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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

**DERRICK M. GUERRERO, JOSEPH A. GANGE,
VINCENT J. CAMACHO, FRED Q. AGUON,
DINO F. LIZAMA, GREGORIO I. DIAZ, DEBORAHLYNN P. SIMMONS,
GOLDENCIO A. ELAGO, JOHN F. ASUNCION, JASON T. PAULINO,
WILLIAM S. ATOIGUE, FRANCIS F. REYES, EDWIN W. LAPUEBLA,
DWAYNE T.D. SAN NICOLAS, AND JOHN J. AGUON,**
Plaintiffs-Appellants,

v.

**DENNIS J. SANTO THOMAS, in his official capacity as
Director of Guam Customs and Quarantine Agency, and
LOU PEREZ, in her official capacity as
Director of the Department of Administration,**
Defendants-Appellees.

Supreme Court Case No. CVA09-027
Superior Court Case No. CV0523-09

OPINION

Cite as: 2010 Guam 11

Appeal from the Superior Court of Guam
Argued and submitted on May 5, 2010
Hagåtña, Guam

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For Plaintiffs-Appellants:

Daniel S. Somerfleck, *Esq.*
SOMERFLECK & ASSOC., PLLC
148 Hernan Cortes Ave.
Hagåtña, GU 96910

For Defendants-Appellees:

David Highsmith, *Esq.*
Assistant Attorney General
Office of the Attorney General
Civil Division
287 W O'Brien Dr.
Hagåtña, GU 96910

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Fifteen named plaintiffs brought suit to vindicate their rights as Guam Customs and Quarantine Officers to receive the full amount of compensation and overtime pay to which they are entitled under the Minimum Wage and Hour Act of Guam.¹ They alleged that when the Guam Customs and Quarantine Agency implemented a compensation plan paying overtime to law enforcement personnel only upon completion of 43 hours in a work week, it deprived them of their statutory right to compensation at the overtime rate of pay for every hour worked in excess of forty hours. For the reasons set forth below, we find that the Superior Court erred when it denied injunctive and declaratory relief. We reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The fifteen named Plaintiffs-Appellants (“Customs Officers”) are law enforcement personnel who perform searches, arrests, and inspections at the Guam Customs and Quarantine Agency (“GCQA”). On March 31, 2009, the Customs Officers filed a complaint against Defendants-Appellees (hereinafter referred to collectively as “Management”) Dennis J. Santo Thomas [sic], in his official capacity as GCQA Director, and Lou Perez, in her official capacity as Director of the Department of Administration. Customs Officers sought a declaratory

¹ Chapter 3 of Title 22 of the Guam Code Annotated provides that this law may be cited as “the Minimum Wage and Hour Act of Guam.” 22 GCA § 3101 (2005). However, pursuant to Guam Public Law 8-11, the Compiler also has subtitled this chapter “Fair Labor Standards”. To avoid confusion between the Guam law and the federal Fair Labor Standards Act, 29 U.S.C. 207, we refer to the Guam statute, 22 GCA § 3101 *et seq.*, as the Minimum Wage and Hour Act, and refer to the federal law as the Fair Labor Standards Act.

judgment from the Superior Court that they are entitled to compensation at one and one-half times the regular rate of pay (“overtime rate”) for all hours worked over forty hours in one work week, as provided by section 3107 of the Minimum Wage and Hour Act of Guam.² They sought preliminary injunctive relief and permanent injunctive relief, ordering Management to compensate them for every hour worked in excess of forty hours per week since 1998 and directing Management to pay the overtime rate in the future, as well as awarding attorney’s fees.

[3] In Opposition, Management contended that the Customs Officers are law enforcement officers subject to a federal exemption from the forty-hour workweek set forth by section 207(k) of the federal Fair Labor Standards Act and implemented in Guam by Executive Order (“E.O.”) 96-08. In May 1998, the GCQA enacted a compensation plan for law enforcement personnel that provided the overtime rate only after an employee had worked more than 43 hours per week. ER, tab 9 at 7 (Dec. & Order, Oct. 16, 2009). This compensation plan is not presented in the record on appeal, but according to the Superior Court’s factual findings, was “based on Executive Order 1996-08.” The Superior Court determined that the compensation plan’s 43-hour work week was first implemented on a voluntary basis, but that this 43-hour work week became mandatory as of December 21, 2007. *Id.* at 2.³

² In the complaint, Customs Officers assert that they “are members of the Guam Federation of Teachers, and bring this action on behalf of all employees similarly situated Guam Federation of Teachers members [sic] employed by Defendants.” ER, tab 1 at 3 (Compl.).

