IN THE SUPREME COURT OF GUAM
TERRITORY OF GUAM

In re:
REQUEST OF GOVERNOR CARL T.C. GUTIERREZ FOR A DECLARATORY JUDGMENT AS TO THE ORGANICITY OF GUAM PUBLIC LAW 22-42

Supreme Court Case No. CRQ96-001
Filed: October 24, 1996
Cite as: 1996 Guam 4

O R D E R

[1] On October 7, 1996, the Governor of Guam filed the following request for a Declaratory Judgment with the Clerk of the Supreme Court of Guam:

> **COMES NOW, Carl T.C. Gutierrez, the governor of Guam, pursuant to 7 G.C.A. §4104 and Rule 27 of the Rules of Appellate Procedure for the Supreme Court of Guam, and requests a declaratory judgment from the Supreme Court of Guam as to the following question of great public interest affecting the powers and duties of the Governor and the operation of the Executive Branch:**
>
> **Whether Public Law 22-42, establishing an elected board of education, violates the Organic Act of Guam in that it usurps the authority of the governor of his executive branch authority over education?**
>
> **Dated this 7th day of October, 1996.**
>
> **/ss/**
> **CARL T.C. GUTIERREZ**
> **GOVERNOR OF GUAM**

[2] This request presents the first instance in which 7 GCA §4104 has been invoked. The provision permits either the Governor or the Legislature to request Declaratory Judgments from this Court in matters affecting the exercise of their respective authorities. Enacted as part of the Frank G. Lujan Memorial Court Reorganization Act of 1992 (P.L. 21-147), §4104 provides for the by-passing of normal legal processes

and the obtaining of immediate consideration by the Guam Supreme Court, but its application is limited to special circumstances: "The Declaratory Judgments may be issued only where it is a matter of great public interest and the normal processes of law would cause undue delay." (7 GCA §4104).

[3] Rule 27 of the Rules of Appellate Procedure for the Supreme Court of Guam reiterates this requirement and places upon the Chief Justice the duty of determining the threshold issues presented. The two prongs of the test, great public interest, and undue delay resulting from normal legal processes, are discussed respectively below.

[4] First, is the question of the elected school board's organicity one of great public interest? The term "public interest" apparently signifies an importance of the issue to the body politic, the community, in the sense that the operations of the government may be substantially affected one way or the other by the issue's resolution. *Cf. In re Opinion of the Justices*, 217 Mass. 607, 105 N.E. 440, 441 (1914) *and In re Opinions of the Justices*, 314 Mass. 767, 49 N.E.2d 252, 255 (1943), in which the Supreme Judicial Court of Massachusetts discusses the requirements of their somewhat analogous constitutional provision[1]. The Massachusetts language requires their high court to provide advisory opinions "upon important questions of law, and upon solemn occasions." *See* 105 N.E. 441 (quoting from Massachusetts Constitution, Chap. 3, Art. 2). These cases construe that language to mean that the issue presented must be significant in substance and relate to a presently existing governmental duty borne by the branch of government that requests the opinion.

[1]The Massachusetts language, drawn from Art. 2, Chap. 3 of that state's constitution is analogous to ours conceptually, if not in its wording, though there are some differences between the two. As noted above, the Massachusetts provision requires that state's highest court to give advisory opinions, whereas our Court is called upon to render Declaratory Judgments. However, the 1985 Source and Comments notes to 7 GCA §4104 indicate that Massachusetts is one of the two significant sources for that section and suggests through discussion that the purpose of section 4104 is to decide the types of issues that Massachusetts has dealt with in this manner.

[5] Applying that standard to the present query, this Court takes judicial notice of the fact that the Department of Education is one of the largest departments in Guam's Government and has a mission that directly impacts on nearly every family on the island.

Public Law 22-42 entrusts management of that Department to the elected school board which is placed in issue here. Perhaps more to the point, this Court is aware of the extensive governmental resources that were involved in the process of 22-42's evolution. These included the previous creation of an elected school board that was ruled inorganic[2], action by Congress to amend the Organic Act to make specific provision for the Guam's school system[3], the enactment of Public Law 22-42 itself, and extensive litigation, challenging various aspects of its application, in the Superior Court of Guam[4].

