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OPINION MEMORANDUM

To: Vice-Speaker Telena C. Nelson
Senator Therese M. Terlaje
I Mina'Trentai Singko Na Liheslaturan Guåhan

From: Attorney General Leevin T. Camacho

Date: January 30, 2020

Subject: (1) Authority of Yona Mayor to appoint Municipal Planning Council while detained pending trial; (2) Grounds for vacancy in Office of Mayor (Ref. LEG 20-0016)

This opinion memorandum is provided in response to your January 15, 2020 requests for legal guidance on the subject matters.

QUESTIONS & ANSWERS

1. Whether being on leave status while being held in a pending criminal case deprived the former Mayor of Yona, Jesse Blas, of his statutory authority to appoint members of the Yona Municipal Planning Council? The answer is no.
2. Whether the language “inability or failure to perform” in 5 GCA §40110(b) creates a separate and independent ground for constituting a vacancy for the office of mayor? The answer is no.

DISCUSSION

- I. Whether being on leave status while being held in a pending criminal case deprived the former Mayor of Yona of his statutory authority to appoint members of the Yona Municipal Planning Council?

Mayors have authority to appoint the members of a municipal planning council. 5 GCA § 40124. Before resigning, former Yona Mayor Jesse Blas was on leave status and detained in a criminal case pending trial. The question presented is whether pretrial detention while on leave status deprived Mr. Blas of his statutory authority to appoint members to the Yona Municipal Planning Council (“Yona MPC”)?

A mayor maintains statutory authority to perform the functions of a mayor by virtue of holding the office of mayor. *See generally* 5 GCA Chapter 40. A mayor is not stripped of this authority unless he or she no longer holds the office. Under Guam law, this occurs either through expiration of his or her term, removal from office, or the occurrence of a specified event causing a vacancy.

With regard to the office of mayor in the municipality of Yona, when Mr. Blas appointed members of the Yona MPC, his term had not expired nor had he been removed from office. The only other manner in which he would lack authority to appoint members to the Yona MPC is if a vacancy occurred.

The events triggering a vacancy in the office of mayor are enumerated in 3 GCA § 13106 as follows:

§ 13106. Events Causing Vacancy in the Municipal Offices of Mayor and Vice Mayor.

The municipal offices of Mayor and Vice Mayor become vacant on the happening of any of the following events:

- (a) death of the incumbent;
- (b) declaration of mental incompetence by a final judgment or final order of a court of competent jurisdiction;
- (c) resignation from office;
- (d) refusal or failure to assume office;
- (e) the decision of a competent tribunal declaring void his or her election;
- (f) conviction of a felony, or of a crime involving moral turpitude;
- (g) his or her change of residence from the municipality in which he or she was elected;
- (h) when an incumbent is incapacitated because of illness and unable to continue for the remainder of the term to which he or she was elected; or
- (i) when an incumbent has sought and won election to another office and assumed the new office,

constituting voluntary relinquishment of the original office.

Pretrial incarceration is not among these specified events and none of these other events had occurred at the time of the appointments. It follows, then, that Mr. Blas' position as mayor had not changed at that time and he had not been deprived of his authority. Therefore, he properly exercised his statutory authority when he appointed members of the Yona MPC.

Neither the fact that he was on leave status and in detention when he made the appointments nor the fact that he has reportedly resigned as of the date of this memorandum has any legal bearing on his ability to have exercised this authority.

II. Whether the language "inability or failure to perform" in 5 GCA §40110(b) creates a separate and independent ground for constituting a vacancy for the office of mayor?

As mentioned above, a vacancy in the office of mayor is created by removal from office or the occurrence of an event specified by 3 GCA § 13106. Title 5 GCA § 40110(b) also addresses the issue of vacancies in the offices of mayor and vice-mayor. The issue is whether section 40110(b) creates an independent basis, separate from section 13106, to declare a vacancy in the office of mayor.¹

This Section provides:

§ 40110(b). Vacancies.

.....