³ This opinion makes no determination of the factual question of the exact point at which GCQA first violated Guam law by employing a Customs Officer more than forty hours without providing compensation at the overtime rate. The First Amended Complaint alleges that the 43-hour work week applied to the Customs Officers named in the action as of 1999. ER, tab 6 at 3 (First Am. Compl., June 12, 2009). At oral argument, however, Customs Officers maintained that they are alleging a cause of action dating back to 1996. Furthermore, the First Amended Complaint alleges that the mandatory 43-hour work week without compensation at the overtime rate commenced on or about December 13, 2007. ER, tab 6 at 4 (First Am. Compl., June 12, 2009). On remand, upon further briefing as to the starting date and as to the effect, if any, of the statute of limitations, the Superior Court must determine this question in order to calculate the amount of unpaid overtime compensation owed to Customs Officers.

[4] Customs Officers filed the complaint initiating this action on March 31, 2009, and the Superior Court heard their *ex parte* Motion for Preliminary Mandatory Injunction and Order to Show Cause on May 20, 2009. After the hearing, on May 27, 2009, the court issued a Decision and Order denying the preliminary injunction, but, citing to 29 U.S.C. § 207(k), granted *sua sponte* a partial permanent injunction, enjoining the Government from requiring the Customs Officers to work beyond 42.75 hours without either overtime compensation or compensatory time off. ER, tab 4 at 4 (Dec. & Order, May 27, 2009). In addition, the court ordered the Government to compensate the Customs Officers for work performed over 42.75 hours weekly at the overtime rate, along with 10 percent interest, for payments made in the period from October 1, 2002 to the present. *Id.* The court set the matter for hearing on July 6, 2009, ordering the parties to brief four specific questions concerning the applicability of the FLSA, the organicity and scope of E.O. No. 96-08, and how these two statutes interact with 22 GCA § 3107.

[5] As instructed, Custom Officers filed a pre-hearing brief on July 1, 2009. The Government filed a Memorandum in Opposition. Several months after the July hearing, the Superior Court issued a Decision and Order denying Customs Officers' request for declaratory judgment and permanent injunction. ER, tab 9 (Dec. & Order re: Perm. Inj., Oct. 16, 2009). This Decision and Order, denying injunctive and declaratory relief, is the basis for the instant appeal.⁴

⁴ The procedural posture of this appeal may be important on remand. On June 12, 2009, Customs Officers filed a First Amended Complaint. Certified Docket Sheet ("CDS") at 5 (Apr. 6, 2010). It appears that Management has not yet filed an answer or responsive pleading to the First Amended Complaint. *Id.* at 5-8. At oral argument, Management contended that affirmative defenses which must be raised in the responsive pleading pursuant to GRCP 12(b) have not yet been waived or forfeited, and, in the alternative, Management may still seek permission from the court to amend its responsive pleading, if such pleading has already been filed.

[6] The Decision and Order held that Guam law was not violated by GCQA's failure to pay the overtime rate or provide compensatory time off for work beyond forty hours in a workweek. The Superior Court rescinded the May 27, 2009 injunction, and denied declaratory and injunctive relief. The final judgment stating "Plaintiffs shall not recover anything from Defendants" was entered on the docket on October 20, 2009. Customs Officers timely appealed the matter to this court.

II. JURISDICTION AND STANDARD OF REVIEW

[7] This court has jurisdiction to hear appeals of a final judgment of the Superior Court pursuant to 48 U.S.C. § 1424-1(a)(2) (West Supp. 2010), 7 GCA §§ 3107(b), and 3108(a) (2005).

[8] The denial of declaratory relief is generally reviewed for abuse of discretion. *Sananap v. Cyfred, Ltd.*, 2009 Guam 13 ¶ 13. However, the trial court's interpretation of the underlying legal principles is subject to de novo review and a trial court abuses its discretion when it makes an error of law. *Id.* The interpretation of a statute is a legal question subject to de novo review. *Apana v. Rosario*, 2000 Guam 7 ¶ 9. The construction of an executive order presents an issue akin to an issue of statutory interpretation, where it presents a question of law for our independent review on appeal. *See City of Morgan Hill v. Bay Area Air Quality Mgmt. Dist.*, 13 Cal. Rptr. 3d 420, 431 (Ct. App. 2004).

III. DISCUSSION

[9] The parties dispute whether E.O. 96-08 restricts GCQA from paying Customs Officers compensation at the overtime rate of pay for hours worked above forty and under forty-three in a work week, in derogation of the forty-hour standard provided in the Guam Minimum Wage and

Hour Act, 22 GCA § 3101 *et seq.* This is a question of law subject to de novo review. *Sananap v. Cyfred, Ltd.*, 2009 Guam 13 ¶ 13.

[10] Acknowledging that Guam law sets forth a forty-hour standard work week, Management contends that the Legislature has never specifically prescribed this forty-hour rule for law enforcement officers. Appellee's Br. at 4 (Apr. 14, 2010). Therefore, Management contends, E.O. 96-08 lawfully enacted a federal exemption for law enforcement under the Fair Labor Standards Act, which provides that a public employer can raise the number of hours a law enforcement employee must work before receiving overtime to forty-three hours. *Id.* (citing 29 U.S.C. § 207(k)).⁵

[11] Resolution of this dispute requires us to determine first whether Customs Officers have a right under 22 GCA § 3107 to overtime compensation for hours worked above forty in a work week, and if so, whether this right has been preempted by federal law.