[6] The issue at hand is obviously one of consequence in terms of governmental function and resources. It is also clear that the Governor has standing to seek clarification of 22-42 insofar as it may impact on his exercise of authority. Although the concept of "great public interest" does not lend itself to precisely drawn boundaries, it is clear in this instance that the issue presented falls within it. This <u>is</u> a question of great public interest.

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[2]Guam Public Law 14-1, in conjunction with former Government Code §5105, created an elected school board that was held inorganic in *Nelson & Wolf v. Ada*, et al., Guam Superior Court Case No. S.P. 192-87)(Findings of Fact and Conclusions of Law of Judge Peter C. Siguenza, dated November 6, 1987), *aff'd*, 878 F.2d 277 (9th Cir. 1989).

[3]See 48 U.S.C.A. §1421g(b), which was enacted through Sections 5 and 13(a)(1) of Pub. Law 99-396, Act of August 27, 1986. This provision was not made retroactive and, therefore, regardless what significance is given the amendment, it could not cure the deficiency in the elected school board created by Guam Public Law 14-1 which was inorganic at its inception.

[4]The Superior Court cases involved in these challenges include: *Tainatongo vs. Board of Education*, et al, SP0114-95; *Gutierrez vs. Board of Education*, et al. CV1383-95; *Gutierrez vs. Board of Education*, et al., CV1856-95 and *Board of Education vs. Rivera*, SP0024-96. Judge Frances Tydingco-Gatewood entered a consolidated Judgment, on September 11, 1996, in these matters. An Amended Judgment was filed on October 9, 1996, which was made *nunc pro tunc* to the date of the earlier determination.

[7] Turning to the issue of undue delay, this concept also lacks bright line demarcation. The question requires one to estimate, as a practical matter, the relative difference in speed for an issue depending on whether it travels the "normal processes of law" route, or that provided by 7 GCA §4104. This standard bears the additional requirement that the anticipated delay be undue, that is to say, excessive or inappropriate.

[8] The present circumstances are unique in framing the issue of delay. 7 GCA §4104 was intended to provide a fast track for the initiation of cases before the Supreme Court of Guam so that rulings could be obtained on important issues of law without time consuming litigation in the inferior court. Ironically, the issue presented by the Governor's request has already been litigated and decided in the Superior Court of Guam. It is available for this Court's consideration on direct appeal. In fact, at this point, such appeal is already pending. On October 10, 1996 the Guam Attorney General filed a notice of appeal as to the Amended Judgment that is referenced in note 4, *supra*.

[9] While one might argue that the declaratory judgment procedure would be faster than an appeal from this point forward, the converse may well be true. 7 GCA §4104 and Rule 27 both require that "interested parties" be noticed and given an opportunity to be heard prior to this Court's deciding the issue presented by Governor Gutierrez. There were numerous parties to the related litigation in the Superior Court and the number of parties, who may claim an interest justifying their participation in the Section 4104 proceedings, could meet or exceed those figures. Just the process of determining which parties should be permitted to be heard may be time consuming. Briefing, argument and decision would follow there as they would in a direct appeal.

[10] Moreover, the Attorney General of Guam can take steps to accelerate the regular appeal process. Rule 7(j)(2) of the Rules Of Appellate Procedure for the Supreme Court of Guam addresses expedited transcription. And even though this Court has been operational for only a few months, it has already issued orders expediting briefing and argument in instances where delay might prejudice a party. Any party can seek the benefit of expedited processing.

[11] This analysis might be different if the request for a Declaratory Judgment had preceded the trial judge's filing of a Judgment on September 11, 1996. It would certainly have changed the equation regarding relative delay.

