



**PORT OF GUAM**

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Lourdes A. Leon Guerrero  
Governor of Guam

Joshua F. Tenorio  
Lieutenant Governor

November 22, 2021

**MEMORANDUM**

TO: Board of Directors

FROM: Rory J. Respicio, General Manager

SUBJECT: **AG Opinion re Retroactive Salary Adjustment for Former Management at the Port Authority of Guam (Ref. PAG21-0111 Nov. 9, 2021)**

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*Hafa Adai!* On November 9, 2021, the Port Authority of Guam (“PAG”) received the Opinion Memorandum issued by the Office of the Attorney General of Guam (“OAG”) in response to the PAG’s request for Opinion on Retroactive Salary Adjustments of Former Management at the Port Authority of Guam. On November 1, 2021, the OAG issued an Opinion Memorandum that directly addressed the Port’s inquiry regarding the validity of the pay adjustments in question, to wit: “Do the pay adjustments . . . constitute evidence of an illegal retroactive salary adjustment under Guam law?” See *Pay Raises Granted to Former and Current GHURA Executive Directors and Deputy Directors*, Op. Att’y Gen. No. OPA 20-0375 (Nov. 1, 2021). In their letter to the PAG, the OAG enclosed the GHURA Opinion and directed PAG Legal Counsel to determine the validity and legality of the PAG Board of Directors’ past actions with respect to former General Manager Joanne Brown’s salary adjustments and best practices moving forward.

On July 15, 2020, the Office of Public Accountability (“OPA”) released OPA Report No. 20-04, relative to Unclassified Employees’ Pay Raises and Bonuses at the PAG. The OPA’s audit was initiated after receiving a request from the OAG to review potential violations of the Open Government Law in relation to the employee compensation within autonomous agencies. Because it was beyond the scope of the audit, the OPA did not conduct their audit with respect to whether the salary raises violate the laws prohibiting retroactive compensation. Thus, the PAG asked the OAG to review the raises in order to determine if they comply with the Guam law.

After thorough review of both the OPA Performance Audit and the OAG’s Opinion Memorandum, as well as the relevant laws and authorities, PAG Staff Attorney conducted an in-house legal review to determine whether the former PAG GM was paid retroactive salary adjustments from December 2012 through December 2017, in violation of Guam law. Based on the Staff Attorney’s review, and with the guidance provided by the OPA and OAG, it is clear that salary adjustments for former PAG General Manager Joanne Brown were ***applied retroactively in violation of Title 4 GCA § 2103.14 (Retroactive Pay) and Title 4 GCA § 6218.1 (Prohibition on Retroactive Pay Raises)***, thus deemed illegal.

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Title 4 GCA § 2103.14, governing Retroactive Pay provides, “[n]o unclassified employee or officer of the government of Guam may receive a retroactive pay increase *unless specifically authorized by statute.*” 4 GCA § 2103.14 (emphasis added). Further, Title 4 GCA § 6218.1 states:

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*.

See Title 4 GCA § 6218.1 (Prohibition on Retroactive Pay Raise) (emphasis added).

Thus, the law is clear: Guam law **prohibits retroactive pay** unless expressly authorized by statute. Here, the authority for salary increments for classified employees under the Port’s Personnel Rules and Regulations is the certification of a satisfactory performance evaluation. See Port Authority R. & Regs. 6.302 and 7.008. Similarly, Title 5 GCA Chapter 43 Article 2 provides that governing boards for all agencies must issue performance reviews of the Chief Executive selected for that agency six (6) months after appointment, and every twelve (12) months thereafter. See 5 GCA §§ 43202 and 43203. There is however, **no authority** for the PAG General Manager (“GM”) nor the Deputy General Managers (“DGM”) to receive retroactive pay increases. While Title 4 GCA § 6202 entitles classified employees to an anniversary increment that cannot be annulled in the event that a performance evaluation or increment certification is delayed, Section 6202 **does not apply to unclassified/exempt employees.** See 4 GCA § 6202. Consequently, absent statutory authority similar to Title 4 GCA § 6202, any salary increment for the PAG GM or DGMs can only be paid prospectively from the date of the pay authorization. See OPA 20-0375 at p. 2.