⁵ Although the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1), mandates that employees must be paid time and one-half for hours worked in excess of forty in a single week, section 207(k) sets forth an exemption applicable to law enforcement employees. This section provides a formula for the maximum number of hours that law enforcement personnel may be required to work in a work period. Section 207(k) provides:

(k) No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities . . . if . . .

[. . .]

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C.A. § 207(k) (current through P.L. 111-202, approved Jul. 13, 2010).

Under this formula, public agencies who have adopted the section 207(k) exemption may elect to pay compensation at the overtime rate to law enforcement working on a 7-day work period after 43 hours are worked, instead of the standard forty hours. *See* 29 C.F.R. § 553.230(b) and (c) (presenting maximum hour standards for various work periods) (current through July 22, 2010).

A. Applicability of Guam Minimum Wage and Hour Act Section 3107(a) to Customs Officers

[12] Custom Officers allege that their statutory right to overtime compensation under 22 GCA § 3107 has been violated. Appellant's Br. at 7, 12 (Mar. 15, 2010). The interpretation of a statute is a legal question subject to de novo review. *Apana v. Rosario*, 2000 Guam 7 ¶ 9. "In cases involving statutory construction, the plain language of a statute must be the starting point." *Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23, cited in *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6. In looking at the statute's language, the court's task is to determine whether or not the statutory language is plain and unambiguous. *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6 (citation and quotation omitted). This is determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (citation and quotation omitted).

[13] Where exemptions are specified in a statute, the court will not imply additional exemptions unless there is a clear legislative intent to the contrary. *See, e.g., Sierra Club v. State Bd. of Forestry*, 876 P.2d 505, 515 (Cal. 1994); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). This is particularly true when construing remedial legislation, for in such cases exceptions are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation. *See, e.g., Drinkwitz v. Alliant Techsystems, Inc.*, 996 P.2d 582, 587 (Wash. 2000) (citation omitted); *Hodgson v. Colonnades, Inc.*, 472 F.2d 42, 47 (5th Cir. 1973).

[14] We start with the plain language of the Guam Minimum Wage and Hour Act. Section 3107(a), as amended by Public Law 11-83, sets forth the general rule prohibiting any employer

from employing an employee in excess of forty hours per week, without providing overtime compensation at one and one-half times the employee's regular wage:

No employer shall employ any employee in excess of forty (40) hours a week, unless such employee receives compensation for employment in excess of such weekly hours, at a rate not less than one and one-half (1-1/2) times the regular rate at which he is employed.

22 GCA § 3107(a) (2005) (emphasis added). "Employee" as used in section 3107 is defined broadly in 22 GCA § 3104(4) to exempt only certain individuals employed in agriculture and in domestic employment in or about a private home. *See* 22 GCA § 3104(4) (2005). The same section defines an "employer" to include entities and instrumentalities of the Government of Guam:

Employer includes any individual partnership, association, corporation, business trust, legal representative, government entity or instrumentality, or any organized group of persons, acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States Government, except when engaged in non-appropriated fund activities.

22 GCA § 3104(3) (2005) (emphasis added).⁶

[15] Customs Officers qualify as "employees" and the Guam Customs and Quarantine Agency qualifies as an "employer" under section 3104. In addition, a "week" is defined in section 3104(7) to mean "any period of seven (7) consecutive days." 22 GCA § 3104(7) (2005). We conclude from these definitions in section 3104 that section 3107, by its terms, applies to prevent GCQA from employing Customs Officers in excess of forty hours in seven days, without

⁶ The former definition of an "employer" included an exception where the Government of Guam was the employer:

... any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, acting directly or indirectly in the interest of an employer in relation to an employee, but *shall not include the Government of Guam* or the United States Government.

GC § 46003(3) (1970) (emphasis added.). However, that section was amended by P.L. 11-167, effective September 1, 1972, to provide that, as used in 22 GCA Chapter 3, "employer" includes the Government of Guam.

providing compensation at the overtime rate, unless an exemption is provided elsewhere in the statutory scheme.

[16] Management contends that the statute is silent as to whether the forty-hour work week extends to law enforcement employees, arguing that section 3107(a) “neither embraces nor rejects the 207(k) exception” and “does not refer to law enforcement employees or to anything very specific.” Appellee’s Br. at 6. However, in interpreting whether a statutory provision is ambiguous, we look to the “broader context of the statute as a whole.” *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6 (citation and quotation omitted). While section 3107(a) sets forth a general prohibition, forbidding an employer from requiring employees to work more than forty hours without paying overtime, section 3108 then specifically exempts eight classes of employees. *See* 22 GCA § 3108 (2005).

