



Office of the Attorney General of Guam



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OPINION MEMORANDUM

Ref: GCEC 17-0556

TO: Executive Director, *Kumision Settefikasion Para I Manmaniduka*
Guam Commission for Educator Certification

FROM: Attorney General

SUBJECT: **Request for Legal Advice Regarding Procedures that Must Be Observed When Considering Suspending or Revoking a Professional Educator's Teaching Certificate.**

This Office is in receipt of your request for legal advice on the question whether the Guam Commission for Educator Certification (GCEC) must conduct a hearing when considering whether to suspend or revoke the Professional Educator teaching certificate of an individual who is currently incarcerated in a federal penitentiary in Sheridan, Oregon. If the answer is yes, that a hearing is required before the Commission may consider suspending or revoking a teacher certification, you ask whether the person holding the certification must be physically present during the proceedings.

Discussion

The rules of procedure applicable to suspension or revocation of a teacher certification are found as an appendix to Public Law 32-236 (Jan. 16, 2015). In particular, the following rules apply to *Procedures for the Investigative Process and Final Determination of Alleged Ethics Violations*:

3. Proposed Action or Hearing

- a. "Notice of Proposed Action Letter" notifying the educator of the proposed GCEC action and the reason for the proposed action (which will be based on the investigation) will be sent within twenty-one (21) calendar days of hearing date.
- b. The educator may consent to the proposed action or may avail themselves of the scheduled hearing before the Ethics Review Sub-Committee of GCEC.
- c. If an educator consents to the proposed action, they must do so in writing, transmitted to the GCEC (as indicated in the "Notice of proposed Action Letter"), within ten (10) calendar days of receipt of the "Notice of Proposed Action Letter."

- d. If an educator does not attend the scheduled hearing, the subcommittee will continue the process and the proposed action becomes a final decision confirmed by GCEC.

According to the GCEC's Rules, a "Notice of Proposed Action" must be sent within 21 calendar days of a scheduled hearing before an Ethics Review Sub-committee, and a hearing before the subcommittee must be held unless the educator consents in writing to the "Notice of Proposed Action." The educator can either waive the hearing altogether and consent to the proposed action in writing, or the educator can waive attendance at the hearing, *provided* that the educator has received notice as provided in Rule 4:

4. Evidentiary Hearing Procedures of the GCEC Ethics Review Sub-Committee

- a. The educator shall be notified in writing of the deadline by which the educator must submit items to the Ethics Review Sub-committee for consideration. The educator shall be notified via (1) certified mail, return receipt requested, (2) E-Mail (PDF of written letter) from the Executive Director or his/her designee with a return e-mail acknowledging receipt, (3) personal delivery by the Executive Director or his/her designee or (4) personal delivery by a licensed process server.

We presume from your question that the Commission anticipates difficulty in serving the educator in question with notice of a hearing because he is incarcerated in a federal penitentiary. You have therefore asked whether, if the GCEC is legally required to conduct a hearing, it would violate the educator's rights to hold it in his absence.

The "first principle" of statutory and regulatory construction is that "an agency does not have authority to ignore its own rules." *Wade v. Taitano*, 2002 Guam 16 ¶ 7 (internal quotation marks and citations omitted).

Regulations have the same legal effect as statutes, *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148, 153 (Neb. 1998), and, "[w]hen an agency has the authority to adopt rules and does so, it must follow them." *Aetna*, 911 P.2d at 365 (quotations omitted). Therefore, an agency's procedural rules "are binding upon the agency which enacts them as well as upon the public." *Douglas County Welfare Admin. v. Parks*, 204 Neb. 570, 284 N.W.2d 10, 10-11 (Neb. 1979); *see also Schmidt*, 586 N.W.2d at 154 ("Regulations governing procedure are just as binding upon both the agency which enacts them and the public, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force.") (internal quotations and citations omitted). *Sound Air Pollution Control Agency*, 112 Wash.2d 314, 771 P.2d 335, 339 (Wash. 1989).


Id. (quoting *Aetna Cas. & Sur. Co. v. Blanton*, 139 Or.App. 283, 911 P.2d 363, 365 (1996)). The Supreme Court of Guam has also previously observed that “‘an agency’s rules must be scrupulously adhered to,’ even if those rules are more generous than what the Constitution requires.” *Carlson v. Perez*, 2007 Guam 6 ¶ 44 (quoting *Brown v. Civil Service Commission*, Docket No. CV-85-0081A, 1984 WL 48861 (D. Guam A.D. Oct. 22, 1984)). It is therefore our considered opinion that it is not an option for the GCEC to conduct a hearing to suspend or revoke a teaching certificate without the educator being physically present *unless* the educator either (a) consents in writing to the “Notice of Proposed Action,” or (b) the educator has been properly served with notice of the hearing and proposed action as provided by Rule 4.a, above, and has either waived attendance or fails to appear.

We offer the following observations for your future consideration: first, personal service is not constitutionally required in all circumstances. Due process can be satisfied by service by publication in a newspaper of general circulation. But an amendment to your rules will be necessary. Second, it is sometimes possible to require as a condition of licensure or certification that a licensee designate a public office as its agent for service of process in particular circumstances including those presented here. Again, this would require an amendment to your rules.

Conclusion

Before the GCEC considers suspending or revoking an educator’s professional teaching certificate, it must conduct a hearing and the educator must be present at the hearing. The GCEC can hold a hearing in the educator’s absence only if the educator has been served with notice of a hearing according to your rules or consented to the “Notice of Proposed Action” in writing.

We trust we have sufficiently addressed your inquiry. For further information concerning this matter, please use the reference number shown above.


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