According to the OPA’s Performance Audit, from the former GM’s hiring in December 2012 until her retirement in January 2019, the former GM received nine (9) pay adjustments in total. Of the nine (9), seven (7) were given due to formal performance evaluations, and two (2) were provided as a result of PAG’s Compensation and Classification Plan or PAG BOD action. See OPA Report No. 20-04 at p. 8. The OPA’s Performance Audit also recommended that the PAG BOD “consistently ratify all pay adjustments for PAG unclassified employees on a going forward basis.” See OPA Report No. 20-04 at p. 9. However, the OAG, in their Opinion Memorandum, provided that “[w]hile this may be best practice the [PAG BOD] should adopt ‘going forward,’ absent an explicit statute or other regulation mandating [BOD] ratification, nothing prohibits an employee’s pay to be adjusted solely by the standard form of personnel action.” See OPA 20-0375 at p. 6. Thus, the PAG BOD’s failure to ratify the upward adjustments to the former PAG GM’s salary does not make the adjustments itself illegal. Nonetheless, so long as the adjustments were paid **prospectively** from the date of authorization as indicated in the personnel action forms, then the compensation was in compliance with the law.

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Upon further review of the personnel actions at issue and corresponding documents, the following actions appear to suggest that several salary adjustments for the former PAG GM were applied retroactively.

Notification of Personnel Action Form	Effective Date	Authorized Date	Reason for Adjustment
NPA 20-13 dated December 14, 2012	December 14, 2012	December 10, 2012	BOD Emergency Meeting (Dec. 10, 2012)
NPA 106-13 dated April 23, 2013	December 10, 2012	April 15, 2013	Adjustment – Performance Evaluation (Apr. 15, 2013)
NPA 23-13 dated December 20, 2012	December 19, 2012	December 19, 2012	BOD Regular Meeting (Dec. 19, 2012)
NPA 107-13 dated April 23, 2013	December 19, 2012	April 15, 2013	Adjustment – Performance Evaluation (Apr. 15, 2013)
NPA 05-14 dated October 11, 2013	June 19, 2013	October 11, 2013	Performance Evaluation (Sept. 25, 2013)
NPA 142-14 dated January 21, 2014	December 19, 2013	January 6, 2014	Performance Evaluation (Jan. 6, 2014)
NPA 89-15 dated May 13, 2015	December 19, 2014	May 7, 2015	Performance Evaluation (May 7, 2015)
NPA 57-16 dated February 4, 2016	December 19, 2015	January 29, 2016	Performance Evaluation (Jan. 29, 2016)
NPA 384-17 dated January 9, 2017	December 19, 2016	December 21, 2016	Performance Evaluation (Dec. 21, 2016)
NPA 160-18 SI dated February 6, 2018	December 19, 2017	February 27, 2018	Performance Evaluation (Feb. 27, 2018)
NPA 370-2018 dated September 24, 2018	September 16, 2018	September 16, 2018	BOD Resolution No. 2018-05
NPA 82-19 dated January 2, 2019	January 4, 2019	January 4, 2019	Retirement

As the current General Manager, it is my duty to ensure the protection of ratepayer funds, particularly when misuse of those funds is brought to my attention. Thus, I am respectfully requesting your approval of Board Resolution No. 2021-34, which directs me to exercise the authority to take any and all administrative and/or criminal actions necessary pursuant to OAG Opinion dated November 9, 2021 re Request for Opinion on Retroactive Salary Adjustments for Former Management at the Port Authority of Guam.