[17] In section 3108, the Legislature provides that the maximum hour requirements of the previous section “shall not apply with respect to” those employed by parent, spouse or child (section 3108(a)); administrators, executives and professionals (section 3108(b)); certain individuals involved in the fishing and aquaculture (section 3108(c)); seamen (section 3108(d)); drivers of certain taxis (section 3108(e)); golf caddies (section 3108(f)); newspaper delivery persons (section 3108(g)); and certain handicapped workers, learners, and apprentices, when designated exempt by the Wage and Hour Commissioner. 22 GCA § 3108(h).⁷ These exemptions, indeed, are specific.

⁷ The Wage and Hour Commissioner is the Director of Labor. 22 GCA § 3103 (2005). The Minimum Wage and Hour Act authorizes the Commissioner to exempt certain employees from the wage and hour standards. 22 GCA §§ 3113 and 3114 (2005). However, the exemption is a narrow one that does not, by its terms or by implication extend to law enforcement officials employed by the Customs Department. Further, when providing for such exceptions, the Commissioner is authorized to do so “by regulations, after a public hearing at which any person may be heard, and subject to the approval of the Governor and promulgation by Executive Order[.]” 22 GCA §§

[18] We adhere to the principle of statutory construction that, where exemptions are specified in a statute, we will not imply additional exemptions unless there is a clear legislative intent to the contrary. *See, e.g., Sierra Club*, 876 P.2d at 515; *Andrus*, 446 U.S. at 616-17. Such intent to provide an exemption may be inferred when the Legislature has enacted another statute expressly establishing a work period inconsistent with 22 GCA § 3107. For example, the Guam Legislature created a 106-hour work period for active duty firefighters in 4 GCA § 6219(a) (2005). This provision states in relevant part that “[n]otwithstanding any other law, rule, or regulation, firefighters . . . shall be compensated at the regular hourly rate of pay at one hundred six (106) hours per pay period.” 4 GCA § 6219(a) (2005). By establishing that firefighters receive only the regular rate of pay for 106 hours per pay period, notwithstanding any other law, the Legislature has plainly expressed its intent to exempt active duty firefighters from the forty-hour workweek established in 22 GCA § 3107, even though the Legislature has not amended the text of 22 GCA § 3107 itself to reflect this exemption.

[19] No comparable statute establishes a work period for law enforcement other than the standard forty-hour workweek. Management contends, “[i]f the Legislature disagreed with this policy [adopting the section 207(k) exemption], it could have overturned E.O. 96-08 many years ago.” Appellee’s Br. at 7. Management, without citation to any relevant precedent, invites us to create a new rule of statutory construction, whereby the court would infer the meaning of the Guam Minimum Wage and Hour Act’s plain text from the Legislature’s subsequent failure to pass another law. We decline to do so.

3113 and 3114 (2005). Thus, the statutory scheme contemplates that exemptions created by the Commissioner be promulgated as regulations, after a public hearing, and subject to the Governor’s approval.

[20] Moreover, when construing remedial legislation, we narrowly construe exceptions and apply them only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation. *See, e.g., Drinkwitz*, 996 P.2d at 587 (citation omitted); *Hodgson*, 472 F.2d at 47. The declared policies of the Minimum Wage and Hour Act, 22 GCA § 3101 *et seq.*, are primarily remedial: to establish minimum wage and maximum hour standards at levels consistent with the public health, efficiency and general well-being of workers; to safeguard existing minimum wage and maximum hour standards from the effects of “serious and unfair competition”; and (c) to increase employment opportunities. 22 GCA § 3102 (2005).

[21] In summary, the Legislature, in three separate places, has created exceptions or exemptions to the maximum hour requirements set forth in section 3107, but has never set forth an exemption for law enforcement personnel. *See* 22 GCA §§ 3104 and 3107 (2005); 4 GCA § 6219 (2005). Where, as here, the Legislature has enacted remedial legislation setting forth a general rule, and has expressly created a list of exemptions or exceptions, we will not lightly presume an exception that has not been set forth by the Legislature. Section 3107 establishes that GCQA Customs Officers who do not fall into one of the exemptions or exceptions that the Legislature has provided by statute (such as the exemption for those employed in an administrative, professional, or executive capacity) must be paid overtime at the rate of one and one-half times their hourly rate of pay for all hours worked over forty per week.

B. Section 207(k) of the federal Fair Labor Standards Act

[22] Having determined that the Guam Minimum Wage and Hour Act affords Customs Officers a right to compensation at the overtime rate for hours worked above forty in one workweek, we next consider Management’s contention that the Governor, via executive order,

implemented a federally-permissible exemption to the federal Fair Labor Standards Act raising the maximum hours per workweek for Customs Officers to 43 hours. Adopting Management's argument would be equivalent to finding that the Governor, by executive order, may override employee protections established by Guam law that are stronger than those afforded by federal law. The only possible way such a finding could be warranted would be if federal law, supreme on this issue, preempts the applicable local law.⁸

[23] No such preemption is present in the instant case. The plain text of the Fair Labor Standards Act (FLSA) explicitly allows states to set stronger wage and hour regulations than those established in the FLSA. 29 U.S.C.A. § 218 (current through P.L. 111-202). Section 218 provides in relevant part:

No provision of this chapter . . . shall excuse noncompliance with any . . . State law . . . establishing . . . a maximum work week lower than the maximum workweek established under this chapter. . . .

