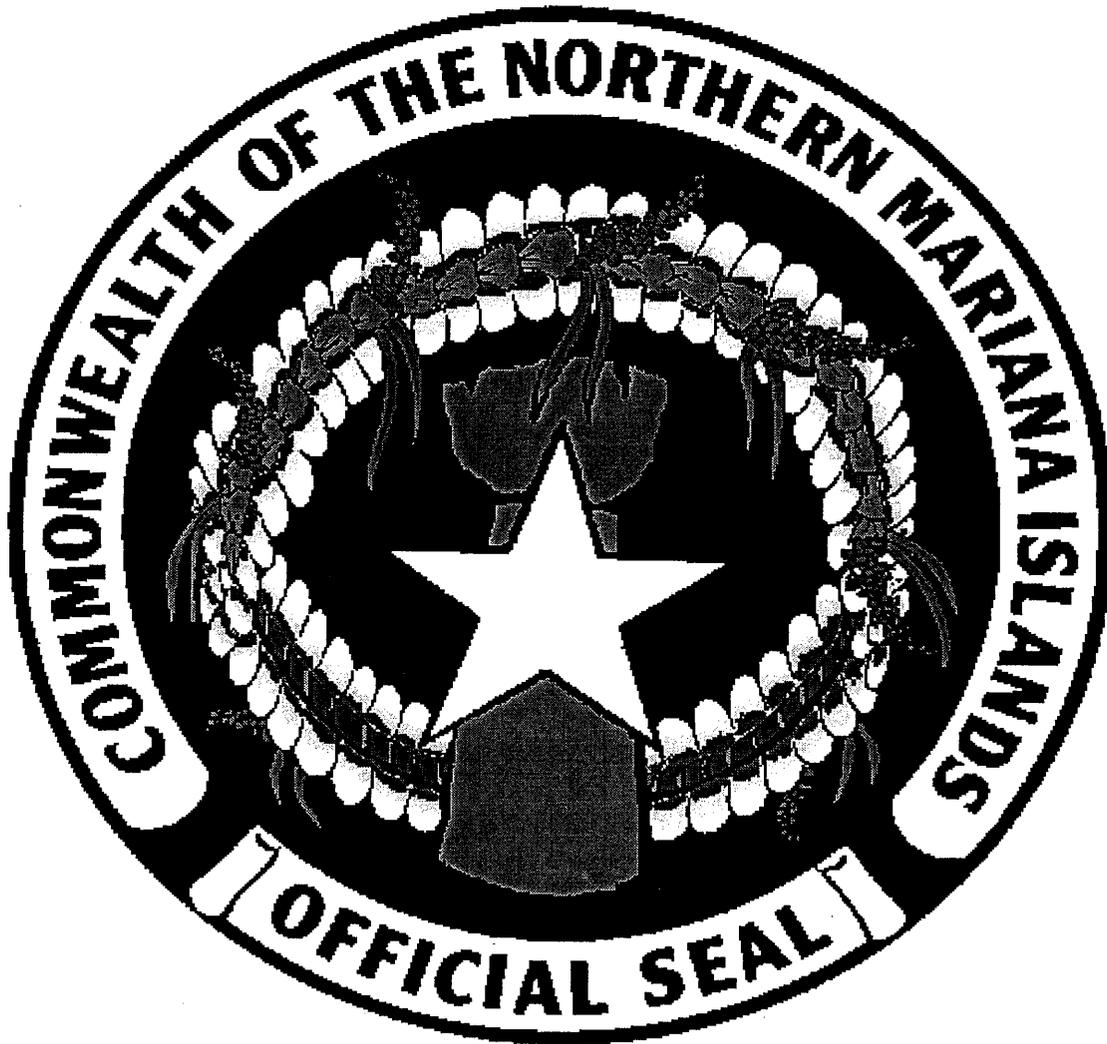


**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
SAIPAN, TINIAN, ROTA and NORTHERN ISLANDS**



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COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Benigno R. Fitial
Governor

Eloy S. Inos
Lt. Governor

DECLARATION OF HEALTH EMERGENCY

WHEREAS the Commonwealth is experiencing an increasing rate of deaths among community members that can be attributed to lack of health care; and,

WHEREAS the current systems of health care delivery are overtaxed with less than needed numbers of physicians and nurses available to serve medical needs; and,