I am available for any questions you may have. *Si Yu'os Ma'ase.*



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Lourdes A. Leon Guerrero  
Governor of Guam  
Joshua F. Tenorio  
Lieutenant Governor

November 18, 2021

## LEGAL MEMORANDUM

**TO:** Rory J. Respicio, General Manager

**FROM:** Christine K. Claveria, Port Staff Attorney

**SUBJECT:** Request for Legal Review – AG Opinion re Retroactive Salary Adjustments for Former Management at the Port Authority of Guam (Ref. PAG21-0111 Nov. 9, 2021)

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*Hafa Adai!*

As per your request, I have reviewed the Opinion Memorandum issued by the Office of the Attorney General of Guam (“OAG”) dated November 9, 2021 in response to the Port Authority of Guam’s (“PAG” or “Port”) Request for Opinion on Retroactive Salary Adjustments of Former Management at the Port Authority of Guam. On November 1, 2021, the OAG issued an Opinion Memorandum that directly addressed the Port’s inquiry regarding the validity of the pay adjustments in question, to wit: “Do the pay adjustment . . . constitute evidence of an illegal retroactive salary adjustment under Guam law?” *See Pay Raises Granted to Former and Current GHURA Executive Directors and Deputy Directors*, Op. Att’y Gen. No. OPA-0375 (Nov. 1, 2021). This legal memorandum will follow the specific guidance provided in the OAG’s Opinion Memorandum to analyze the validity and legality of the pay increments at issue and the prior Board’s actions with respect to the former PAG General Manager’s salary adjustments.

## DISCUSSION

Title 4 GCA § 2103.14, governing Retroactive Pay provides, “[n]o unclassified employee or officer of the government of Guam may receive a retroactive pay increase ***unless specifically authorized by statute.***” 4 GCA § 2103.14 (emphasis added). Further, Title 4 GCA § 6218.1 states:

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.***

See Title 4 GCA § 6218.1 (Prohibition on Retroactive Pay Raise) (emphasis added).

The law is clear: Guam law **prohibits retroactive pay** unless expressly authorized by statute. Here, the authority for salary increments for classified employees under the Port's Personnel Rules and Regulations is the certification of a satisfactory performance evaluation. See Port Authority R. & Regs. 6.302 and 7.008. Similarly, Title 5 GCA Chapter 43 Article 2 provides that governing boards for all agencies must issue performance reviews of the Chief Executive selected for that agency six (6) months after appointment, and every twelve (12) months thereafter. See 5 GCA §§ 43202 and 43203. There is however, **no authority** for the PAG General Manager ("GM") nor the Deputy General Managers ("DGM") to receive retroactive pay increases. While Title 4 GCA § 6202 entitles classified employees to an anniversary increment that cannot be annulled in the event that a performance evaluation or increment certification is delayed, Section 6202 **does not apply to unclassified/exempt employees**. See 4 GCA § 6202. Consequently, absent statutory authority similar to Title 4 GCA § 6202, any salary increment for the PAG GM or DGMs can only be paid prospectively from the date of the pay authorization. See OPA 20-0375 at p. 2.

**I. FORMER PAG GENERAL MANAGER WAS PAID RETROACTIVE SALARY ADJUSTMENTS FROM DECEMBER 2012 THROUGH DECEMBER 2017 IN VIOLATION OF GUAM LAW.**

In July 2020, the Office of Public Accountability ("OPA") issued Report No. 20-04 setting forth its findings of a performance audit relative to Unclassified Employees' Pay Raises and Bonuses at the PAG from October 1, 2011 through September 30, 2019. The audit focused specifically on the former PAG General Manager and former Deputy General Managers. While not within the scope of the audit, the dates provided in Table 1 suggest that several salary adjustments for the former PAG GM were applied **retroactively**.

**Table 1: Former General Manager's Pay Adjustments**

Date of Personnel Action Form	Period Covered	Reason for Adjustment
04/23/2013	Effective 12/10/2012	Adjustment – Performance Evaluation (Former)
04/23/2013	Effective 12/19/2012	Adjustment – Performance Evaluation (Former)
10/11/2013	12/19/2012 to 06/18/2013	Performance Evaluation
01/21/2014	12/19/2012 to 12/19/2013	Performance Evaluation
05/13/2015	12/19/2013 to 12/19/2014	Performance Evaluation
02/04/2016	12/19/2014 to 12/19/2015	Performance Evaluation
10/25/2016	N/A	Board Resolution 2016-04
01/09/2017	12/19/2015 to 12/18/2016	Performance Evaluation
02/06/2018	12/19/2016 to 12/18/2017	Performance Evaluation
09/24/2018	N/A	Board Resolution 2018-05

See OPA Report No. 20-04 at p. 8 (Former General Manager's Pay Adjustments).