29 U.S.C.A. § 218(a); *see also Maccabees Mut. Life Ins. Co. v. Perez-Rosado*, 641 F.2d 45, 46 (1st Cir. 1981) (“The FLSA does not expressly prohibit state legislation in the area of wages and working conditions. To the contrary, it (FLSA) specifically contemplates state regulation of labor conditions.”) (quotation and citation omitted).

[24] Section 218 of the FLSA permits the Guam Legislature to enact law more favorable to the employee than the federal Fair Labor Standards Act. *See Maldonado v. Int’l Bus. Machs.*

⁸ In its Decision and Order denying the permanent injunction, the Superior Court stated that both parties agree that the FLSA does not preempt applicable territorial law addressing minimum wage, overtime, or compensatory time off, where the territorial law is more favorable to employees. ER, tab 9 at 3 (Dec. & Order, Oct. 16, 2009). However, the court failed to make a determination as to whether 22 GCA § 3101 *et seq.* by its terms was more favorable to Customs Officers. *Id., passim*. The Superior Court’s holding, that the Governor lawfully enacted the federal section 207(k) exemption for law enforcement via E.O. 96-08, either construed section 3107 of the Guam Minimum Wage and Hour Act as not applying to law enforcement, or relied on an implicit finding that the territorial statute was preempted by federal law.

Corp., 56 F.R.D. 452, 455 (D. Puerto Rico 1972). The FLSA establishes a “national floor” that states are free to exceed. *Pac. Merch. Shipping Ass’n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990). Indeed, “every Circuit that has considered the issue has reached the same conclusion—state overtime wage law is not preempted by . . . the FLSA.” *Overnite Transp. Co. v. Tianti*, 926 F.2d 220, 222 (2d Cir. 1991), *cert. denied*, 502 U.S. 856 (1991). The section 218 reference to “state law” includes Guam Territorial law, since “State” is defined under the FLSA to mean “any State of the United States or the District of Columbia or any Territory or possession of the United States.” 29 U.S.C.A. § 203(c) (current through P.L. 111-202).

[25] It appears to be uncontested that the “national floor” for law enforcement working on a 7-day workweek schedule is 43 hours.⁹ See 29 C.F.R. § 553.230(b) and (c). As articulated above in section A, Guam law is more favorable to employees than the FLSA, establishing a right to overtime compensation for every hour worked above a forty-hour workweek and setting forth no law enforcement exemption. Applying section 218 of the FLSA, we find that Guam statutory law, not section 207(k), controls the employer’s duty in this case. Section 218 establishes that the FLSA cannot be the basis of the Governor’s authority to enact the section 207(k) exemption,

⁹ The FLSA, 29 U.S.C.A. § 207(a)(1), requires private employers to compensate an employee at a rate of not less than one and one-half times the employee’s regular rate for all hours worked above forty per week, which is the same 40 hour workweek established by 22 GCA § 3107 for government entities or instrumentalities as employers in Guam. The FLSA permits states to adopt an exemption for public agencies with employees engaged in fire protection and law enforcement activities, for whom maximum hours may be averaged over work periods of between seven and twenty-eight consecutive days. 29 U.S.C.A. § 207(k); 29 C.F.R. § 553.230. Where this exemption has been adopted, law enforcement employees who have a work period of at least seven but less than 28 consecutive days are not entitled to overtime compensation (at the rate of one and one-half times the regular rate) until the number of hours worked exceeds 6.11 hours per day. 29 C.F.R. § 553.230(c). Thus, if the work period is seven days, overtime compensation is due only after the employee has worked more than 43 hours; if the work period is 28 days, overtime compensation is not due until the employee works more than 171 hours. 29 C.F.R. § 553.230(b) and (c).

where, as here, applicable local law establishes stronger wage and hour protections for employees.

C. Executive Order 96-08

[26] We next consider whether the Superior Court correctly interpreted and applied E.O. 96-08 when it determined that the Governor, via this order, sought to implement the federal section 207(k) exemption. Management asserts that E.O. 96-08 authorized Guam agencies employing law enforcement personnel to implement the federal section 207(k) law enforcement exemption. Appellee's Br. at 4. Customs Officers contend that E.O. 96-08, as construed by Management, is in direct conflict with Guam law and must be struck down as inorganic. Appellant's Br. at 10.