WHEREAS the rate of off-island referrals has increased to the point where it poses a fiscal threat to the economic stability of the Executive Branch; and,

WHEREAS the Department of Public Health is unable to address this situation within the existing regulatory structure,

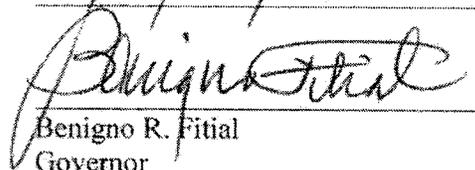
NOW THEREFORE I Benigno R. Fitial do hereby DECLARE A STATE OF HEALTH EMERGENCY for the Commonwealth and direct the following actions to occur forthwith:

1. Within ten (10) days of this Declaration, the Department of Public Health shall submit a written plan to move the Commonwealth from its present "medical emergency" status to an acceptable level of care.
2. Within fifteen (15) days of this Declaration, the Medical Licensing Board shall review and revise regulations so that expanded medical services may be provided to the client population of the Commonwealth.
3. Immediately, the Department of Public Health shall adopt appropriate recruitment strategies to restore an adequate level of medical services to the client population.

DATED:

10/20/09

BY:


Benigno R. Fitial
Governor

Caller Box 10007 Saipan, MP 96950 Telephone: (670) 664-2200/2201 Facsimile: (670) 664-2211

A.G. OPINION NO. 2009-01

Re: Legal Authority Pertaining to an "Acting" Attorney General

The following is a legal opinion concerning what, if any, legal authority exists for an individual to serve as an "Acting Attorney General" without being nominated by the Governor and confirmed by the Senate.

QUESTION PRESENTED

In the absence of a confirmed Attorney General, is there legal authority for an individual to serve as an "Acting Attorney General" without being nominated by the Governor and confirmed by the Senate?

SUMMARY CONCLUSION

As set forth herein, in the absence of a confirmed Attorney General, no legal authority exists for an individual to serve as an "Acting Attorney General" without being nominated by the Governor and confirmed by the Senate.

ANALYSIS

The Attorney General is a position created by the Constitution of the Commonwealth of the Northern Mariana Islands. See N.M.I. Const. Art. III sec. 11.¹ Under the CNMI Constitution the Governor shall appoint the Attorney General. *Demapan v. Kara*, Civ. No. 99-0548 (N.M.I. Super. Ct. January 20, 2000) (Decision and Order) at p.18 ("[T]he Governor's sole authority to appoint an Attorney General derives from Article III, §11"). Significantly, there is no provision in the Commonwealth Constitution for the appointment of an "acting" Attorney General. *Id.* ("There is no reference to an Acting Attorney General appointment, nor does this provision give the Governor authority to make such an acting appointment").

In addition to the constitutional requirement for the Governor to appoint an individual to serve as the Attorney General, the Commonwealth Constitution also provides that the Senate has the exclusive authority to confirm (or reject) the appointee by the Governor. See N.M.I. Const.

¹ Section 11 of Article III of the NMI Constitution reads, in pertinent part: "Attorney General. The governor shall appoint an Attorney General with the advice and consent of the Senate. ... The Attorney General shall be responsible for providing legal advice to the governor and executive departments, representing the Commonwealth in all legal matters, and prosecuting violations of Commonwealth law."

Art. III sec. 11.² This authority is also found within the relevant Commonwealth code provisions that identify which positions or appointments legally require legislative consent.

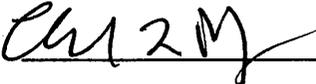
Under the applicable laws, the appointed Attorney General's name must be submitted to the Senate within 30 days of the appointment. See 1 CMC § 2902. Further, if the appointment is not confirmed by the Senate "within 90 consecutive calendar days from the date the person was appointed, the appointment is deemed rejected and shall automatically terminate, the position shall become vacant, and the person nominated shall not be renominated." 1 CMC §2904.³; *Demapan* at 22.

Furthermore, upon a review of the applicable law, there is no explicit constitutional or statutory authority for the proposition that a duly appointed and confirmed Attorney General can, by contract, appoint an "Acting" Attorney General who will serve during periods when the Attorney General has resigned, or is otherwise permanently unable to fulfill the duties of office.

