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August 9, 2010

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Time 2:09 p.m.
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Legal Memorandum

Re: GOV 10-0607

TO: Lieutenant Governor Michael Cruz

FROM: Attorney General *John Weisenberger*

RE: Validity of Collective Bargaining Agreements



Buenas yan Saluda!

In response to your request for legal guidance regarding the proper response to the claim that existing and prospective collective bargaining agreements with the Guam Federation of Teachers may be invalid because Mr. Matthew Rector since February 2008 has not been and is not now its organization representative, we submit the following observations and conclusions.

The legal grounds that have been asserted for the absence of his power to represent the GFT is based upon alleged violations of two different statutes, the federal Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401-531, and the Guam Ethical Standards for Elected Officials, 4 G.C.A. § 15100-15211. Under the LMRDA, it is argued that non-compliance with the procedural rules of the LMRDA for the union election of February 2008 rendered his election as GFT President void. Under the Ethical Standards Act it is argued that since January 2010 he is legally disabled from negotiating on behalf on GFT because of his status as ex-Senator. In our view neither statute disables his status as GFT President and until a new election is held, it would be unlawful for the government to repudiate existing labor agreements or to refuse to negotiate with Mr. Rector for renewal of expiring agreements.

Facts

The Guam Federation of Teachers is almost entirely a public sector labor organization and represents the employees of several line and autonomous agencies of the government of Guam, but also represents a private sector labor union, the School Bus Driver Employees of Alutiiq Global Solutions, Inc. Matthew Rector has held himself out as President of the Guam Federation of Teachers since 2004, the year in which his employment with the Guam Department of Education ended. His current three-year term is based upon an election in February 2008. Some GFT members

contend that the events preceding the February 2008 election violated the requirements of the LMRDA, such as proper notice to membership of the meeting at which the GFT Constitution was amended so as to allow the election in February 2008 and proper notice to the membership of the period in which to nominate candidates for union offices. This year at least two GFT members have filed complaints with the U.S. Department of Labor under the LMRDA and seek to have the U.S. Secretary of Labor void the election results and order a new election.

In November 2008 he won election to the 30th Guam Legislature, and took his seat in January 2009. On January 18, 2010 he resigned from his office.

Labor Management Reporting and Disclosure Act

The LMRDA regulates the procedures for electing the officers of a union. Union members have the guaranteed right to nominate candidates, run for office, get written notice of the election, and vote freely. 29 U.S.C. § 401(a). An election held in violation of statutory requirements, which violation might have affected the outcome, is void. 29 U.S.C. § 482; *Dole v. International Broth. of Elec. Workers, Local Union 1049, AFL-CIO*, 727 F. Supp. 789 (E.D. N.Y. 1989).

The Secretary of Labor has reviewable discretion to decide not to bring an action to set aside an election. *Dunlop v. Bachowski*, 421 U.S. 560 (1975). If he accepts the complaint he must petition the federal courts for an order to set aside the election. A complaint will be upheld only if it appears that the violation of the statute “may have affected the outcome of the election.” *Id.* § 402(c). If an election is set aside, the Secretary will conduct a new election. *Id.* Thus, the invalidation of an election is a contingent event that depends upon the exercise of discretion by the Secretary of Labor and a finding by the federal court that the irregularities affected the outcome of the election. By no means is a new election automatic if violations occurred.

The LMRDA does not apply to purely public sector labor unions. The LMRDA governs unions that deal with “employers,” where “employer” does not include a government. *Id.* § 402(i). Courts do not have subject matter jurisdiction to hear LMRDA claims against public sector unions excluded from the statute’s coverage. *Martinez v. Am. Fed’n of Gov’t Employees*, 980 F.2d 1039, 1041 (5th Cir.1993). However, in 2006 the GFT became the bargaining representative of a private sector union, the School Bus Driver Employees of Alutiiq Global Solutions, Inc., and thus the GFT is bound by the requirements of the LMRDA.

In many reported cases the federal courts have applied the LMRDA so as to order new union elections, but surprisingly no case among them can be found that addresses the right of the union president to represent the union during the pendency of the proceedings or the effect of a voiding of an election upon collective bargaining agreements that were executed during the pendency of the proceedings. It seems that this issue would be present in the case of every invalidation of a election.

For lack of a case on point we think that the court would turn to general legal principles that govern the contractual relations between associations of persons and third parties. Although labor contracts have peculiar features distinguishing them in some respects from ordinary contracts, nevertheless

Congress has seen fit to adopt the concept of 'contract' as the vehicle or instrumentality for regulating labor relations. A consequence of this is that the general principles of contract law do apply to such agreements. *Roadway Express, Inc. v. General Teamsters*, 211 F. Supp. 796, 797 (W.D. Pa. 1962).

The management officials of the government can only enter contracts with the GFT through its incumbent President. The GFT is an unincorporated association. Under Public Employees Management Relations Act ("PEMRA"), an "employee organization" is defined as a "lawful association." 10 G.C.A. § 10104(d). An association is a group of persons acting together, without a charter, for the prosecution of a special purpose or business. In the absence of a statute or agreement among the members to create a separate entity, it is not an entity that is distinct from the members composing it. *Shortlidge v. Gutoski*, 484 A.2d 1083, 1085 (N.H. 1984). Being an association, it can only act by virtue of an agent, *id.* at 1086, which PEMRA terms an "organization representative." 4 G.C.A. § 10104(f). An association may exist without officers and act through a agent without office, but the GFT has chosen to elect officers--the President, Vice-President, Treasurer, and Secretary. The Constitution of the GFT determines the authority of its President, who is their agent. See *Solon Lodge No. 9 Knights of Pythias Co. v. Ionic Lodge Free Ancient and Masons No. 72 Co.*, 101 S.E.2d 8, 14 (N.C. 1957), and in this respect their authority is determined by the law of agency. *Hann v. Nored*, 378 P.2d 569 (Ore. 1963). An officer may enter a contract on behalf of the association when he is acting within the scope of his authority to do so. *Will v. View Place Civic Ass'n*, 580 N.E.2d 87 (Ohio C.P. 1989).