According to the OPA's report, from the former GM's hiring in December 2012 until her retirement in January 2019, the former GM received nine (9) pay adjustments in total. Of the nine (9), seven (7) were given due to formal performance evaluations, and two (2) were provided as a result of PAG's Compensation and Classification Plan. See OPA Report No. 20-04 at p. 8. This

opinion will analyze and determine the validity of each pay adjustment made for the periods covering December 2012 through December 2017.

**a) December 10, 2012 - First Pay Adjustment**

Personnel Action No. 20-13 (“PA 20-13”) dated December 14, 2012, effectuated the appointment of former PAG GM, then Deputy General Manager, to Acting General Manager with a Pay Range and Salary of Q-4B \$101,870.00 per annum, *effective December 10, 2012*. This action was approved by the PAG BOD in their emergency meeting of December 10, 2012. Thereafter, an adjustment was made to PA 20-13 in Personnel Action No. 106-13 (“PA 106-13”) dated April 23, 2013, which corrected the Pay Range and Salary from Q-4B \$101,870.00 to Q-6C \$111,414.00 per annum. PA 106-13 covered the period effective December 10, 2012, as contained in PA 20-13. According to the OPA Report, justification for the adjustment was due to the former GM’s outstanding performance evaluation dated April 15, 2013, which entitled her to an additional 3-substep increase. See 12 GCA § 10111(c) (“Notwithstanding any other provision of law, the manager . . . shall be within the unclassified service . . . and shall be hired, compensated and employed under the terms and conditions fixed by and at the pleasure of the Board.”).

Here, assuming that the pay adjustment was supported by a performance evaluation, so 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. See OPA 20-0375 at pp. 6-7 (“nothing prohibits an employee’s pay to be adjusted solely by the standard form of personnel action.”). In this case, PA 106-13 dated April 23, 2013, if supported by the performance evaluation accepted and approved by the PAG BOD, **set the effective date of the salary adjustment as early as April 15, 2013**. In other words, the PAG BOD’s certification of the performance evaluation on April 15, 2013, authorized the salary adjustment for the former PAG GM from Q-4B \$101,870.00 to Q-6C \$111,414.00 per annum, **prospectively from that date**. However, as aforementioned, *PA 106-13 covered the period effective December 10, 2012*, as contained in PA 20-13. Thus, any retroactive payment of the salary increment authorized on April 15, 2013, is in clear violation of Guam law.

**b) December 19, 2012 – Second Pay Adjustment**

Personnel Action No. 23-13 (“PA 23-13”) dated December 20, 2012, changed the title of former PAG GM from Deputy General Manager, then Acting General Manager, officially to General Manager with a Pay Range and Salary of R-4A \$114,982.00 per annum, *effective December 19, 2012*. This action was approved by the PAG BOD in their regular meeting of December 19, 2012. Thereafter, an adjustment was made to PA 23-13 in Personnel Action No. 107-13 (“PA 107-13”) dated April 23, 2013, which corrected the Pay Range and Salary from R-4A \$114,982.00 to R-4D \$118,467.00 per annum. PA 107-13 covered the period effective December 19, 2012, as contained in PA 23-13. According to the OPA Report, justification for the adjustment was due to the former GM’s outstanding performance evaluation dated April 15, 2013, which entitled her to an additional 3-substep increase. See 12 GCA § 10111(c), supra.

