3. The Guam Election Commission is statutorily designated as "an autonomous instrumentality and an independent commission of the government of Guam, the Election Commission." 3 GCA § 2101(a). There is no further clarification of the Guam Election Commission's status in relation to the executive branch of government. Without analyzing the Election Commission's status as a government entity or its unique functions, the Supreme Court simply assumed the Guam Election Commission was an executive agency and proceeded to the analysis whether limitations placed on the Governor's appointment authority were inorganic.

Although section 2101(a) does not completely divest the Governor of his discretion in appointing the members of the GEC, it does place a limitation on his power of appointment by restricting his group of candidates to persons recommended by Guam's recognized political parties. Therefore, we must address the Governor's argument that any limitation placed on his power of appointment

violates the Organic Act. The Governor's appointment authority is limited and set forth in 48 U.S.C. § 1422, which states that the Governor "shall appoint, and may remove, all officers and employees of the executive branch of the government of Guam, except as otherwise provided in this or any other Act of Congress, or under the laws of Guam...." 48 U.S.C. § 1422 (1950). Assuming *arguendo* that the GEC is an executive agency, the phrase "except as otherwise provided ... under the law[]" is an "unmistakable recognition of the authority of the lawmaking department to provide for the appointment of all officers whose appointment is not definitely regulated by the Constitution itself." *Driscoll v. Sakin*, 121 N.J.L. 225, 1 A.2d 881, 882 (N.J.1938).

Id., 2002 Guam 13 ¶ 13. The Court then specifically distinguished the Legislature's authority to influence the manner in which appointments to the Guam Election Commission are made from the manner in which appointments are made to the board of Guam's public hospital – as discussed in *Bordallo* – and the manner in which appointments are made to the board of Guam's public school system – as discussed in *Nelson*.

Unlike the facts presented in *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir.1980), and *Nelson v. Ada*, 878 F.2d 277 (9th Cir.1989), no other provision within the Organic Act limits the manner in which the legislature may restrict the power of appointment with respect to the GEC. *See Bordallo*, 624 F.2d at 934-35 (finding that a statute rendering the Governor's power to appoint hospital trustees ministerial conflicted with the provision of the Organic Act that vested the Governor with authority to maintain Guam's health services); *see also Nelson*, 878 F.2d at 279-80 (finding that a statute divesting the Governor of his power to appoint school board members conflicted with the provision of the Organic Act that vested the Governor with authority to maintain Guam's public school system). Therefore, section 2101(a) is a legitimate exercise by the legislature of its express authority to determine how the members of a board it created are to be selected and appointed. *See Welch v. Key*, 365 P.2d 154, 157 (Okla.1961).

Id., 2002 Guam 13 ¶ 14.

Because the Legislature's authority with respect to the Guam Election Commission was not constrained by the Organic Act in the way it was (and is) with respect to the hospital, the Supreme Court found that requiring the Governor to select his appointees to the Guam Election Commission from lists provided by each of the recognized political parties on Guam was a reasonable limitation on the Governor's appointment authority and was not in conflict with the Organic Act. The Court said, "Therefore, we find that the legislature can restrict the Governor's selection and appointment of the GEC board members to persons recommended by Guam's recognized political parties without being inconsistent with the Organic Act." *Id.*, 2002 Guam 13 ¶ 16 (citation omitted).

In *Bordallo v. Reyes*, 610 F.Supp. 1128 (D.Guam 1984), *aff'd* 763 F.2d 1098 (9th Cir. 1985), the Governor filed a federal complaint challenging the creation by the Legislature of the

public corporation known as the Guam Visitors Bureau as inorganic and in violation of 48 U.S.C. § 1422. Section 1422 section provides: "The Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam." The Governor argued that the law was a nullity, and specifically that the section of the law providing for the composition and appointment of the Board of Directors was in derogation of his authority to supervise and control an instrumentality of the Executive Branch of the Government of Guam. *Reyes*, 610 F.Supp. 1129.

The district court denied relief and held that despite the fact that the Guam Visitors Bureau was a public corporation; that its employees were entitled to membership in the Guam Retirement Fund; that the Legislature had made the Administrative Adjudication Act applicable to the Board; and that the Personnel Rules provisions of 4 GCA, Chapter 4 were applicable to its employees, the Guam Visitors Bureau was nonetheless *not* an instrumentality of the executive branch of the Government of Guam.

