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November 1, 2021

OPINION MEMORANDUM

Ref: OPA 20-0375

TO: Chairman, GHURA Board of Commissioners

FROM: Attorney General

SUBJECT: Pay Raises Granted to Former and Current GHURA Executive Directors and Deputy Directors

This Opinion Memorandum is provided in response to a request from Public Auditor Benjamin J.F. Cruz received on September 23, 2020, to review pay increase adjustments given between 2013 and 2019 to the former and current Executive Directors and Deputy Directors of the Guam Housing and Urban Renewal Authority (GHURA).

QUESTION AND SHORT ANSWER

Were the upward pay adjustments received by the former and current GHURA Executive Directors and Deputy Directors after 2013 made in compliance with applicable laws and regulations?

Yes. However, board action is needed to ensure the proposed pay increments for the Executive Director and Deputy Director for the period between January 11, 2019 to January 10, 2020 is effective no earlier than September 11, 2020.

DISCUSSION

Guam law prohibits retroactive pay unless expressly authorized by statute. Based on our review, the authority for a salary increment under the GHURA Personnel Rules and Regulations is the certification of a satisfactory performance evaluation. There is, however, no statutory authority for the Executive Director or Deputy Director of GHURA to receive a retroactive pay increase. As set forth below, any

salary increment for the Executive Director and Deputy Director can only be paid prospectively from the date that the Board certifies a satisfactory performance evaluation.

1. **Guam Law Prohibits Retroactive Payments to Employees.**

Unless authorized by statute, and regardless of the justification, government of Guam employees are prohibited from receiving salary increases that are paid retroactively from the date of authorization.

4 GCA § 2103.14. **Retroactive Pay.** No unclassified employee or officer of the government of Guam may receive a retroactive pay increase **unless specifically authorized by statute.**

and

4 GCA § 6218.1. **Prohibition on Retroactive Pay Raise.** Whenever a classified or unclassified employee of the Government of Guam, including all departments, agencies and instrumentalities, whether or not autonomous, receives an increase in pay resulting from *step increase*, pay range increase, promotion *or any other cause*, such increase in pay **shall not be retroactive from the date of its authorization, unless so specified by law.** Any person who authorizes a pay raise which is retroactive in violation of this Section shall be guilty of a misdemeanor.

2. **The salary increments received by the Executive Director and Deputy Director in September 2020 cannot be paid retroactively from the date of authorization.**

On May 28, 2019, the Office of Public Accountability (OPA) received a request from the Office of the Attorney General (OAG) to review potential violations of the Open Government Law in relation to unclassified employee compensation within the government's autonomous agencies. In September 2020, the OPA issued Report No. 20-05 setting forth its findings of a performance audit conducted on upward pay adjustment raises given to GHURA's unclassified employees, specifically the Executive Directors (ED) and the Deputy Directors (DD).¹ Because it was beyond the original scope of the audit, the OPA did not perform any audit procedures with respect to whether the salary raises violate the laws prohibiting retroactive

¹ In addition to GHURA, the OPA also reviewed and issued performance audits on Guam Power Authority and Guam Waterworks Authority (OPA Report No. 19-09) and on the Port Authority of Guam (OPA Report No. 20-04).

compensation and has asked the Attorney General to review the raises in order to determine if they comply with the laws.

The OAG requested a response from GHURA as part of its review. GHURA's legal counsel submitted a letter to the OAG on April 13, 2021, arguing that salary increments proposed in June 2020 for the current ED and DD are not retroactive because they are based upon performance and further, that they are payable after the ED and DD's January employment anniversary dates.

According to the OPA's report, in September 2020 the GHURA Board of Commissioners (BOC) approved an upward pay adjustment for the current ED and DD as a result of their annual performance evaluations for the period covering January 2019 through January 2020.² Both the current ED and DD were hired in January 2019, which means that January 2020 was their one-year employment anniversary date.