Again, assuming that the pay adjustment was supported by a performance evaluation, so 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. See OPA 20-0375 at pp. 6-7 (“nothing prohibits an employee’s pay to be adjusted solely by the standard form of personnel action.”). Similar to the First Pay Adjustment, pursuant to PA 106-13, PA 107-13 dated April 23, 2013, if supported by the performance evaluation accepted and approved by the PAG BOD, **set the effective date of the salary adjustment as early as April 15, 2013**. In other words, the PAG BOD’s certification of the performance evaluation on April 15, 2013, authorized the salary adjustment for the former PAG GM from R-4A \$114,982.00 to R-4D \$118,467.00 per annum, **prospectively from that date**. However, as aforementioned, *PA107-13 covered the period effective December 19, 2012*, as contained in PA 23-13. Thus, any retroactive payment of the salary increment authorized on April 15, 2013, is in clear violation of Guam law.

**c) December 19, 2012 – June 18, 2013**

Personnel Action No. 05-14 (“PA 05-14”) dated October 11, 2013, effectuated the pay adjustment of the former PAG GM from R-4D \$118,467.00 to R-6A \$124,510.00 per annum, ***effective June 19, 2013***. Justification for PA 05-14 resulted from a Performance Evaluation dated September 25, 2013, signed by both the former PAG Board Chairman and former PAG GM on October 11, 2013, and October 8, 2013, respectively. See PAG Board Policy Memorandum No. 09-03 (Policy on Performance Evaluation for General Manager). The PAG BOD did not ratify this pay adjustment.

The OPA’s report recommends that the PAG BOD “consistently ratify all pay adjustments for PAG unclassified employees on a going forward basis.” See OPA Report No. 20-04 at p. 9. However, the OAG, in their Opinion Memorandum, provided that “[w]hile this may be best practice the [PAG BOD] should adopt ‘going forward,’ absent an explicit statute or other regulation mandating [BOD] ratification, nothing prohibits an employee’s pay to be adjusted solely by the standard form of personnel action.” See OPA 20-0375 at p. 6. Thus, the PAG BOD’s failure to ratify the upward adjustments to the former PAG GM’s salary does not make the adjustments itself illegal.

Nonetheless, so long as the adjustment was paid prospectively from the date of authorization as indicated in the personnel action forms, then the compensation was in compliance with law. See OPA 20-0375 at pp. 6-7 (“nothing prohibits an employee’s pay to be adjusted solely by the standard form of personnel action.”). Here, PA 05-14 notes that such pay adjustment is justified by the corresponding performance evaluation. Although the performance evaluation is dated September 25, 2013, the PAG Board Chairman did not sign or approve the evaluation until October 11, 2013. Thus, **the certification of the performance evaluation on October 11, 2013, authorized the salary adjustment** for the former PAG GM from R-4D \$118,467.00 to R-6A \$124,510.00 per annum, **prospectively from that date**. However, as aforementioned, *PA 05-14 covered the period effective June 19, 2013*. Thus, any retroactive payment of the salary adjustment authorized on October 11, 2013, is in clear violaton of Guam law.

**d) December 19, 2012 – December 19, 2013**

Personnel Action No. 142-14 (“PA 142-14”) dated January 21, 2014, effectuated the pay adjustment of the former PAG GM from R-6A \$124,510.00 to R-7B \$130,861.00 per annum,

**effective December 19, 2013.** Justification for PA 142-14 resulted from a Performance Evaluation dated January 6, 2014, signed by both the former PAG Board Chairman and former GM the same day. See PAG Board Policy Memorandum No. 09-03 (Policy on Performance Evaluation for General Manager). On January 6, 2014, the PAG BOD adopted the former PAG GM's Performance Evaluation, which was posted and made public on the PAG's website. The PAG BOD however, did not ratify this pay adjustment.

Again, the OPA's report recommends that the PAG BOD "consistently ratify all pay adjustments for PAG unclassified employees on a going forward basis." See OPA Report No. 20-04 at p. 9. However, the OAG, in their Opinion Memorandum, provided that "[w]hile this may be best practice the [PAG BOD] should adopt 'going forward,' absent an explicit statute or other regulation mandating [BOD] ratification, nothing prohibits an employee's pay to be adjusted solely by the standard form of personnel action." See OPA 20-0375 at p. 6. Thus, the PAG BOD's failure to ratify the upward adjustments to the former PAG GM's salary does not make the adjustments itself illegal.