For the sake of clarity, this opinion recognizes that the authority to delegate an acting position rests with the legal incumbent of that particular office. Thus, consistent with case law on this issue, an Attorney General, who has been properly nominated by the Governor and confirmed by the Senate, may appoint an Acting Attorney General to serve in an acting capacity for a temporary period of time when he or she is temporarily unable to perform his or her duties. Moreover, in the event that no duly confirmed Attorney General exists, the Office of the Attorney General still maintains its capacity to perform all its duties and functions. *CNMI v. Peredo*, Crim. No. 04-0181 (N.M.I. Super. Ct. January 31, 2005) (Order) ("...criminal activities such as murders, rapes, child molestation, assaults, and thefts, will continue to occur regardless of the status of the Attorney General. The people cannot and will not lose the power to prosecute these crimes.").

CONCLUSION

Based on the foregoing, in the absence of a confirmed Attorney General, no legal authority exists for an individual to serve as an "Acting Attorney General" without being nominated by the Governor and confirmed by the Senate.

 11.6.09

Edward T. Buckingham
Attorney General

² See, *supra*, n.1.

³ See *Demapan v. Kara*, Civ. No. 99-0548 (N.M.I. Super. Ct. January 20, 2000) (Decision and Order) at pp.18-25. Section 2904 of Title 1 of the Commonwealth Code was recently amended by Public Law 15-84, but not in a way which would change the *Demapan* analysis.

A.G. OPINION NO. 2009-02

Re: Housing Benefits to Government Employees Recruited from Off-island

At the request of the Commonwealth of the Northern Mariana Islands (CNMI) Acting Director of Personnel, the Acting Secretary of Public Health, and the Acting Secretary of Finance, and in light of a legislative inquiry of the Public Auditor, the Office of the Attorney General has analyzed the issue of whether housing benefits may be provided to government employees recruited from off-island notwithstanding the enactment of Northern Mariana Islands Public Law 14-91, Section 3 (entitled "Housing Allowance Policy for Recruitment Outside the CNMI"), codified at Title One of the Commonwealth Code, Section 8228.

I. LEGAL ISSUES

The question posed implicates two legal issues:

1. Does Title One, Commonwealth Code, Section 8228 prohibit housing benefits to government employees recruited from outside the Commonwealth?
2. If not, are there any temporal or other limitations on such employees continuing to receive housing benefits?

II. SHORT ANSWERS

1. No. Public Law 14-91, Section 3 repealed the current housing regulations and barred their amendment. However, this repeal did not completely eliminate the government's power to grant housing benefits.
2. No. In repealing the housing regulations, Public Law 14-91, Section 3 eliminated the five-year limit on housing benefits. Thus, the decision whether or not to grant such benefits remains a matter within the sound discretion of management, presumably a policy decision subject to fiscal limitations and employee contractual rights.

III. BACKGROUND

The provision of government employee housing allowances is derived from U.S. military and naval pay systems.¹ This provision of recruiting off-island employees was then

¹ It was grafted into Trust Territory of the Pacific Islands (TTPI) personnel practices under the Departments of the Navy and of the Interior.

continued under the Office of Personnel Management ² and applied only to excepted service employees whose point of recruitment is outside the Commonwealth of the Northern Mariana Islands and those excepted service employees hired within the Commonwealth and transferred to a post outside the Commonwealth. An excepted service employee recruited outside the Commonwealth shall receive either housing or housing allowance at the election of the employee, but not the two simultaneously. If the employee elects housing, it is provided pursuant to a revocable license and not as a tenancy or leasehold. The housing allowance shall not exceed \$600 per month for an employee without dependents and \$800 per month for an employee with dependents.

NMIAC § 120-10-205, para. 1 (Excepted Service Personnel Regulations § III.B., para.1) (ESPR) (section entitled "Housing") (attached). ³

Also included in the ESPR was a temporal limitation on the length housing benefits could be received:

Any housing benefit, regardless of whether it is in the form of housing or housing allowance, shall not exceed five consecutive years from the date of initial employment. For all current employees the five-year term of this benefit will start at the effective date of this chapter.

NMIAC § 120-10-205(g) (ESPR § III.B.7.).

IV. ANALYSIS

A. NO UNCONDITIONAL REPEAL OF HOUSING BENEFITS

As befits an issue of such prominence, there is a history of CNMI laws addressing government housing allowances. On April 16, 1987, the Governor signed into law as part of the budget a new provision prohibiting housing allowances for employees or officials who hold title in a lease longer than 10 years, or are purchasing a home or residence, on the island on which they work. On April 26, 1988, a year and ten days later, the same Governor signed a budget for the ongoing Fiscal Year 1988, see Pub. L. 6-3, § 102, that tightened up the prohibition on housing allowances for same-island property owners (interests of 10 years or more) by including spouses, and clarifying the reference to "real property" and including contracts to purchase a home.