1. The text and purpose of E.O. 96-08

[27] The construction of an executive order presents an issue akin to an issue of statutory interpretation, where it presents a question of law for our independent review on appeal. *See City of Morgan Hill*, 13 Cal. Rptr. 3d at 431. As is true of interpretation of statutes, “[w]e start with the language of the Order.” *Amer. Fed’n of Gov’t Employees v. Fed. Labor Relations Auth.*, 204 F.3d 1272, 1275 (9th Cir. 2000). The language “cannot be read in isolation.” *Aguon*, 2002 Guam 14 ¶ 9. Statutory language “must be examined within its context,” which “includes looking at other provisions of the same statute and other related statutes[.]” *Id.* (emphasis added). The text must be construed consistently with the Order’s object and policy. *See People v. Quichocho*, 1997 Guam 13 ¶ 5; *see also Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 830 (9th Cir. 1996).

[28] Executive Order 96-08 is presented in its entirety as an appendix to this opinion. The operative provisions of E.O. 96-08 are as follows:

1. Executive Order 90-05 is rescinded.
2. Uniformed law enforcement personnel or police officers not employed in an administrative, executive, or professional capacity . . . may accrue compensatory time off in accordance with the provisions of the Federal Fair Labor Standards Act.
3. Uniformed law enforcement personnel or police officers shall work on a [s]even (7) day work cycle, as provided for in the Federal Fair Labor Standards Act.

ER, tab 3, Ex. B at 5 (E.O. No. 96-08, Mar. 21, 1996).

[29] Executive Order 96-08 was signed and promulgated by Governor Carl T. C. Gutierrez on March 21, 1996. Subsection (3) provides that “[u]niformed law enforcement personnel or police officers shall work on a [s]even (7) day work cycle, as provided for in the Federal Fair Labor Standards Act.” *Id.* Management interprets this reference to the FLSA’s seven-day work cycle as implementing the federal section 207(k) exemption for law enforcement. *See Appellee’s Br.* at 4. The plain text permits Management’s interpretation, but also could be construed as clarification that law enforcement personnel accruing compensatory time off, as provided in subsection 2, will do so on the basis of a seven-day work cycle, and that such a workcycle is permissible under federal law. In short, the meaning of the reference to the FLSA’s seven-day work cycle, standing alone, is ambiguous.

[30] The ambiguity disappears when the text of this subsection is considered not in isolation but rather in the context of the entire order. *See E.O. 96-08.* The object and policy of E.O. 96-08 can be directly inferred from its text by reading the operative sections in tandem with the order’s title and four prefatory paragraphs. *Id.* The title suggests that the main object of the order is to permit law enforcement to accrue compensatory time off: “Relative to allowing *compensatory time off* for law enforcement personnel or police officers who are not employed in an

administrative, executive, or professional capacity.” *Id.* (emphasis added). This title makes no reference to changing the overtime rate of pay.

[31] In addition, three of the four introductory paragraphs explicitly reference compensatory time off, but make no reference to the overtime rate of pay. The first paragraph acknowledges that the Federal FLSA permits the accrual of a maximum of 480 hours of compensatory time off for law enforcement personnel, on a 7-day work cycle. *Id.* The third paragraph provides historical context, acknowledging that the previous order E.O. 90-05 (rescinded by subsection 1) restricted law enforcement personnel “from accruing any compensatory time off[.]” *Id.* The fourth paragraph states that it is desirable to standardize personnel policies and payment practices throughout the government, and “thereby allow the accrual of compensatory time off for law enforcement personnel . . . up to a maximum of 480 hours, in conformity with the Federal Fair Labor Standards Act.” *Id.*¹⁰

[32] Furthermore, we read the statement in subsection 2, that compensatory time off may be accrued “in accordance with the provisions of the Federal Fair Labor Standards Act,” as establishing that compliance with the federal minimum wage and hour requirements governing accrual of compensatory time-off is still mandatory. *Id.* These requirements are set forth in FLSA section 207(o), which entitles employees who elect compensatory time off in lieu of

¹⁰ The remaining paragraph, paragraph 2, explains why the executive order only permits accrual of compensatory time off for those law enforcement personnel who are not employed in an administrative, executive, or professional capacity—such policy is consistent with that of a previous Executive Order 95-11, which standardized overtime compensation throughout the government of Guam and specified that administrative, executive, or professional personnel would not receive any overtime compensation.

overtime pay to 1.5 hours of compensatory time off for every hour worked in overtime. *See* 29 U.S.C.A. § 207(o).¹¹

[33] Reading all the provisions together, E.O. 96-08 is sensibly construed as permitting law enforcement to accrue compensatory time off on a seven-day work cycle, so long as the compensatory time off in lieu of overtime pay is provided at the 1.5 hour to 1 hour rate, as required by federal law. This construction is further supported by the fact that comprehensive personnel rules and regulations, adopted by the Director of Administration, approved by the Civil Service Commission, and promulgated by executive order of the Governor in E.O. 96-24 just seven months after E.O. 96-08 was issued, include no reference to a 43-hour workweek for law enforcement personnel, but do refer to the maximum number of hours of compensatory time that may be accrued by law enforcement personnel. *See* E.O. 96-24, “Relative to adopting and promulgating the Department of Administration’s personnel rules and regulations governing the rights, conduct, and obligations of employees and responsibilities and actions of management,” Oct. 1, 1996.