Nonetheless, so long as the adjustment was paid prospectively from the date of authorization as indicated in the personnel action forms, then the compensation was in compliance with law. See OPA 20-0375 at pp. 6-7 ("nothing prohibits an employee's pay to be adjusted solely by the standard form of personnel action."). Here, PA 142-14 notes that such pay adjustment is justified by the corresponding performance evaluation. The performance evaluation was signed by the PAG Board Chairman on January 6, 2014 and adopted by the PAG BOD the same day. Thus, **the certification of the performance evaluation on January 6, 2014, authorized the salary adjustment** for the former PAG GM from R-6A \$124,510.00 to R-7B \$130,861.00 per annum, **prospectively from that date.** However, as aforementioned, *PA 142-14 covered the period effective December 19, 2013.* Thus, any retroactive payment of the salary adjustment authorized on January 6, 2014, is in clear violation of Guam law.

e) **December 19, 2013 – December 19, 2014**

Personnel Action No. 89-15 ("PA 89-15") dated May 13, 2015, effectuated the pay adjustment of the former PAG GM from R-7B \$130,861.00 to R-8C \$137,536.00 per annum, **effective December 19, 2014.** Justification for PA 89-15 resulted from a Performance Evaluation, which did not indicate a "Date of Review", but was signed by both the former PAG Board Chairman and former PAG GM on May 7, 2015. See PAG Board Policy Memorandum No. 09-03 (Policy on Performance Evaluation for General Manager). On May 7, 2015, the PAG BOD adopted the former PAG GM's Performance Evaluation, which was posted and made public on the PAG's website. The PAG BOD however, did not ratify this pay adjustment. See OPA 20-0375, *supra*.

Again, so long as the adjustment was paid prospectively from the date of authorization as indicated in the personnel action forms, then the compensation was in compliance with law. See OPA 20-0375 at pp. 6-7 ("nothing prohibits an employee's pay to be adjusted solely by the standard form of personnel action."). Here, PA 89-15 notes that such pay adjustment is justified by the corresponding performance evaluation. The performance evaluation was adopted by the PAG BOD on May 7, 2015. Thus, **the certification of the performance evaluation on May 7, 2015, authorized the salary adjustment** for the former PAG GM from R-7B \$130,861.00 to R-



8C \$137,536.00 per annum, **prospectively from that date**. However, as aforementioned, *PA 89-15 covered the period effective December 19, 2014*. Thus, any retroactive payment of the salary adjustment authorized on May 7, 2015 is in clear violaton of Guam law.

f) **December 19, 2014 – December 19, 2015**

Personnel Action No. 57-16 (“PA 57-16”) dated February 4, 2016, effectuated the pay adjustment of the former PAG GM from R-8C \$137,536.00 to R-9D \$144,552.00 per annum, ***effective December 19, 2015***. Justification for PA 57-16 resulted from a Performance Evaluation. See PAG Board Policy Memorandum No. 09-03 (Policy on Performance Evaluation for General Manager). On January 29, 2016, the PAG BOD adopted the former PAG GM’s Performance Evaluation, which was posted and made public on the PAG’s website. The PAG BOD however, did not ratify this pay adjustment. See OPA 20-0375 at p. 6, *supra*.

Once again, so long as the adjustment was paid prospectively from the date of authorization as indicated in the personnel action forms, then the compensation was in compliance with law. See OPA 20-0375 at pp. 6-7 (“nothing prohibits an employee’s pay to be adjusted solely by the standard form of personnel action.”). Here, PA 57-16 notes that such pay adjustment is justified by the corresponding performance evaluation. The performance evaluation was adopted by the PAG BOD on January 29, 2016. Thus, **the certification of the performance evaluation on January 29, 2016, authorized the salary adjustment** for the former PAG GM from R-8C \$137,536.00 to R-9D \$144,552.00 per annum, **prospectively from that date**. However, as aforementioned, *PA 57-16 covered the period effective December 19, 2015*. Thus, any retroactive payment of the salary adjustment authorized on January 29, 2016, is in clear violaton of Guam law.