The contention of the Governor that by virtue of Public Law 17-32 making GVB employees members of the Government of Guam Retirement Fund GVB, thus, automatically became an instrumentality of the Executive Branch of the Government of Guam is untenable and must fail. Contrariwise, the retirement law clearly indicates that employees of public corporations are not employees of the Government of Guam.

In its totality, the Governor has failed to prove that, by virtue of the applicability of the Administrative Adjudication Act, the Personnel Rules provisions of 4 GCA, Chapter 4, Section 4105, as amended by Section 3 of Public Law 17-32, and the laws relating to Retirement of Public Employees under 4 GCA, Chapter 8, GVB is an instrumentality of the Executive Branch of the Government of Guam.

Id., 610 F.Supp. 1133. The court next canvassed a number of Guam statutes creating public corporations, and distinguished between those established as instrumentalities of the government that were created to serve a governmental function and those that were not.

Public corporations such as GAA [Guam Airport Authority], GTA [Guam Telephone Authority], GPA [Guam Power Authority], and PAG [Port Authority of Guam], *supra*, are the only public corporations wherein each one is specifically designated as an *instrumentality of the government of Guam*. It is construed that the legislature, in expressly designating each one of the four public corporations as an instrumentality of the government, had determined that the other public corporations not so designated are not instrumentalities of the government. Ergo, GVB is not an instrumentality of the Executive Branch of the government.

Absent definitions of "public corporation" and "instrumentality of government" in our local statutes, a determination of what a public corporation and instrumentality of government has to be made.

Generally, a public corporation is organized for certain governmental purposes, such as counties, townships, school districts, cities, and incorporated towns, the so-called *municipal* or *political corporations*. Guam's public corporations cannot be categorized as public corporations in the true sense of municipal corporations.

Guam's legislatively-created public corporations are not public in the sense of being organized for governmental purposes; nevertheless, their operations contribute to the comfort, convenience, or welfare of the general public. They perform functions ordinarily undertaken by private enterprises such as electric, telephone, and water companies. In essence, these private enterprises are said to be "affected with a public interest" and, for that reason, they are subject to legislative regulation and control to a greater extent than corporations not of this character. These are usually designated as "public service corporations" or "quasi-public corporations."

* * *

Though it could be concluded that Guam's public corporations do not primarily perform governmental function; nevertheless, they cater to certain needs and convenience of the public. GVB as a public corporation fits within one of these categories. It does not perform any governmental function. To maintain that it is an instrumentality of the Executive Branch of the government, though devoid of governmental functions, defies the basic concept of government.

Id., 610 F.Supp. 1135 (emphasis in italics in original; emphasis in underline added). The district court in *Bordallo v. Reyes* held that the Guam Visitor's Bureau was not an instrumentality of the Government of Guam, but simply a "non-stock, non-profit *membership* corporation governed according to general corporation laws of Guam." *Id.*, 610 F.Supp. 1136 (emphasis in original). Because the Guam Visitor's Bureau did not perform a governmental function and was therefore not an instrumentality of the government of Guam, the act creating it did not impinge upon the Governor's executive powers and did not violate the doctrine of separation of powers. The court of appeals affirmed. *Bordallo v. Reyes*, 763 F.2d 1098 (9th Cir. 1985).

The district court found that in creating certain public corporations, such as the Guam Airport Authority, the Guam Telephone Authority, the Guam Power Authority, and the Port Authority of Guam, the Legislature had expressly designated each as a public corporation and as an instrumentality of the government. The Legislature also chartered other public corporations which were not designated as instrumentalities of the government. The district court thus concluded that because the Legislature had expressly designated four public corporations as instrumentalities of the government, it did not intend the same characterization to apply to other public corporations, not so designated. Consequently, the Bureau was not a governmental entity since it had not been expressly designated as such.

Id., 763 F.2d 1103. What is lacking for purposes of analysis in the court of appeals' opinion is an acknowledgment of the district court's analysis which determined that the Guam Visitor's Bureau is not an "instrumentality of the Government of Guam" because it does not perform a governmental function. Rather, the court of appeals, in affirming the district court decision, simply indicated in its opinion that because the Legislature designated certain entities as "instrumentalities of the government" to the exclusion of others, those entities not so designated were not instrumentalities of the government.