² The OPM started with the beginning of the CNMI government on January 9, 1978 from the transition of TTPI housing assets on Capitol Hill and elsewhere through most recent regulations adopted in 2004.

³ On January 22, 2004 the ESPR were adopted, 26 Commw. Reg. 21,714 (Jan. 22, 2004), and became effective ten days later on February 1, 2004 pursuant to Title One, Commonwealth Code, Subsection 9105(b). This happened almost eight months before the enactment of Public Law 14-91, Section 3 on September 30, 2004. These ESPR were also temporarily effective for 120 days from July 31, 2003 as Emergency and Temporary Regulations, 25 Commw. Reg. 20,740 (Aug. 22, 2003).

This same Act, Public Law 6-3, Section 308, imposed another, broader bar on housing allowances, "Commencing Fiscal Year 1989, there shall be no more housing allowance nor Government Housing Benefits, except those provided by law." Government Partial Operations Appropriations Act of 1988, Pub. L. 6-3, § 308, Apr. 26, 1988. This almost absolute prohibition of housing allowances was to take effect on October 1, 1988, the beginning of Fiscal Year 1989. However, less than two months later, a new budget was passed indefinitely postponing the effect of that provision: "Commencing Fiscal Year 1989, **upon passage of new legislation regulating subsidized government housing**, there shall be no more housing allowance nor Government Housing Benefits, except those provided by law." Government Partial Operations Appropriations Act of 1988, Pub. L. 6-5, § 308, June 22, 1988 (emphasis added).

The anticipated "passage of new legislation regulating subsidized government housing" never occurred. That is essentially how this law stands today, codified at Title One of the Commonwealth Code, Section 8227:

§ 8227. Housing Allowance.

(a) A housing allowance shall not be paid to any government employee or official, or spouse of a government official who holds title to real property or has a lease in real property longer than 10 years, or who, pursuant to a contract, is purchasing a home or a residence on the island on which the employee or official performs his government duties. Commencing Fiscal Year 1989, upon passage of new legislation regulating subsidized government housing, there shall be no more housing allowance nor government housing benefits, except those provided by law.

(b) Employees receiving government housing shall be assessed a fair rental value of the house due and payable to the General Fund monthly.

1 CMC § 8227.

The most recent law dealing with government housing allowances is Public Law 14-91, Section 3, Act of September 30, 2004. This law deals mostly with numerical limitations on governmental hiring of foreign national workers, but Subsections 3(a) and 3(b) directly address government housing allowances and have been codified at Title One of the Commonwealth Code, Section 8228:

§ 8228. Housing Allowance Policy for Recruitment Outside of the CNMI.

- (a) Regulations in effect on August 1, 2005 on housing allowance or housing benefit for employees who are recruited from outside the Commonwealth shall remain in effect for a period of not more than two years after the effective date of this act [September 30, 2004], and such regulations may not be amended.
- (b) Any government employee who receives a housing allowance or housing benefit and voluntarily terminates his or her contract before the expiration of the contract shall forfeit the benefit of repatriation to the point of hire or any

other location specified in the employment contract and be required to pay back to the Commonwealth Government fifty percent (50%) of the expenses to recruit the employee and fifty percent (50%) of the total housing allowance or housing benefit received by the employee.

- (c) All new or renewal contracts of employment entered into pursuant to 3 CMC § 4434(i), as amended, are subject to this section.

1 CMC § 8228 (effective date added); Pub. L. 14-91, § 3, Sep. 30, 2004.

The operative language of Public Law 14-91, Section 3 above with respect to prohibiting government housing benefits is contained in Subsection 3(a).⁴ By virtue of Public Law 14-91, Subsection 3(a), these regulations, having been adopted on January 22, 2004 with their publication in the Commonwealth Register, 26 Commw. Reg. 21,714 (Jan. 22, 2004), and having become effective ten days later on February 1, 2004, see 1 CMC § 9105(b), remained in effect until Saturday, September 30, 2006, whereupon they no longer were valid by operation of law, and could not be further amended. 1 CMC § 8228(a); Pub. L. 14-91, § 3(a), Sep. 30, 2004.