g) **December 19, 2015 – December 18, 2016**

Personnel Action No. 384-17 (“PA 384-17”) dated January 9, 2017, effectuated the pay adjustment of the former PAG GM from RR-5A \$149,345.00 to RR-6B \$156,963.00 per annum, ***effective December 19, 2016***. Justification for PA 384-17 resulted from a Performance Evaluation signed by the former PAG BOD Vice Chairman. On December 21, 2016, the PAG BOD adopted the former PAG GM’s Performance Evaluation, which was posted and made public on the PAG’s website. See PAG Board Policy Memorandum No. 09-03 (Policy on Performance Evaluation for General Manager). The PAG BOD however, did not ratify this pay adjustment. See OPA 20-0375 at p. 6, *supra*.

Nonetheless, so long as the adjustment was paid prospectively from the date of authorization as indicated in the personnel action forms, then the compensation was in compliance with law. See OPA 20-0375 at pp. 6-7 (“nothing prohibits an employee’s pay to be adjusted solely by the standard form of personnel action.”). Here, PA 384-17 notes that such pay adjustment is justified by the corresponding performance evaluation. The performance evaluation was adopted by the PAG BOD on December 21, 2016. Thus, **the certification of the performance evaluation on December 21, 2016, authorized the salary adjustment** for the former PAG GM from RR-5A \$149,345.00 to RR-6B \$156,963.00 per annum, **prospectively from that date**. However, as aforementioned, *PA 384-17 covered the period effective December 19, 2016*. Thus, any

retroactive payment of the salary adjustment authorized on December 21, 2016, is in clear violation of Guam law.

**h) December 19, 2016 – December 18, 2017**

Personnel Action No. 160-18 SI (“PA 160-18 SI”) dated February 6, 2018, effectuated a salary increment of the former PAG GM from RR-6B \$156,963.00 to RR-7C \$164,970.00 per annum, *effective December 19, 2017*. PA 160-18 SI did not indicate that it was justified or supported by a corresponding performance evaluation. However, on February 27, 2018, the PAG BOD adopted the former PAG GM’s Performance Evaluation, which was posted and made public on the PAG’s website. See PAG Board Policy Memorandum No. 09-03 (Policy on Performance Evaluation for General Manager). The PAG BOD however, did not ratify this pay adjustment. See OPA 20-0375 at p. 6, *supra*.

Again, so long as the adjustment was paid prospectively from the date of authorization as indicated in the personnel action forms, then the compensation was in compliance with law. See OPA 20-0375 at pp. 6-7 (“nothing prohibits an employee’s pay to be adjusted solely by the standard form of personnel action.”). Here, it appears that PA 160-18 SI was effectuated without a performance evaluation. However, a performance evaluation was conducted and adopted by the PAG BOD on February 27, 2018. Thus, **the certification of the performance evaluation on February 27, 2018, authorized the salary increment** for the former PAG GM from RR-6B \$156,963.00 to RR-7C \$164,970.00 per annum, **prospectively from that date**. However, as aforementioned, *PA 160-18 SI covered the period effective December 19, 2017*. Thus, any retroactive payment of the salary adjustment authorized on February 27, 2018, is in clear violation of Guam law.

**i) September 24, 2018 – Personnel Action**

Personnel Action No. 370-2018 (“PA 370-2018”) dated September 24, 2018, effectuated a salary adjustment of the former PAG GM from RR-7C \$164,970.00 to RR-8B \$169,977.60 per annum, *effective September 16, 2018*. PA 370-2018 was generated as a result of the PAG’s Compensation and Classification Plan. See PAG Board Resolution No. 2018-05 (relative to the Port Compensation and Classification Plan). However, there is no record of a performance review for the former PAG GM for 2018 as required by law. See 5 GCA §§ 43202 and 43203; see also PAG Board Policy Memorandum No. 09-03 (Policy on Performance Evaluation for General Manager).

