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**FRANKLIN
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September 19, 2016

MEMORANDUM

TO: Lourdes Perez, Comptroller

CC: Joseph Leon M. Sanchez, Acting Superintendent of Education
Taling Taitano, Deputy Superintendent of Finance and Administrative Services
Christopher J. Anderson, Acting Deputy Superintendent of Assessment and Accountability

FROM: Franklin Cooper-Nurse, Chief Internal Auditor

SUBJECT: Overtime to Exempt GDOE Employees

Hafa Adai Ms. Perez,

The Internal Audit Office (IAO) received several hotline concerns relative to and requests to review payment of overtime to exempt Guam Department of Education (GDOE) employees. On November 2015, IAO researched applicable regulations and interviewed representatives from the Government of Guam (GovGuam) Departments of Labor and Administration, Office of the Governor's Legal Counsel, and GDOE's independent auditors Deloitte & Touche, LLP.

On December 21, 2015, IAO met with key GDOE officials to present its general guidance on overtime. During this meeting, IAO notified GDOE's management on who is eligible to receive overtime pay and when to use overtime using references such as Executive Order 2005-28. IAO's guidance included:

- (1) GDOE, as a GovGuam line agency, should comply with the executive order, which prohibited exempt employees (or employees occupying "bona fide administrative, executive and/or professional positions" of GovGuam) from receiving overtime or compensatory time-off;
- (2) The executive order reflected the U.S. Code of Federal Regulations (CFR) and U.S. Department of Labor Fact Sheets;
- (3) The fact sheet states that the exempt and non-exempt employees were defined by their salary and duties.

After the meeting, IAO suggested to the Deputy Superintendent of Finance and Administration to request for Legal Counsel's opinion on the matter and to halt any overtime payments or compensatory time-off to exempt employees until resolution. A number of overtime plans were currently in place and employees needed to be informed if overtime was unlikely to be paid.

On December 22, 2015, IAO sought advisement on the matter from GDOE Legal Counsel. Legal Counsel provided a draft Legal Opinion on Overtime for Exempt Staff on December 31, 2015. In the draft opinion, Legal Counsel agreed that GDOE exempt employees were not entitled to overtime pay. Although the executive order prohibited such, certain exempt GDOE employees were allowed to earn additional compensation, separate and distinct from overtime and compensatory time off. The employment arrangement must have included a guarantee of at least the minimum weekly-required amount paid on a salary basis per 29 CFR Section 541.604(a).

On April 2, 2016, IAO received an email request to provide additional comments regarding the Proposed Policy related to Additional Compensation for Exempt Employees for Hours Worked beyond 80 Hours in a Pay Period. The email noted that all comments are to be submitted on or before end of business day, Tuesday, April 5, 2016 (or two business days). IAO sent a memo, on April 5, 2016, to Deputy Superintendent Taitano requesting for an extension and to halt any immediate approval of the proposed policy. The request was to conduct further research on the appropriateness of the proposed policy and evaluate related risks, which may result in audit findings for non-compliance from GDOE's external auditors.

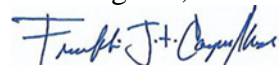
On May 18, 2016, the U.S. Department of Labor's final rule updated the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt from overtime pay. The Final Rule amended the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The Final Rule's effective date is December 1, 2016.

On July 18, 2016, Deputy Superintendent Taitano informed Acting Superintendent Sanchez that "the Superintendent was not approving overtime for salaried staff due to conflicts with an existing executive order and IAO issued recommendations against overtime for these staff".

IAO maintains its position that until specific authority is identified, exempt GDOE employees are not entitled to overtime pay. IAO acknowledges and agrees that 29 CFR Section 541.604(a) allows for employment arrangements to include additional pay to certain exempt employees. Before such payments could be made, GDOE should establish the appropriate employee arrangements per 29 CFR 541.604(a), establish and implement policy and procedures that govern the additional compensation, and clearly define emergency situations that warrant overtime pay. Further, IAO recommends for GDOE to update its personnel regulations to reflect the updated federal regulations relative to overtime.

Should you have questions or concerns, please contact me at 300-1273 or fjtcooper-nurse@gdoe.net.

Best Regards,



Franklin Cooper-Nurse
Chief Internal Auditor

Attachments: (1) Executive Order 2005-28; (2) 29 CFR 541.604(a); and (3) U.S. DOL Final Rule