In Guam, there is a certain amount of confusion over the meaning of the term "instrumentality of the Government of Guam," especially since the term varies depending on its appearance in any given statute. Title 10 GCA § 80102, states, "There is established within the government of Guam a public corporation and an autonomous instrumentality called the Guam Memorial Hospital Authority." The problem is that calling a particular entity an agency or "instrumentality of the Government of Guam" does not always mean that the entity is, in fact, intended to perform a governmental function. Furthermore, the designation "autonomous" does not automatically mean that the entity is not intended to perform a governmental function.

Whether a public corporation or other entity created by the Legislature is or is not an instrumentality of the government of Guam, and what "instrumentality of the government of Guam" means exactly, has never been easy to discern. The first reported decision referencing the term under Guam law may be *Tyndzik v. Director, Office of Workers Compensation Programs*, 53 F.3d 1050 (9th Cir. 1995), in which the Ninth Circuit Court of Appeals held that the University of Guam was not a "subdivision" of the government of Guam for purposes of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. The court observed that when the University of Guam was created by the Guam Legislature as "a non-membership, non-profit corporation," it turned control of the University over to a Board of Regents; the Board's members were not "employees of the government of Guam," and the University was not controlled by the government of Guam. *Id.*, 53 F.3d 1053 (citations omitted). The court cited *Carter v. Torres*, No. 83-0042 (D.C. Guam Feb. 5, 1986), which found that the University was not a "public corporation" because the Legislature had removed the University from the control of Guam's government. The decision in *Carter* is described as holding that an action against the University under 42 U.S.C. § 1983 would not lie because the University under the Higher Education Act was not 'an agency or instrumentality of the Government of Guam.' " *Tyndzik*, 53 F.3d 1053 n. 4 (emphasis added). "It is true, as the University points out, that the Guam legislature appoints the Board of Regents, and exercises control over the University's budget. But the Board's members are not governmental employees and thus the Guam government does not control the University in the relevant sense." *Tyndzik*, 53 F.3d 1053 n. 5. "The University, therefore, was neither controlled by the government of Guam, nor was itself some form of governmental body." *Accord Wheaton v. Golden Gate Bridge, Highway & Transp. Dist.*, 559 F.3d 979, 981 (9th Cir. 2009) ("In *Tyndzik*, 53 F.3d at 1052-53 & n. 5, we held that the University of Guam was not a subdivision of a state as that term is used in the LHWCA. We noted that the University was created by the legislature, had a Board of Regents appointed by the legislature, and had a budget controlled by the legislature. However, we held the University was not a subdivision of Guam because the Guam government did not otherwise control the

University and the University could not perform basic government functions on its own....”) (emphasis added; footnote omitted). The significance here is that the earliest cases suggest that to be considered an “agency and instrumentality of the government,” there must be some indicia of *control* by the government beyond the fact that it is a publicly chartered institution whose appropriations come, in part, from public funds and whose governing board is appointed by public officials, which in *Tyndzik* was the Legislature.

Guam Econ. Dev. Auth. v. Island Equipment Co., 1998 Guam 7 ¶ 9 is the first decision by a local court on the question of what “agency and instrumentality” means. The Guam Supreme Court held that although the Guam Economic Development Authority (GEDA) was a public corporation established by the Legislature, it was nonetheless a “non-governmental entity.” Therefore, the doctrine of sovereign immunity did not apply to it in an action for garnishment for wages. Relying upon *Laguana v. Guam Visitor’s Bureau*, 725 F.2d 519 (9th Cir. 1984) and *Bordallo v. Reyes*, 763 F.2d 1098 (9th Cir. 1985), the Court reasoned that GEDA “should be treated as a public corporation, *but not an instrumentality of the government exercising governmental functions.*” *Island Equipment*, ¶ 7 (emphasis added). For purposes of discussion, the Court then assumed, without deciding, that GEDA was a public entity, performing governmental functions, but held that the Legislature had waived GEDA’s sovereign immunity by affording it the right to sue and be sued. *Id.*, ¶¶ 8, 9. The Court’s assumption, for purposes of discussion, that GEDA was performing governmental functions and the Court’s dubious conclusion that the Legislature had waived sovereign immunity by its “sue and be sued” language, very likely contributed to the ensuing lack of clarity on the meaning of “agency and instrumentality of the government of Guam.” *Cf. In re Lazar*, 237 F.3d 967 (9th Cir. 2001) (“sue or be sued” language is not determinative of whether an instrumentality created by a state legislature is deemed to have waived sovereign immunity); 5 GCA § 6102 (“The fact that an agency or instrumentality has or has not the right to sue or to be sued in its own name does not exclude such agency or instrumentality from the scope of [the Government Claims Act].”).