The OPA, in its performance audit, found: “[a]lthough a pay adjustment was received in 2018, the Board of Directors did not conduct a formal evaluation of the former General Manager’s performance period covering December 2017 through December 2018. Based on 5 GCA § 43202, governing boards for all agencies must issue performance reviews of the Chief Executive selected for that agency . . . every 12 months thereafter that the Chief Executive is retained by the Governing Board. As a result, *we questioned PAG’s basis for providing the former General Manager a pay increase for that period.*” See OPA Report No. 20-04 at pp. 9-10.

Accordingly, although there is no record indicating that the PAG BOD conducted a formal performance evaluation as mandated by Title 5 GCA Chapter 43 Article 2 to justify the basis for the pay adjustment, the PAG BOD approved the Port's 2018 Compensation and Classification Plan authorizing the pay adjustment in PA 370-2018. Further, Personnel Action No. 82-19 ("PA 82-19") dated January 2, 2019, effectuated the former PAG GM's retirement indicating the same at a Pay Range and Salary of RR-8B \$169,968.00 per annum, effective January 4, 2019 C.O.B. Thus, any pay adjustments made effective September 16, 2018, were justified by PAG Board Resolution No. 2018-05. However, any retroactive payment of the salary adjustment authorized on September 16, 2018, if found, would violate Guam law.

## II. FORMER GENERAL MANAGER'S HIRING DISCUSSED/DECIDED IN EXECUTIVE SESSION.

Guam's Open Government Law ("OGL") is codified in Title 5 GCA Chapter 8, which establishes the general policy that the formation of public policy and decisions is public and shall not be conducted in secret. Title 5 GCA § 8111 provides that "[u]nder no circumstances shall a public agency hold an executive or closed meeting to discuss salaries, salary levels, or salary adjustments of any employee or officer. All discussions or decisions must be held in a public meeting and minutes shall be kept and open to the public." 5 GCA § 8111(a). Further, the OGL states that "[u]nder no circumstances shall a public agency vote on any matter before it during an executive or closed meeting." *Id.* at 8111(d). Finally, "[e]ach member of a public agency who attends a meeting of a public agency where action is taken in violation of the Open Government Law, with knowledge of the fact that the meeting is in violation thereof, is *guilty of a misdemeanor.*" 5 GCA § 8115(b).

The OPA, in its performance audit, found that the PAG BOD discussed and decided on the hiring of the former PAG GM in its December 19, 2012 executive session, then announced their decision in their regular session. OPA Report No. 20-04 at p.7. An excerpt of the PAG BOD decision, cited in the OPA's report, went as follows:

*"Board Secretary agreed to make the motion and Vice Chairman agreed to second the motion in the general session. Legal Counsel advised that the matter may be discussed, but the vote won't count in the executive session. The general session reconvened. Board Secretary motioned that the Acting General Manager be designated as the General Manager for PAG. Vice Chairman seconded. There was no objection or discussion and the motion carried."*

See *id.*; see also PAG BOD Minutes, Section VIII (Dec. 19, 2012) (designating former PAG GM as the permanent GM of the PAG effective December 19, 2012).

The OPA concluded that the PAG generally complied with the OGL relative to personnel matters however, found that the BOD discussed and decided on the hiring of the former PAG GM in its executive session. Nonetheless, the OPA acknowledged that the BOD motioned and approved the hiring of the former GM once the general session reconvened. See OPA Report No. 20-04 at pp. 1, 7. In this case, there was a clear violation of the OGL when the PAG BOD discussed the hiring of the former PAG GM in its executive session. However, it appears that because the matter

was decided and voted on once the regular session reconvened, the OPA did not opine further. See id.

I trust the foregoing is responsive to your specific questions regarding Opinion Memorandum issued by the Office of the Attorney General of Guam (“OAG”) dated November 9, 2021 in response to the Port Authority of Guam’s (“PAG” or “Port”) Request for Opinion on Retroactive Salary Adjustments of Former Management at the Port Authority of Guam. Please let me know should you have any questions or wish to discuss this matter more. *Si Yu’os Ma’ase!*



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