These raises appear supported by the certification of performance evaluations as required by Rule 6.302 of the GHURA personnel rules which provide that "no action will be taken to adjust the employee's pay" if a performance report is not received:

GHURA Personnel Rule 6.302. Salary Increment – Procedure. Employees (inclusive of classified and unclassified/exempt³) entitled to an increment increase shall be based on an annual review of performance as outlined in Chapter 7. . . .The compensation plan is adopted by the Board of Commissioners. The detailed procedures have been delegated to the Executive Director and are subject to certification of funds and modification by the Board of Commissioners. The salary increment substep table can be found in a shared and accessible network drive for all employees.

The salary increment will be granted upon certification by the Executive Director that satisfactory service has been rendered for the performance rating period preceding such increase.

When a Division Head determines that a particular employee shall not be granted a salary increment, the Division Head shall

² OPA Report No. 20-05 at p. 10 (Subsequent Event Disclosure).

³ Unclassified/exempt employees like the ED and DD are generally not covered by the GHURA Personnel Rules "unless otherwise identified." See GHURA PRR § 1.100(B). Rule 6.302 is one of those "otherwise identified" rules.

notify the Executive Director of such denial prior to the employee's anniversary date. If the Executive Director does not receive a performance report or a notification of denial of an employee's salary increment, no action will be taken to adjust the employee's pay.

GHURA Personnel Rules and Regulations (PRR) (ver. Dec. 12, 2012) (emphasis added).

It appears that the Board certified the performance evaluations for the ED and DD on September 11, 2020, and approved the request to proceed with the processing of personnel actions.⁴

As discussed above, under Guam law increments cannot be paid retroactively for any time before the authorization unless specifically authorized by statute. Title 4 GCA § 6202 provides, "Every classified employee in Pay Grades A through V shall be entitled to one step salary increment for satisfactory performance. Employees at Steps 1 through 6 shall be entitled to an increment after twelve (12) months of satisfactory performance."⁵ A classified worker's entitlement to an anniversary increment under 4 GCA § 6202 is a statutory mandate that cannot be annulled in the event that a performance evaluation or increment certification is somehow delayed. Section 6202, however, does not apply to unclassified/exempt employees.

In the absence of the statutory authority similar to 4 GCA § 6202, increments for exempt and unclassified employees such as the ED and DD can only be paid prospectively from the date of the pay authorization. In this case, the Board's certification of the performance evaluations on September 11, 2020 authorized the salary increase for the ED from \$153,479 to \$159,498 and the DD from \$106,985 to \$111,244 prospectively from that date.

However, in this case the Notification of Personnel Action attached to the Board minutes set the effective date of the salary increment for both the ED and DD as their anniversary hire date of January 11, 2020. This is not specifically authorized by statute. The personnel action, which formalizes a salary increment, can be effective as of the date of authorization. However, any retroactive payment of the salary increment authorized on September 11, 2020 would violate Guam law.

⁴ Minutes from GHURA Board of Commissioners Regular Scheduled Meeting, September 11, 2020 (last accessed Oct. 26, 2021).

⁵ 4 GCA § 6202 (emphasis added).

3. The Pay Increases Authorized from 2013 to 2018 appear to comply with applicable laws and regulations.

The OPA's audit found that between 2013 and 2018, GHURA's former executive managers received several salary raises.

Former Executive Director's Pay Increases (2013 to 2018).

According to Table 1 of the OPA's Report No. 20-05, between 2013 and 2018, the *former* GHURA Executive Director (ED) received six pay increases after his initial hiring in January 2013:⁶

Table 1: Former Executive Director's Pay Adjustments

Date of Personnel Action Form	Period Covered	Reason for Adjustment
03/05/2013	Effective 02/21/2013	Board Resolution FY2013-014
06/24/2014	01/15/2013 to 01/14/2014	Performance Evaluation
07/20/2015	01/15/2014 to 01/14/2015	Performance Evaluation
12/16/2016	01/15/2015 to 01/14/2016	Performance Evaluation
02/06/2017	01/15/2016 to 01/14/2017	Performance Evaluation
04/12/2018	01/15/2017 to 01/14/2018	Performance Evaluation

The first pay increase in Table 1 was authorized on February 21, 2013, (approximately one month after the ED was hired) when the GHURA BOC passed Resolution No. FY2013-14 to raise the former ED's starting salary from \$100,071 to \$106,075.⁷ According to the resolution, the increase was applied "*prospectively*" from the authorization date of February 21, and presumably became effective two weeks later when the personnel action was issued on March 5, 2013.⁸

Because the former ED's first pay increase to his starting salary was prospective and not retroactive, the first pay increase did not violate the laws prohibiting retroactive pay raises. The pay increase was also otherwise in compliance

⁶ OPA Report No. 20-05 at p. 8, Table 1.