The holding in *Island Equipment* was expressly limited in *Guam Radio Serv. Inc. v. Guam Econ. Dev. Auth.*, 2000 Guam 1, ¶¶ 17 – 19, and again in *Wood v. Guam Power Authority*, 2000 Guam 18. In *Guam Radio* the Court held that GEDA was an “official body” for purposes of the Sunshine Act, 5 G.C.A. §§ 10101 through 10120. In *Guam Radio*, the Court specifically limited its prior holding in *Island Equipment* to GEDA’s assertion of sovereign immunity in garnishment proceedings. “The comments in that case relative to the status of GEDA and GVB as governmental entities pertained only to the issue of sovereign immunity.” *Guam Radio*, ¶ 17. “Indeed, the holding in *Island Equipment* was specifically limited to garnishment proceedings.” *Wood v. Guam Power Authority*, 2000 Guam 18, n. 5. Despite its disclaimer, the Supreme Court’s three decisions – *Island Equipment*; *Guam Radio*; and *Wood* – seem to be drawing somewhat inconsistent conclusions as to the meaning and significance of the term “instrumentality of the Government of Guam.” The Guam Supreme Court’s decision in *Guam Radio* merits particular attention, for it sheds light on an issue the Legislature has at times clouded when it has defined certain public corporations or other entities established by statute as an “instrumentality of the government of Guam” or an “official body of the territory of Guam” for some purposes, and not for others, as in the case of GEDA and GEDCA.

Notwithstanding the foregoing cases, there is compelling evidence that the Legislature did in fact consider GEDA to be an instrumentality of the government in certain, admittedly limited respects, as evidenced in 12 GCA § 50103 (k) (1993). Title 12, Chapter 50 of the GCA encompasses the statutes concerning the creation, status, duties, and powers of GEDA. Relevant to this discussion, section 50103 (k) indicates that in at least one instance, the Legislature considered GEDA to be an “agency or instrumentality of the government.” This section provides:

(k) The Corporation shall act as a central financial manager and consultant for those agencies or instrumentalities of the Government requiring financial guidance and assistance. Such technical assistance by the Corporation shall include but not be limited to obtaining of funds through bond or other obligations, structuring such bond issuances, preparation and dissemination of financial and investment information, including bond prospectuses, development of interest among investment bankers and bond brokers, maintenance of relationships with bond rating agencies and brokerage houses and, generally, acting as the centralized and exclusive financial planner and investment banker for all the agencies and instrumentalities of the Government. **For purposes of this Subsection, ‘agencies and instrumentalities of the Government’ include but are not limited to such public corporations as the Guam Economic Development Authority, the Port Authority of Guam, the Guam Airport Authority, the Guam Telephone Authority, the Guam Power Authority, the Guam Memorial Hospital Authority, the University of Guam, and all other agencies or instrumentalities of the Government given the power, now or in the future, to issue and sell bonds or other obligations for the purpose of raising funds.**

12 GCA § 50103(k) (1998) (emphasis added).

Generally, courts have interpreted the legislative inclusion of certain entities to the omission of others in any statute as a indication of a legislative intent to omit or not include all other similarly situated entities. Similarly, the Legislature’s use of the limiting words, “[f]or purposes of this Subsection,” may properly be viewed as a manifestation of the Legislature’s conscious intent to so limit the designation of “agency” or “instrumentality of the government” to this particular subsection and this one specific instance. We do not oppose this position. However, we do note that section 50103 (k) evidences the fact that GEDA is, in certain legislatively defined circumstances, an agency or instrumentality of the government and as such we deem GEDA to be an “official body of the territory of Guam.” It bears emphasizing that the Sunshine Act neither includes or excludes *any* entity, be it an agency, public corporation, or instrumentality of the government, in terms of setting forth its applicability.