While Public Law 14-91 did indeed affect housing regulations — it essentially repealed them — this law did not represent the long-awaited “passage of new legislation regulating subsidized government housing.” 1 CMC § 8227(a). Public Law 14-91 in no way purports to “regulate” government housing benefits.

As shown by the history of Subsection 8227(a), when the Legislature wants to bar housing benefits they know how to do so. Since April 16, 1987, the law has prohibited housing allowances for employees or officials if they or their spouses hold title to real property in a lease longer than 10 years, or are purchasing a home or residence, on the island on which they work. Between April 26, 1988 and June 22, 1988, an almost absolute prohibition of housing allowances was to take effect on October 1, 1988, the beginning of Fiscal Year 1989, but less than two months after enactment, the Legislature and Governor thought better of it.

Accordingly, there has been no legislative repeal of housing benefits by Public Law 14-91.

B. CONSEQUENCE OF REPEAL OF HOUSING REGULATIONS

While Public Law 14-91, Section 3(a) does not repeal or regulate government housing benefits⁵, it does repeal “[r]egulations . . . on housing allowance or housing benefit for

⁴ The “[r]egulations in effect on August 1, 2005” were Northern Mariana Islands Administrative Code Section 120-10-205 (Excepted Service Personnel Regulations Section III.B.) referenced and quoted on the previous page, a copy of which are attached to this opinion. The final sentence of the Excepted Service Personnel Regulations provides, “The Employee shall comply with all housing regulations promulgated by the Office of Personnel Management.” NMIAC § 120-10-205(i) (ESPR § III.B.9.). There is no record of such additional regulations being published in the Commonwealth Register since the January 22, 2004 ESPR adoption, and the contemplated additional regulations apparently were intended to regulate conduct or procedure rather than grant an entitlement as done by Section 120-10-205 (ESPR Section III.B.).

⁵ As was done and still is done to a limited extent in the various iterations of Title One of the Commonwealth Code, Subsection 8227(a)

employees who are recruited from outside the Commonwealth," effective September 30, 2006. 1 CMC § 8228(a); Pub. L. 14-91, § 3(a), Sep. 30, 2004. So what is the consequence of these repealed regulations? Does it mean, as some assume, that without explicit regulatory authorization, housing benefits are finished?

When the Legislature does not prohibit an act, it is generally presumed to be allowed. *United States v. Le*, 327 F. Supp. 2d 601, 610 (E.D. Va. 2004)⁶

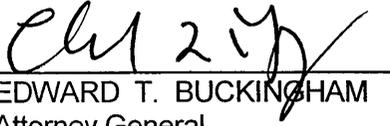
Moreover, the statement 1 CMC § 8227(a), second sent.,⁷ serves as a continuing authorization for the Office of Personnel Management to provide housing benefits, and for the Secretary of Finance to pay them if they are within total budget compensation authority and as contracted for.

Under the formerly applicable provisions of the Excepted Service Personnel Regulations, there was a five-year limit on housing benefits. NMIAC § 120-10-205(g) (ESPR § III.B.7.). That five-year temporal limitation was repealed by Public Law 14-91 effective September 30, 2006, so since then employees may receive housing benefits indefinitely.

Now, rather than being bound by Northern Mariana Islands Administrative Code Section 120-10-205, the Office of Personnel Management may proceed under custom, practice, policy, or contractual bargain. If the Government and affected employees have entered in good faith into their contracts that provide housing benefits, it is the opinion of the Attorney General's Office that such practice is legal and protected under the U.S. and CNMI constitutions.

V. CONCLUSION

For the foregoing reasons, this legal opinion holds that Public Law 14-91, Subsection 3(a) does not prohibit housing benefits for government employees recruited from outside the Commonwealth. Accordingly, this remains a matter of individual contract negotiation under the sound discretion of the branches of government that employ off-island employees.

 11.12.09
EDWARD T. BUCKINGHAM
Attorney General

Attachment: NMIAC § 120-10-205 (ESPR § III.B.).

⁶ It held that when nothing in a statute forbids an action, the statute can be construed to allow the act; *Kildea v. Electro Wire Products, Inc.*, 792 F. Supp. 1046 (E.D. Mich. 1992)

⁷ "upon passage of new legislation regulating subsidized government housing, there shall be no more housing allowance nor government housing benefits, except those provided by law"