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INFORMATION AND GUIDANCE (Confidential) Ref. LEG 09-0929

TO: Senator Frank B. Aguon
 Fire Chief David Peredo

FROM: Assistant Attorney General

SUBJECT: Leave Sharing Benefits; Limiting Leave Sharing Benefits to Medical Leave;
 Transferring Fire Fighter to Administrative position prior to Military Leave.

There are two related requests for assistance and guidance concerning leave sharing benefits, and the impact on the Guam Fire Department for use of leave sharing benefits by GFD employees taking leave for active duty military service.

Senator Aguon has asked:

Can government of Guam directors and administrators restrict government employee earned benefits or leave sharing benefits to deployed personnel, while other government employees continue to receive such earned benefits?

No. The Uniformed Services Employment and Re-Employment Rights Act prohibits this behavior by an employer. See discussion below.

Fire Chief David Peredo has asked:

Can I continue to disallow leave that is based on leave sharing where there is no justification of a medical necessity?

No. The personnel law for the government of Guam prohibits limiting leave sharing benefits to only medical leave. See discussion below.

Can DOA or GFD change the schedule of firefighters, when leave is requested, from a twenty four hours schedule (a one hundred and six hour pay period) to a normal administrative schedule of eight hours per day (an eighty hour pay period)?

No. The personnel law for the government of Guam prohibits the change in scheduling of firefighter hours as proposed by GFD. See discussion below.

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Discussion:

I. Use of Leave Sharing As it Affects Guam Fire Department.

The use of donated leave by employees (leave sharing) who go on active military duty as members of the Guam National Guard or a military Reserve unit has had an adverse financial impact on the Guam Fire Department ("GFD"). A large number of GFD fire fighters, 46 in 2009, have received donated leave through the leave sharing program and used this leave while on extended active military duty.¹ GFD has addressed this financial impact by implementing a policy of denying all employees the opportunity to use donated leave for anything but a medical necessity. This GFD policy has affected employees seeking to use donated leave through the leave sharing program for active military duty.

The negative impact of the leave sharing program on GFD is compounded by government personnel policy that provides that firefighters, who work a series of twenty-four hour shifts, are compensated for a 106 hour pay period, as opposed to the 80 hour pay period utilized for all other government of Guam employees. 4 GCA §6219 (a). As an administrative practice, an 80 hour pay period is equivalent to 10 workdays. For firefighters, a 106 hour pay period is equivalent to 5 workdays.

By law, leave sharing is limited to 90 work days. 4 GCA §4109.1 (b). For this reason, the calculation of work days is important when determining the limit an employee has to the use of shared leave for any given request. For all employees but firefighters, the 90 workdays of shared leave permitted is equivalent to receiving shared leave for 9 pay periods (about 4½ months of leave). For firefighters, the 90 workdays of shared leave per request is equivalent to receiving 18 pay periods of leave (about 9 months of leave). For this reason, a firefighter who goes on active military duty, and is donated leave sharing for ninety (90) work days, is actually provided paid leave for 18 pay periods, as opposed to paid leave for 9 pay periods as with all other government employees.

The impact of the leave sharing program is a concern of the Guam Fire Department because of the high number of employees who request leave for military services, when this leave is compensated through the leave sharing program. Because of the payroll and administrative process, firefighters can receive nine (9) months of leave through leave sharing for each request.²

¹ According to the Department of Administration, in fiscal year 2009, of 106 government of Guam employees who have been approved for military leave, forty six (46) of those employees were from the Guam Fire Department. The next highest department, at twenty six (26) employees was Department of Education. After those two departments, no other department or agency had more that 9 employees.

² A second financial impact for an agency, such as GFD, that receives a large amount of donated leave from outside agencies of the government, is that the money to pay for the donated leave does not follow the donated hours. A government employee from an outside agency, e.g., the Office of the Attorney General, can send donated leave to a firefighter, and GFD receives the leave time but does not receive the appropriated funds to pay for the leave, once it is taken.