⁷ OPA Report No. 20-05 at p. 22, Appendix 4 (BOC Resolution No. FY2013-14 dated Feb. 21, 2013) ("Whereas, the Human Resources Division recommends that the initial slotting for the Executive Director's position for 2013 *be adjusted prospectively* to start at \$106,075 per annum. . . .")

⁸ Id.

with the law at 12 GCA § 5103(g) which allows the GHURA BOC to establish the compensation of the Executive Director.⁹

The remaining five pay increases shown in the OPA's Table 1 between 2014 and 2018 were implemented through the issuance of a personnel action form, although not memorialized in a GHURA BOC resolution as was the first increase.

For example, on June 24, 2014, the former ED received a second pay increase which covered his service and performance for the preceding performance period of January 15, 2013 to January 14, 2014.

And on July 20, 2015, he received a third pay increase that covered his service and performance for the preceding period of January 15, 2014 to January 14, 2015.

According to the OPA's report, the pay increases given between 2014 and 2018 were justified and supported by a performance evaluation report as is required by GHURA PRR 6.302. The OPA's concern appears to be that the increases were implemented through the execution of a personnel action form and were never formally ratified by the GHURA Board at a meeting:

While we believe that these pay adjustments were justified as supported by the evaluation forms, the Board of Commissioners did not ratify these pay adjustments during their general sessions.¹⁰

The OPA's report recommends that the GHURA BOC "consistently ratify all pay adjustments for GHURA unclassified employees on a going-forward basis."¹¹ While this may be best practice the GHURA BOC should adopt "going forward," absent an explicit statute or other regulation mandating BOC ratification, nothing prohibits an employee's pay to be adjusted solely by the standard form of personnel action. Therefore the GHURA BOC's failure to ratify the upward adjustments to the former ED's salary between 2014 and 2018 does not make the adjustments illegal.

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⁹ 12 GCA § 5103(g) ("The Board may employ an Executive Director of the Authority who shall serve at the pleasure of the Board, technical experts, such other officers, agents and employees, permanent and temporary, as it may deem necessary, *and shall determine their qualifications, duties, tenure and compensation.*")

¹⁰ OPA Report No. 20-05 at p. 9.

¹¹ OPA Report No. 20-05 at p. 10.

Finally, the OPA's report did not make any finding as to whether the five pay increases between 2014 and 2018 were made prospectively or retroactively, and there are no copies of the relevant personnel action forms or check stubs available that would assist in this determination. Because the pay increases were supported by a performance evaluation, as long as the adjustments were *paid prospectively from the date of their authorization* as indicated in the personnel action forms, then the compensation was in compliance with law.

4. The Former Deputy Director's Pay Increases (2016 to 2018).

The former GHURA Deputy Director (DD) was initially hired in May 2016. In 2018, he received a pay increase that covered the two-year period between May 30, 2016 and May 30, 2018:¹²

Table 3: Former Deputy Director's Pay Adjustments

Date of Personnel Action Form	Period Covered	Reason for Adjustment
06/8/2016	Effective 05/30/2016	Board Resolution FY2016-026
08/20/2018	05/30/2016 to 05/29/2017	Performance Evaluation
08/20/2018	05/30/2017 to 05/30/2018	Performance Evaluation

The two pay increases were justified by performance evaluations approved by the former ED but again, were not ratified by the GHURA BOC:

Like the former Executive Director's performance evaluations, none of the former Deputy Director's performance evaluations were discussed and approved by the Board of Commissioners. While we believe that these pay adjustments were supported by evaluation forms, the Board of Commissions did not ratify these pay adjustments during their general sessions.¹³

As with the former ED's compensation, although it is ideal that the GHURA BOC approve the compensation of its top executives, including the DD, there is no law requiring BOC approval in order for the compensation to become effective.