Authority can be express, implied, or apparent. Apparent authority is "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Restatement (Third) of Agency* § 2.03. The course of dealings between the GFT and the employing agencies since 2004 provides overwhelming evidence that the GFT membership as a whole has held Mr. Rector out as its lawful President.

In addition to the apparent authority of Mr. Rector, there is also the de facto officer doctrine. The de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient. *Khanh Phuong Nguyen v. U.S.*, 123 S. Ct. 2130 (2003). This doctrine is commonly used to validate the acts of officers of governmental entities and business corporations rather than the elected officers of associations, but we think that the court would by analogy apply the doctrine in this case.

Attacking the validity of a collective bargaining agreement by attacking the title to office of the union representative is in legal parlance termed a collateral attack. Title to public office generally may not be attacked collaterally, *In re Bunker Hill Urban Renewal Project 1B of Community Redevelopment Agency of City of Los Angeles*, 61 Cal. 2d 21, 37 Cal. Rptr. 74, 389 P.2d 538 (1964), even if the officer concerned is not a good officer in point of law. *U. S. v. Richmond*, 274 F. Supp. 43 (C.D. Cal. 1967). Rather, the question of the status of an incumbent of an office, or one returned as elected, can only be determined in a direct proceeding brought for that purpose, to which such person is a party. *Gryzik v. State*, 380 So. 2d 1102 (Fla. Dist. Ct. App. 1st Dist. 1980).

Management officials have a legal duty to negotiate with an employee organization accorded exclusive recognition by public employees. 4 G.C.A. § 10111(6). By necessity an employee organization as an association must elect a representative or representatives to act for it in negotiations with management officials.

There are policy considerations supporting the continued recognition of a union official against whom a complaint under the LMRDA has been filed. In the first instance, the duty and jurisdiction to investigate and judge the legality of a union election has been placed exclusively in the U.S. Secretary of Labor. Thus, when presented with the claim that the election for the office of a employee organization violated the LMRDA, it is not the duty or role of management officials of the local government to investigate the facts and determine the merit of the charges and, in the case of a finding of a violation, refuse to recognize the title to the office in question and repudiate executed agreements. If the mere allegation of a violation of the LMRDA were under the law to invalidate agreements that have been made and prevent the execution of new ones, disorder would result if subsequently the Secretary of Labor or the federal court were to find no violation or that the violation did not affect the outcome of the election. Official action should await the decision of a federal court, and to date, there has not been a finding by the U.S. Secretary of Labor that a violation has occurred.

Given the general principles of agency law, the duty of management officials to bargain in good faith with the elected representative of a union, the steps that must occur before a violation of the LMRDA has been found, the exclusive jurisdiction of the U.S. Department of Labor, and the de facto officer doctrine, we conclude the claim of Matthew Rector to the title of GFT President, and the validity of agreements signed by him, must be treated as valid until a different person has been elected to that office, whether by election under its Constitution and Bylaws or by order of the court under the LMRDA.

Standards of Conduct for Elected Officers

Mr. Rector resigned from the 30th Guam Legislature in January 2010. Under the Standards of Conduct for Elected Officers ex-officials are debarred from representing clients and principals before agencies in which they had been employed for a period of twelve months.

There are two relevant statutes:

A territorial agency shall not enter into a contract with any person or business which is represented or assisted in a material manner in the matter by a person who has been an employee of that agency within the preceding twelve (12) months and who participated while in territorial office or employment in a material manner in the matter with which the contract is directly concerned.

4 G.C.A. § 15206(b).

No former employee shall, within twelve (12) months after termination from employment, assist any person or business, or act in a representative capacity for a

fee or other consideration, on matters involving official action by the particular territorial agency with which the employee had actually served.

4 G.C.A. § 15210(b).

It is obvious that Mr. Rector could not lobby the Legislature or individual members for official action until January 2011. However, the validity of collective bargaining agreements under PEMRA does depend upon official action by the Guam Legislature. The signature of the Governor consummates the agreement. 2 G.A.R. § 5105(d).

The argument would only have merit if the intent of the Legislature were to debar an ex-official such as an ex-Senator from representing a principal before each and every agency of the government of Guam. One could argue for that intent from the text of the definition of "territorial agency":

territorial agency or agency shall mean every branch of government, public corporations, all government of Guam departments, bureaus, and line agencies, autonomous and semi-autonomous agencies, instrumentalities, entities or sub-entities thereof, the Mayor's Council, and Mayors' Offices.

4 G.C.A. § 15102(k).

In one sense, every government employee is an employee of the particular government agency for which he works and at the same time an employee of the government viewed as one indivisible entity. However, when the term "territorial agency" is used in the context of the various subsections regulating ex-employees, it is apparent that this term is used in the sense of a particular subdivision of the entire government, namely, the part or branch of the government for which he worked.

For the foregoing reason we do not think that Mr. Rector violated either Section 15210(b) or Section 15206(b) of the Ethical Standards for Elected Officials.

Dangkolo na Si Yu'os Ma'ãse.

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By:



Monty R. May
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PCF#

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18-10-10

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DATED 18-10-10

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