II. Uniformed Services Employment and Re-Employment Rights Act.

The Uniform Services Employment and Re-Employment Rights Act (“USERRA”) is the recent updating and amendment of federal law, initially enacted in 1941, to protect the employment rights of uniformed military personnel called to active duty. USERRA rights now

extend to National Guard and Reserve personnel called to duty, for both voluntary as well as involuntary service, and to include active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and funeral honors duty performed by National Guard or Reserve members. See 38 USC §§ 4301 – 4333.

USERRA intends to encourage an all-volunteer uniformed service and prohibits employment discrimination against those who serve or have served. Courts have followed the Supreme Court admonition that “[t]his legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.” *Fishgold v. Sullivan Drydock and Repair Corporation*, 328 U.S. 275, 285, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230 (1946). With regard to employment benefits and privileges, USERRA provides that servicemen and women returning to private life and private employment after service are to be treated equal to their fellow employees. This has been interpreted to mean that the military member returning to work after active service is to be treated, for purposes of employee benefits, as if they had been on leave like any other employee.

Title 38, section 4316 states, in relevant part:

“(b) (1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

(2)...

(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.

(5) ...

(6) ...”

This section has been interpreted to mean that an employer did not have to grant an employee returning to employment after serving in the uniformed services enhanced benefits or seniority, but rather, the same benefits and seniority that would have been granted to the employee had him or her gone on a non-military furlough or leave. *Rogers v. City of San Antonio*, 392 F. 3d 758 (5th Cir. 2004). In *Rogers*, 15 firefighters sued the city for compensation and lost wages after taking leave to serve on active duty in the military. The firefighters contended that they were denied opportunities to earn straight and overtime pay, extra vacation leave, vacation scheduling flexibility, and opportunities to secure unscheduled overtime work and job upgrades. The city contended that the firefighters were treated just like any other employee on leave; any employee on furlough or leave would have missed opportunities to earn straight and overtime pay, extra vacation leave, opportunities to secure unscheduled overtime work and other opportunities. *Rogers*, interpreting 38 USC 4316 (b) as applicable to this question, holds that an employee going onto active duty, and returning to work after active duty, is to be deemed on leave of absence or furlough and receive the same benefits as any employee in that circumstance. In accord is *Monroe v. Standard Oil*, 452 U.S. 549, 101 S.Ct. 2510, 69 L. Ed. 2d 226 (1981), interpreting the Vietnam era Veterans’ Readjustment Allowance Act, a predecessor to USERRA.

Government of Guam employees, whether they be firefighters, or not, when going on active duty in the armed forces, are to receive the same leave benefits as are provided by the government of Guam to any employee. These leave benefits need not be enhanced for employees going on active military duty, but the benefits can not be reduced either. GFD firefighters going on active military duty and utilizing shared leave must be treated like any other government of Guam employee going on leave and using shared leave benefits.

III. Leave Sharing Benefits for government of Guam Employees.

A leave sharing program has been established for government of Guam employees since 1993. See P.L. 22-10, codified at 4 GCA §4109.1. The program of providing leave sharing benefits for government employees has been revised on several occasions over the years. Public Law 22-140:5 removed certain restrictive provisions, expanding the availability of leave sharing between non-related employees from different departments. Public Law 26-134 amended the policy to specifically declare that the leave sharing program is intended to benefit employees going on active military duty for greater than 15 days, and limited the use of leave sharing for a participant to 90 work days. Public Law 27-29: V: 16 expanded the program to provide an additional 90 days of shared leave to an employee if a medical doctor certifies that the additional leave is needed for medical treatment or to recover from a medical illness. Public Law 28-068: IV: 105 and P.L. 29-019: VI: 96 further amended and expanded the leave sharing program regarding use of leave sharing in medical leave instances, and provided for a criminal penalty for the selling of accumulated leave to another employee through the leave sharing program. Public Law 27-158 amended 4 GCA §4109.5 to provide that teachers employed by the Department of Education who are members of the military reserves or the National Guard may participate in the leave sharing program solely for the purpose of leave required for military training or active duty.