¹² OPA Report No. 20-05 at p. 9, Table 3.

¹³ Id.

Moreover, the increments would be in compliance with law as long as they were paid going forward from their authorization date of August 20, 2018.

5. The Current Executive Director's Pay Increases (2019).

On August 24, 2018, the FY2019 budget appropriations act was enacted as Public Law 34-116. In addition to other cost-cutting measures, P.L. 34-116 placed a freeze on all government salary increments payable between October 1, 2018, and September 30, 2019. The law specifically states that upon the ending of the freeze, the payment of increments cannot be retroactively applied:

P.L. 34-116:XIII (Administrative Provisions, Part I). *****

Section 3. Salary Increments Freeze. Notwithstanding any other provision of law, rule or regulation, there shall be a freeze on all salary increments, promotions, reclassifications, merit bonuses, and any other upward pay adjustment, which shall take effect October 1, 2018 and *shall remain in effect through September 30, 2019*. . . Upon the lifting of such salary increments and merit bonus freeze, the payment of increments or merit bonuses *shall not be retroactively applied and shall only be prospectively paid.*

In anticipation that the salary freeze would end as scheduled on September 30, 2019,¹⁴ the GHURA BOC met on July 8 and authorized a restoration of the frozen increments. The GHURA BOC additionally authorized a new pay schedule granting an across-the-board, one-step pay increase to all GHURA employees. The GHURA BOC's actions were later memorialized in its written Resolution No. FY2019-018 dated July 29, 2019.

The current ED was originally appointed to his position on January 11, 2019.¹⁵ In the same year, the ED received two salary increases: the first on October 21, 2019, justified as being part of the restoration of the FY2019 salary increments; the second on December 23, 2019, justified as part of the one-step pay shift given to all employees:¹⁶

¹⁴ P.L. 34-116's freeze on the FY2019 salary increments was not renewed after it was lifted on September 30, 2019. *See*, Gov. Lourdes Leon Guerrero's transmittal letter to P.L. 35-36 (FY2020 appropriations law) dated Sept. 4, 2019.

¹⁵ GHURA BOC Resolution No. 2019-007 (Jan. 11, 2019).

¹⁶ OPA Report No. 20-05 at p. 9, Table 2.

Table 2: Current Executive Director Ratified Pay Adjustments

Date of Personnel Action Form	Beginning Salary	Salary Increment	Reason for Adjustment
01/15/2019	N/A	\$ 136,596	Appointment, BOC Resolution No. FY2019-007
10/21/2019	\$ 136,596	\$ 144,792	GHURA restored FY 2019 salary increments, BOC Resolution No. FY2019-018
12/23/2019	\$ 144,792	\$ 153,479	One-step pay shift to GHURA's new pay schedule, BOC Resolution No. FY2019-018

A. The first pay increase restoring the frozen FY2019 salary increments can only be paid forward from September 30, 2019, and not retroactively back to any date prior.

Under the clear language of P.L. 34-116, the GHURA BOC's restoration of the frozen salary increments cannot be applied retroactively to *any* upward pay adjustments earned in FY2019, regardless of reason or justification.

Therefore, to be in compliance with the law, the current ED's first pay increase could have only been applied prospectively, beginning October 21, 2019 (date of Personnel Action). It could not have been applied retroactively to January 11, 2019 (date of appointment); to July 8, 2019 (date of BOC meeting authorizing restoration); or to July 10, 2019 (date of former ED's initial six-month performance under 5 GCA § 43202¹⁷).

B. The second pay increase resulting from the one-step pay shift can only be paid forward from September 30, 2019 and not retroactively to any date prior.

The current ED's second pay increase was approved December 23, 2019. The adjustment was made as part of a new pay schedule authorized by the GHURA BOC at its July 8, 2019 meeting. The new pay schedule implemented an across-the-board, one-step pay shift for all GHURA employees.