[34] On October 1, 1996, the Government of Guam implemented new Personnel Rules and Regulations after “a rigorous and lengthy process, which included public hearings and scrutiny by many groups and individuals[.]” E.O. 96-24. The Executive Order required all agencies to adopt the new personnel rules, stating “[u]nless contrary to statute, all autonomous departments and agencies are hereby required to adopt the Department of Administration’s Personnel Rules

¹¹ To meet the federal standards for providing this compensation, the employer must arrive at an agreement or understanding with employees that compensatory time will be granted instead of cash compensation. 29 U.S.C.A. § 207(o)(2)(A) (current through P.L. 111-202); 29 C.F.R. § 553.23 (1999). Such an agreement or understanding need not be formally reached and memorialized in writing, but instead can be arrived at informally, such as when an employee works overtime knowing that the employer rewards overtime with compensatory time. *Christensen v. Harris County*, 529 U.S. 576, 579 n.1 (2000) (referring to 29 C.F.R. § 553.23(c)(1) (1999)).

and Regulations (“Rules”) to promote uniformity and consistency concerning personnel rules and regulations throughout the Executive Branch.” *Id.* The Rules explicitly superseded any previous orders to the contrary, with E.O. 96-24 stating “[a]ll prior rules, regulations, policies, memoranda or Executive Orders in conflict with this Executive Order are hereby rescinded to the extent of any conflict.” *Id.*

[35] Rule 7.401 refers to the standard forty-hour workweek. DOA Personnel Rules and Regulations, promulgated by E.O. 96-24, Oct. 1, 1996. In the next section, governing “Occurrence of Overtime Work,” the regulations provide that:

[t]he appointing authorities shall hold hours worked by their employees to the government of Guam’s established 40 hour workweek (106 hours maximum work period standard for fire protection personnel) standard, except in those cases where excessive hours of work are necessary because of weather conditions, necessary seasonal activities or emergencies.

DOA Personnel Rules and Regulations, Rule 7.402(B). Although the Rules include a reference to the alternate 106-hour workweek for fire protection personnel, they include no reference to any alternate workweek for law enforcement.

[36] Rules governing compensatory time off in lieu of overtime pay are also included. An employee may not waive his or her right to overtime for hours worked over forty hours except as provided in Rule 7.405, “Compensatory Time Off in Lieu of Overtime Pay.” DOA Rule 7.404(D). Rule 7.405 establishes that compensatory time credit at the rate of 1.5 hours to each hour of overtime worked may be earned “by mutual agreement” between the employee and management before work is performed. DOA Rule 7.405(A) and (B).¹² However, employees engaged in law enforcement or firefighting work may accrue no more than 480 hours of

¹² This tracks the federal requirement that employer and employee reach an agreement or understanding, set forth in 29 U.S.C. § 207(o)(2)(A) and discussed above.

compensatory time, while all others may accrue no more than 240 hours. DOA Rule 7.405(C). Finally, in the event any rule or regulation is in conflict with a statute, the statute shall prevail to the extent of inconsistency. DOA Rule 1.600. These DOA Rules, enacted by the same administration the same year that E.O. 96-08 was enacted, support our construction of E.O. 96-08 as permitting law enforcement personnel to accrue compensatory time off, rather than establishing the 43 hour workweek for law enforcement.

[37] In light of the foregoing analysis, we hold that E.O. 96-08 did not implement section 207(k) of the FLSA, but rather established that uniformed law enforcement personnel on Guam could accrue compensatory time off, earned on the basis of a seven-day work cycle. The Superior Court erred when it applied E.O. 96-08 to deny Customs Officers declarative and injunctive relief. On remand, the Superior Court should determine the amount of unpaid compensation at the overtime rate to which plaintiffs are entitled. This determination must take into account the extent to which GCQA employees, pursuant to a voluntary overtime policy, agreed to accept, in lieu of wages, compensatory time off at the rate of 1.5 hours to each hour of overtime worked. An employee is not entitled to an award of unpaid wages for overtime where he or she volunteered to accept compensation in the form of compensatory time off. Furthermore, to the extent an employee has already received compensatory time off at the requisite rate in lieu of wages, the employee's Minimum Wage and Hour claim must be offset by that amount.¹³

¹³ Similarly, this opinion should not be construed to entitle an employee to any additional compensation for overtime hours in which the employee performed carrier off-duty services pursuant to 4 GCA § 6220 (which provides compensation at the rate of three times the officer's hourly wage for the first hour of service, and one and one half times the hourly rate of pay for each hour thereafter).

2. Management's Interpretation of E.O. 96-08

[38] In declining to adopt Management's proposed interpretation of the Executive Order, we are mindful that courts in certain instances give deference to an agency's interpretation of an executive order it is charged with administering. *See, e.g., American Fed'n of Gov't Employees*, 204 F.3d at 1275.