Consequently, our determination that GEDA is an “official body of the territory of Guam,” in at least this respect, proves significant because the Sunshine Act provides for the disclosure of the written acts or records of an “official body of the territory of Guam.” See 5 GCA § 10102 (c).

Guam Radio, 2000 Guam 1 ¶¶ 18, 19 (emphasis in bold and italics supplied by the court; emphasis in underline added). For the limited purpose of determining whether GEDA was an “official body of the territory of Guam,” the Court found it probative *in that case on that issue* that the Legislature made GEDA subject to the Government Claims Act. But that is the limit of the holding. It does not mean that GEDA is or was an agency and instrumentality of the government for all purposes.

The fact that the Legislature deemed GEDA to be an “agenc[y] and instrumentalit[y] of the Government” combined with the fact that GEDA is a public corporation points definitively to the conclusion that GEDA is an official body of the territory under section 10102. GEDA is subject to the Government Claims Act, *because* it is a public corporation. Likewise, GEDA’s status as a public corporation indicates that is an “official body of the territory of Guam.”

Guam Radio, 2000 Guam 1 ¶ 22 (editorial brackets and emphasis in italics in original).

Applying a functional analysis – *see again Bordallo v. Reyes*, 610 F.Supp. 1135 (“To maintain that it is an instrumentality of the Executive Branch of the government, though devoid of governmental functions, defies the basic concept of government.”) – GEDA clearly would not qualify as an “instrumentality of the Government of Guam.” Although the Court fails to recognize or emphasize that “official body of the territory of Guam” and “instrumentality of the government” are terms of art, and are not necessarily interchangeable, the fact is that when the Legislature creates a public corporation or other corporate entity, it may define those terms however it deems appropriate to serve the particular purposes of specific legislation. The Legislature may selectively confer whatever attributes, benefits of government for its employees, restrictions, and other mandates that are automatically applicable to all executive branch agencies and departments upon those entities as it desires, subject of course to the limitations imposed by the Organic Act.

The rule to be derived from the cases discussed above is that while the Legislature may *for some purposes* designate GEDA and other public corporations as “agencies and instrumentalities of the Government” or as an “official body of the territory of Guam” (e.g., for purposes of including them in the provisions of 12 GCA § 50103(k); making them subject to the Sunshine Act; requiring that their employees are subject to civil service merit system protection laws; or authorizing their employees to participate in the Retirement Fund) it does not automatically follow that every public corporation or entity established by the Legislature is necessarily an “agency and instrumentality of the Government” *for all purposes* (e.g., for the purpose of being entitled to claim sovereign immunity in the courts, or being considered to be fulfilling a *government function* within and subject to the plenary authority of the executive branch). Stated differently, simply including the term “agency and instrumentality” in a

corporate entity's enabling legislation does not necessarily answer the question whether, in fact, a particular entity or public corporation is fulfilling a governmental function.

In *Carlson v. Perez*, 2007 Guam 6, the Supreme Court of Guam noted that it "has confirmed that GEDCA [GEDA's successor] is not considered an instrumentality, an agent for agency purposes, of the government of Guam, *Guam Economic Development Authority v. Island Equip. Co., Inc.*, 1998 Guam 7 ¶ 7, relying on *Bordallo v. Reyes*, 763 F.2d 1098, 1103 (9th Cir. 1985) and *Laguana v. Guam Visitor's Bureau*, 725 F.2d 519, 521 (9th Cir. 1984), though GEDCA retains its characteristic as a public corporation (owned by the public)." *Carlson*, 2007 Guam 6 ¶ 47. It is unclear why the Court in *Carlson* used the particular wording "an agent for agency purposes," inasmuch as the law of agency and agency law principles are nowhere discussed in any of the cases cited. Rather, the holding of the case is simply that whether or not a public corporation established by the Legislature is deemed an instrumentality or a non-instrumentality of the government – that is, does or does not perform a governmental function – the Legislature has the prerogative to impose whatever conditions on the public corporation it deems appropriate, including merit system protection for the entity's employees.