[12] It is noteworthy that courts in other jurisdictions have expressed concern generally about answering requests for opinion from a Governor (or Legislature), when the issue has already been addressed in actual litigation, even where the request does not arise from a litigated case. *See In re Answer of the Justices to the House of Representatives*, 375 Mass. 790, 374 N.E.2d 1345, 1347 (1978)(noting that the court's decision not to answer the question presented, regarding the immunity of witnesses at legislative hearings, was further supported by the issue's having been addressed in previous litigation, apparently because this meant some guidance already existed on the question). *See also Opinion of the Justices*, 447 So.2d 1305, 1307-08 (Ala. 1984)(declining to provide an advisory opinion where the issue raised was addressed in pending litigation) *and In re Request of Janklow*, 530 N.W.2d 367, 369 (S.D. 1995)(identifying several past determinations of the South Dakota Supreme Court where requests for advisory opinions were denied because the issue raised was addressed in pending litigation).

[13] It is unnecessary to resolve here whether this Court could appropriately accept jurisdiction, under 7 GCA §4104, of an issue that has been litigated to judgment in the court below. Such a procedure threatens a de facto reversal of the trial judge without a review of the proceedings reversed. This may have adverse consequences for our legal community. As the Appellate Division of the District Court of Guam recently observed, "One of the uglier spectacles in any system of jurisprudence is that of two or more courts solemnly deciding questions of law in divergent and inconsistent ways." *Board of Education*, et al vs. *Rivera*, D.C. No. SP0024-96, Order of October 16, 1996, p.4, (D.Guam App. Div.). While this Court obviously has the authority to reverse a decision from the inferior courts of Guam, direct appeal provides a mechanism that guards, to some extent, against divergence and inconsistency.

[14] The substitution of a section 4104 proceeding for direct appeal in a case already adjudicated can result in sudden and unexpected changes in the framing of issues and the legal footing of the parties, which could prejudice individual litigants. This would weigh against exercise of our authority under section 4104. *Cf. Opinion of the Justices to the Senate*, 396 Mass. 1211, 486 N.E.2d 1109, 1110 (1985), noting that under their advisory opinion procedure potentially affected persons are not before the court during the determination of such issues and that, in fairness, opinions should not be provided where prejudice may result. While our system provides for interested

parties to be heard on the request for Declaratory Judgment, this does not change the fact that the posture of the case is altered and the non-prevailing party given a clean slate to draw upon. *See also Opinion of the Justices*, 431 So.2d 496 (Ala. 1982), where the Supreme Court of Alabama held that it would not render an advisory opinion to their governor, where the issue was being litigated in a pending case, even though the case was filed after the request for opinion -- in large part due to concern for the rights of the litigants.

[15] While these concerns suggest that this Court should avoid exercising section 4104 jurisdiction in circumstances like those presented[5], this issue is not reached here. Because there is no basis for finding that significant delay will result from proceeding through the regular course of appeal, we are barred from exercising jurisdiction in this matter, regardless of other reasons supporting such a refusal.

[16] In summary, this Court does not have the authority to consider the issue presented because one of the two exceptional circumstances required by law to activate our consideration of a Declaratory Judgment is not present[6]. The law therefore dictates that this matter be considered as a regular appeal.

[17] Accordingly, consideration of the question presented for Declaratory Judgment is respectfully DENIED.

IT IS SO ORDERED this 24th day of October, 1996.

PETER C. SIGUENZA
Chief Justice

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[5]Obviously, where the issue presented amounts to a crisis, the analysis under the "undue delay" prong would likely be quite different. *Cf. Answer of the Justices*, 358 Mass. 833, 265 N.E. 2d 590, 592 (1970) (suggesting that, where a public emergency exists, the jurisdictional constraints of their advisory opinion authority might be excepted.)

[6]Where the jurisdictional prerequisites of section 4104 are not met, we lack authority to render a judgment on the question. *Compare In re Advisory Opinion to Governor Request*, 388 So.2d 554, 555-56 (Fla. 1980)(so construing the provisions of Art. IV, Section 1(c) of the Florida Constitution) *with* 1985 Source and Comment Notes following 7 GCA §4104 (identifying the preceding Florida provision as the primary source for Guam's provision).

Request of Gov. Gutierrez For A Declaratory Judgment, 1996 Guam 4, (Order)