(b) Mayors. *If* by reason of death, resignation, removal from office, inability or failure to perform, there shall be a vacancy in the office of the Mayor *less than* two hundred forty (240) days before the date of the next general election for Mayors and Vice-Mayors, it *shall* be filled by the Vice-Mayor in a municipality where there is a Vice-Mayor, and there *shall* be a vacancy in the position of Vice-Mayor until the end of the term. In a municipality where there is no Vice-Mayor and the vacancy is *less than* two hundred forty (240) days before the date of the next general election for Mayors and Vice-Mayors, the vacancy *shall* be

¹ This office was specifically asked for "a legal opinion on the status of incarcerated Yona Mayor Jesse Blas' 'inability or failure to perform' pursuant to §4011 (b) of Chapter 40, Title 5 of the Guam Code Annotated." We interpreted this to mean whether "inability or failure to perform" constitutes an independent ground to declare a vacancy. Mr. Blas reportedly resigned today but we provide this opinion because the question remains unanswered.

filled by a majority vote of the municipal planning council of the municipality in which the vacancy occurs, subject to the advice and consent of *I Liheslaturan* (the Legislature).

Section 40110(b) does not create independent, separate grounds to declare that a vacancy has occurred. The section is procedural: it prescribes how a vacancy in the office of mayor must be filled when there are less than two hundred forty (240) days before the next general election.

Instead, this section must be read together with 3 GCA §§ 1121, 13106 and 13107. Section 1121 covers “removal from office”, section 13106 covers “death” and “resignation” as two of the nine specific events that cause a vacancy. An “inability or failure to perform” as referenced in section 40110(b) is a categorical description of the seven other specific events of section 13106 that cause a vacancy, for example, a declaration of mental incompetence from a court or incapacitation due to illness. Section 13107 provides that a special election is held when a vacancy occurs two hundred forty days or more until the next election. Section 40110(b) complements section 13107 procedurally by setting forth what occurs after a vacancy has been established less than two hundred forty days before the next election for mayor or vice mayor.

To read 5 GCA § 40110(b)—and specifically “inability or failure to perform”—as a separate basis for a vacancy would result in two tests for determining whether a vacancy exists: one when there is 240 or more days until the next election (sections 13106-7) and one when there is fewer than 240 days (section 40110(b)). Section 13106 sets out the grounds for vacancy generally, without regard for the timing of the next election. Section 40110(b), however, only applies when there are less than two hundred forty (240) days before the next general election for mayors. If one were to read Section 40110(b) as an independent test for determining a vacancy, several events under section 13106 would not result in a vacancy if they occurred less than two hundred forty days before the next mayoral election. For example, conviction for a crime of moral turpitude does not fall within any of the grounds in 40110(b).

It is reasonable that the procedure used to fill a vacancy would be different if the vacancy occurs closer or farther in time (e.g., 240 days) to an already scheduled election. However, it would be unreasonable to have the *determination* of whether a vacancy exists turn on whether the triggering event happened more or less than 240 days before the next mayoral election.

Finally, section 40110(b) does not state who must declare or determine the existence of a mayor’s “inability or failure to perform.” Just as important, “inability or failure to perform” is not defined by section 40110(b). In contrast to the concrete examples

in 3 GCA § 13106, determining whether a specific set of facts constitutes an “inability or failure to perform” would require factual determinations. Assuming, for the sake of argument, that section 40110(b) does provide a separate test for determining a vacancy, the courts and/or the Guam Election Commission would be the most appropriate entities to conduct evidentiary hearings as needed and declare if or when a vacancy has occurred.

CONCLUSION

At the time of the appointments to the Yona MPC, Mr. Blas had not been removed from office, he had not resigned, and none of the grounds for vacancy under Guam law existed. Despite his pretrial incarceration and leave status, his status as mayor of Yona was unchanged. There appears to be no legal authority limiting or proscribing his ability to exercise his statutory authority and, therefore, his appointment of members to the Yona MPC appears to be valid.

Finally, a mayor’s “inability or failure to perform” is not an independent basis for a vacancy to exist in the office of mayor separate and apart from the specified grounds for vacancy contained in Section 13106. Title 5 GCA § 40110(b) must be read together with 3 GCA §§ 1121, 13106, 13107 to determine whether a vacancy exists in the office of mayor and, if so, how that vacancy must be filled.



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