GHURA Personnel Rules 5.101 and 5.103 authorize the GHURA BOC to establish and implement a pay schedule strictly for the "Housing & Community Development operations and certified, technical and *professional positions*" (emphasis added). According to Rule 5.101, "compensation for all other positions, shall remain consistent with compensation plans and pay schedules as determined by law."

¹⁷ OPA Report No. 20-05 at p. 11 (In July 2019, the GHURA BOC conducted the current ED's required 6-month performance review for the period covering January to July 2019).

A one-step pay shift for the ED would be allowed under the Rules because the ED position is a professional position for which the BOC has authority to establish compensation. A salary increase paid forward from the ending of the increment freeze on September 30, 2019 would be allowed under P.L. 34-116. The personnel action form indicates that the adjustment became effective on December 23, 2019, after the freeze ended. Therefore, as long as the second pay increase was paid forward from December 23, 2019, the increase was in compliance with the law.

6. The Current Deputy Director’s Pay Increases (2019).

The current Deputy Director was hired in January 2019 at a salary of \$87,260. The following month in February 2019, the DD received a pay adjustment “to correct her salary to \$100,930.”¹⁸ The correction was ratified by the BOC through Resolution No. FY2019-008.

Table 4: Current Deputy Director Ratified Pay Adjustments

Date of Personnel Action Form	Beginning Salary	Salary Increment	Reason for Adjustment
01/15/2019	N/A	\$ 87,260	Appointment; BOC Resolution No. FY2019-008
02/13/2019	\$ 87,260	\$ 100,930	Adjusted to correct salary; BOC Resolution No. FY2019-010
12/23/2019	\$ 100,930	\$ 106,985	One-step pay shift to GHURA’s new pay schedule; BOC Resolution No. FY2019-018

The issuance of a “correction” by the GHURA BOC implies that it made a mistake when the DD was hired and that from the start, her salary should have been established at \$100,930 and not \$87,260. Given the GHURA BOC’s authority under 12 GCA § 5103(g) to employ and determine the compensation of those officers whom it deems proper, the correction of its initial mistake with respect to the DD’s compensation is probably not the type of upward pay adjustment intended to be covered by the salary increment freeze imposed by P.L. 34-116. Therefore, the DD’s corrected salary adjustment was likely not in violation of law.

On December 23, 2019, the current DD received a second pay increase as a result of the BOC’s one-step pay shift. As with the executive director position, a deputy director position is a professional position. Even though the pay shift was authorized by the GHURA BOC at its meeting on July 8, 2019, the increment freeze did not end until September 30, 2019, and therefore no adjustment attributable to

¹⁸ OPA Report No. 20-05 at p. 10, Table 4.

the pay shift can be applied retroactively to any date before September 30, 2019. Assuming that the second pay adjustment was paid from the date of the personnel action form on December 23, 2019, then the pay adjustment would not violate the laws against retroactive compensation.

CONCLUSION

Unless authorized by statute, and regardless of the justification, government of Guam employees are prohibited from receiving salary increases that are paid retroactively from the date of authorization.

Salary increments for the current Executive Director and Deputy Director based upon their performances between January 2019 and January 2020 can only be paid prospectively from the authorization date of September 11, 2020 and not retroactive from any date prior. Any retroactive payment is prohibited by Guam law.

The upward salary adjustments given to the GHURA former Executive Director and Deputy Director between 2013 and 2018 were justified by performance evaluations as required by GHURA PRR 6.302. Although not formally ratified by the GHURA BOC, the adjustments do not violate any laws as long as they were paid forward from the date of authorization as shown on the relevant personnel action forms.

Finally, because of the salary increment freeze imposed by P.L. 34-116 throughout the entirety of FY2019, no pay increases may be given for any reason to the current ED or DD that would upwardly compensate them for services performed between the time of their appointment in January 2019 to the end of the freeze on September 30, 2019.

We request confirmation that any payments of the proposed salary increments for the current Executive Director and Deputy Director for the period between January 2019 and January 2020 were made in compliance with this opinion and Guam law.


LEEVIN TAITANO CAMACHO
Attorney General