GEDCA was created by an act of the Guam Legislature, and even though GEDCA is not an instrumentality of the government of Guam for purposes of agency law, the Guam Legislature has the power to legislate a merit system for employees of the non-instrumentality corporations that are owned by the people of Guam, such as GEDCA. One of the ways that the Guam Legislature has exercised that authority is by requiring that even non-instrumentality public corporations extend merit system protection to its classified employees. This directive is found in 4 GCA § 4105, where GEDCA is mandated to adopt rules and regulations to extend merit system protections to its classified employees. The Guam Legislature clearly intended to extend merit system protection to GEDCA employees who are classified, that is, who competed for their job. Therefore, we reject GEDCA's argument that the distinction between classified and unclassified employees is not applicable to GEDCA's employees.

Id., 2007 Guam 6 ¶ 49. Although GEDCA's employees are subject to the merit system protection laws, the court again emphasized in the following paragraph that "GEDCA is not an instrumentality of the government of Guam." *Id.*, 2007 Guam 6 ¶ 50. Stated another way, the Legislature may in its discretion establish public corporations that are not "instrumentalities of the government of Guam" because they do not fulfill a governmental function (*see again Bordallo v. Reyes*, 610 F.Supp. 1135), but are, nonetheless, as a drafting convenience, "in certain legislatively defined circumstances," (*Guam Radio*, 2000 Guam 1 ¶ 19) denominated as instrumentalities of the government for other purposes. Hence, a public corporation, which does not perform a government function, may have imposed upon it certain requirements that are generally reserved for or imposed upon agencies and instrumentalities of the government that do perform governmental functions, such as the Sunshine Act; the Administrative Adjudication Act; the merit system protection laws governing classified employees; and the extension of membership in the Government of Guam Retirement Fund.

The fact that a public corporation or other corporate entity created by the Legislature is denominated for certain purposes as "an agency and instrumentality of the government of Guam" or is deemed an "official body of the territory of Guam" does not necessarily lead to the inevitable conclusion that it serves a governmental function and is, therefore, subject to separation of powers doctrine. Conversely, the fact that a public corporation is designated as an "autonomous instrumentality" does not always mean that it is not subject to the separation of powers doctrine.

Title 10 GCA § 80102, states, "There is established within the government of Guam a public corporation and an autonomous instrumentality called the Guam Memorial Hospital Authority." However, the designation "autonomous instrumentality" cannot avoid the separation of powers doctrine requirement of the Organic Act because 48 U.S.C. § 1421g(a) *mandates* that, "[s]ubject to the laws of Guam, the Governor shall establish, maintain, and operate public health services in Guam, including hospitals, dispensaries, and quarantine stations, at such places in Guam as may be necessary...." The court in *Bordallo v. Baldwin* found that "[t]he Legislature has exceeded its power," when it had "in effect, taken over the entire power to establish, maintain and operate the hospital by dictating who the governing trustees shall be. 624 F.2d 934-35. Therefore, although the Hospital is referred to as an "autonomous instrumentality" it is not independent from the Governor's plenary authority to *govern* its operations.

Conclusion

The Legislature may "determine whether a hospital shall exist at all, where and how large it shall be, the size and qualifications for appointment to the governing body, and a wide variety of other matters establishing the laws of Guam 'subject to' which the Governor perform his function with respect to the hospital," but the Legislature simply "may not negate the command of the Organic Act that the ultimate responsibility for the governance of the Hospital be in the Governor." *Id.* Title 10 GCA §§ 80105.5 and 80107 purport to do precisely that. The provisions of GMHA's revised statute limiting the Governor's powers of appointment and removal of GMHA's Board of Trustees are inorganic.

OFFICE OF THE ATTORNEY GENERAL

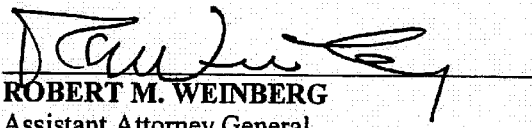
Leonardo M. Rapadas, Attorney General

By:


LEONARDO M. RAPADAS

Attorney General

By:


ROBERT M. WEINBERG

Assistant Attorney General