Likewise, other benefits intended to support employees in the National Guard and the military reserves that go on active duty were enacted by the Guam Legislature. Public Law 22-54 added Section 4119 to Title 4 and provided for 15 days of paid leave for all employees of the government who are members of the military reserves or Guam National Guard on all days during which they are engaged in active military duty. Public Law 23-41 further clarified Section 4119 to provide that, in any given year, after an employee used the 15 days of military leave, the employee still on active duty shall elect annual leave or leave without pay for the remainder of the leave. Public Law 24-258 provided that an employee may carry over up to 15 days of unused military leave from one year to the next, resulting in the possibility that an employee with a 15 day carry over from the prior year, could have a total not to exceed 30 days of military leave in a given year.

There is a clear and unambiguous pattern of legislative action, beginning with P.L. 22-54, to provide members of the Guam National Guard and the military reserves with leave benefits for military active duty and with liberal access to the shared leave program, in order to expand paid leave for military active duty by government of Guam employees. In those enactments and amendments in which the legislature set out its intent or rationale, it is clear that the Legislature intended to support the national efforts to combat terrorism, and to support those government employees who serve in military units. The intent of the relevant legislative action is clear in this regard.

IV. Leave Sharing Can Not Be Limited To Use For Medical Purposes Only.

The leave sharing policy is legislatively mandated. It provides that an employee may use donated annual leave hours for personal leave. 4 GCA §4109.2 (b). The program works as follows. An employee advises his department of his intent to donate leave, annual leave or sick leave, to another identified employee, the recipient employee. The recipient employee can be employed in any government agency or department. Once the donating agency confirms that the donating employee has the requisite number of hours to donate, “the payroll supervisor *shall* notify the Payroll Division to transfer the approved number of hours to the recipient.” *Id.* (Emphasis placed by legislature in the law.) The recipient employee’s agency is notified of the availability of donated leave hours. Upon receipt of the notice of transfer of leave hours, the employee then submits a leave request. “The department head *shall* then approve the leave request.” *Id.* (Emphasis placed by legislature in the law.)

The intent of the law is clear. There is no discretion granted to the department or agency head to limit the leave sharing program to only medical leave. Further, the leave sharing program is specifically intended for active duty military leave. “From time to time, classified employees ... have occasion to need leave for personal reasons ... At times like these, particularly when the employee needs time off ... in the case of the military reserves and National Guard members, being called to active duty in excess of fifteen (15) working days, the employee might be forced to take leave without pay.” 4 GCA §4109.2 (a).

The practice of limiting the leave sharing program to use for medical leave only is contrary to law.

V. Transfer of Firefighters Prior To Leave.

As a result of the disparate impact of the leave sharing program on the Guam Fire Department due to the payroll policy of according fire fighters a 106 hour pay period, resulting in fire fighters receiving the effect of nine months of leave sharing, the Fire Chief has asked whether fire fighters can be transferred to an administrative position, an 80 hour pay period position, prior to taking leave that utilizes shared leave (presumably for active duty military leave). Without even analyzing the USERRA implications of this suggested action, the transfer of a fire fighter is either not permitted, or if involuntarily detailed, would not provide the remedy being sought.

Transfer of classified employees in the government of Guam is controlled by law and regulation. "No employee of a department, agency or instrumentality of the government of Guam may be involuntarily transferred to a position which is unrelated with respect to job duties and responsibilities to the position occupied by the employee before such transfer." 4 GCA §4116. Personnel Rules and Regulations ("Rules" or "Rule") have further denominated the circumstances within which an employee can be transferred.³ Under the heading of Non-Competitive Actions, the Rule for transfers, at Section 4.501, states:

"A. Intra-departmental and Inter-departmental

Upon the approval of the Appointing Authority (receiving department), employees may transfer within the same department or to another department when the following conditions are met:

1. the employee meets the minimum qualification requirements for the position which he seeks movement, including and assembled examination requirements.
2. **movement is within the same class of position, or from one class of position to another class of position having comparable duties and responsibilities and qualification requirements.**
3. any such transfer shall require **clearance of the Director and the consent of the employee.** The employee shall give the releasing department reasonable notice of the transfer. Prior approval for the transfer is not required by the releasing department. The releasing department cannot require the employee to resign.
4. any employee affected by this section shall not have affected adversely his government service, retirement credits, sick or annual leave and other fringe benefits normally granted to an employee of the government.
5. the appointing authority may require a transferred employee to serve a probationary period." (Emphasis added)

According to the Department of Administration there are only three positions within the fire fighter series that are truly administrative in nature. These positions are: Assistant Fire

³ The Personnel Rules and Regulations were updated and adopted by Executive Order 96-24.

Chief; Deputy Fire Chief; and Fire Chief. All other fire fighter positions have some administrative responsibilities, but are not administrative positions. Therefore, a transfer of a fire fighter to an administrative job would be to “a position which is unrelated with respect to job duties and responsibilities to the position occupied by the employee before such transfer.” 5 GCA §4116. Further, it is not movement “within the same class of position, or from one class of position to another class of position having comparable duties and responsibilities and qualification requirements.” Rules §4.501 (A) (2). Finally, such a transfer requires the consent of the Director of Administration and the consent of the firefighter. *Id.* at (A) (3).

Therefore, unless a firefighter consents to a transfer to an administrative position, and unless the Director of Administration approves of the transfer, a firefighter can not be transferred prior to taking personal leave that is supported by donated (shared) leave.

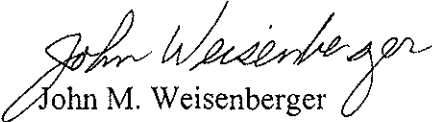
Finally, it may be asserted that the fire chief could detail a firefighter to an administrative position prior to taking personal leave. Detail assignments are permitted by the Rules. “A detail is the temporary assignment to meet management needs of an employee to another position or group of specific duties and responsibilities for a specified period with the employee returning to his regular duties at the end of the detail.” Rules §4.506 (A). Details shall be made only for meeting the temporary needs of the department program such as addressing an emergency workload or unanticipated absences, pending the formal classification of a new position, or to replace an incumbent who is undergoing training. *Id.* at (B). Details are limited to ninety days; By express approval of the Director of Administration, a detail may be extended to an additional 90 days upon application. 4 GCA § 4117. Finally, pursuant to the Rules, employees detailed in excess of 30 days to a position having a lower pay grade, shall not have their pay adjusted to the lower pay. Rule §4.506 (I).

The detailing of a firefighter to an administrative position in order to circumvent the application of personnel law regarding pay to firefighters, under the circumstance of a firefighter’s use of the shared leave policy, is contrary to the spirit, intent and proper application of personnel law and rules. Detailing of a firefighter in this circumstance is not the detailing of an employee “for meeting temporary needs of department or agency programs such as (1) emergency details – to meet emergencies occasioned by abnormal workload, change in organization, or unanticipated absences; or (2) pending description and formal classification of a new position; or (3) to replace an incumbent who is undergoing training.” Rule 4.506 B.

Conclusion.

1. Government of Guam directors and administrators cannot restrict access to the use of leave sharing benefits to deployed personnel, while other government employees continue to receive such earned benefits. Government employees that go on active duty with the Guam National Guard or the Reserves must be treated the same as any government employee in exercise of leave benefits.
2. The Fire Chief can not continue to restrict the use of shared leave for only medical purposes and disallow the use of donated leave for personal purposes. Leave sharing benefits may not be restricted to instances of medical necessity, and shall be available to government employees for personal reasons, to include active duty military leave.

3. Neither the Department of Administration nor the Guam Fire Department can change the schedule of a firefighter, when leave is requested, from a twenty four hours schedule (a one hundred and six hour pay period) to an administrative schedule of eight hours per day (an eighty hour pay period). This is a personnel transfer that is not permitted if a fire fighter does not consent to the transfer. Further, to detail a fire fighter to an administrative position in order to circumvent personnel pay policy mandated by law is not permitted by personnel rules.


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