[39] We have stated that if a statute is silent or ambiguous, we "defer to the agency's reasonable interpretation of the statute." *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 17. We afford deference to an agency's interpretation of a statute when the agency has specialized knowledge in the area, but accord the agency interpretation less weight where technical knowledge is not necessary in interpreting a statute. *Id.* ¶ 18. If, however, an agency's construction of a statute is contrary to clear congressional intent or frustrate[s] the policy that Congress sought to implement," then the court "must reject those constructions." *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10.

[40] Assuming without deciding that these same principles of deference apply when we interpret an executive order, we would accord some deference to the Department of Administration's reasonable interpretation of an executive order implementing personnel rules the agency is in part charged with administering. However, the agency's interpretation must still be reasonable. *See Carlson*, 2002 Guam 15 ¶ 17; *Kester v. Campbell*, 652 F.2d 13, 15-16 (9th Cir. 1981) ("All that is required is that the interpretation adopted by the agency be reasonable."). In this case, we reject as unreasonable Management's interpretation of the Executive Order. Its language, read as a whole, and interpreted in light of its object and policy, permits but one reasonable interpretation: that its purpose was to permit law enforcement to accrue compensatory

time off. Moreover, as discussed in section B, above, Management's interpretation would turn on its head the relationship between the FLSA and the Guam Minimum Wage and Hour Act. Furthermore, it would violate the Organic Act's requirement that an executive order not conflict with applicable law.

[41] The Organic Act establishes that the Governor is "responsible for the faithful execution of the laws of Guam and the laws of the United States applicable in Guam." 48 U.S.C.A. § 1422, cited in *People v. Cruz*, No.83-00001A, 1983 WL 29956, at *2 (D. Guam App. Div. Sept. 13, 1983). The Organic Act expressly authorizes the Governor to issue executive orders, but also limits the scope of that authority, stating that the Governor "shall have the power to issue executive orders and regulations *not in conflict with any applicable law.*" 48 U.S.C.A. § 1422 (emphasis added). If an executive order directly conflicts with applicable statutory law, the order is inorganic and invalid. *In re Camacho*, 2004 Guam 10 ¶ 61; *cf. Bell v. Luis*, 528 F. Supp. 846-51 (D.C.V.I. 1981) (stating that an executive order promulgated by the governor of the Virgin Islands was inorganic and consequently null and void when it conflicted with existing legislation).

[42] As discussed in section A, above, the Guam Minimum Wage and Hour Act includes no law enforcement exemption and by its terms applies to GCQA Customs Officers, establishing their right to compensation at the overtime rate for every hour worked over forty hours in a workweek. We will not defer to Management's interpretation that would create a direct conflict

between Guam's law and E.O. 96-08, rendering the executive order inorganic, where the order's plain text demands a different, reasonable interpretation.¹⁴

[43] Because we have found that the Superior Court erred in its interpretation of 22 GCA § 3107 and Executive Order 96-08, it is unnecessary to consider Customs Officers' contention, in the alternative, that the Superior Court erred in rescinding its May 27, 2009 Partial Permanent Injunction. *See* Appellants' Br. at 12.

D. Attorneys Fees, Costs, and Interest

[44] Customs Officers contend that, on remand, they are entitled to reasonable attorney's fees and costs, not to exceed ten percent of the recovery, as well as statutory interest. The Government concedes that the question of attorney's fees "hinges entirely on the success of Plaintiffs' case. If they succeed on the merits, they may get fees." Appellee's Br. at 10, citing 4 GCA § 6221.1. Accordingly, the Superior Court on remand shall award attorney's fees to Customs Officers.¹⁵

¹⁴ Management also contends that a local government may adopt the federal section 207(k) administratively. *See* Appellee's Br. at 7, citing *Barefield v. Winnetka*, 81 F.3d 704, 709-10 (7th Cir. 1996) and *Lamon v. City of Shawnee*, 972 F.2d 1145 (10th Cir. 1992). The cited cases support the contention that FLSA exemptions may be adopted administratively. However, this argument misses the mark, for it fails to demonstrate that the federal exemption may be adopted administratively in a jurisdiction where the federal exemption conflicts with local statutory law establishing stronger protections for employees.

¹⁵ Section 6221.1, cited by Customs Officers as the basis for their entitlement to costs, does not explicitly award costs to the prevailing plaintiff. *See* 4 GCA § 6221.1 (2005). On the other hand, the Wage and Hour Act, 22 GCA § 3117, includes a provision for collection of unpaid wages. Subsection 3 provides that an action to recover compensation for which an employer is liable pursuant to section 3105 or section 3107 may be maintained by any one or more employees, on behalf of himself or themselves and other employees similarly situated. 22 GCA § 3117(3) (2005). In the event plaintiffs prevail, "the court *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." *Id.* If on remand the Customs Officers state a cause of action pursuant to 22 GCA § 3117(3), they are entitled to costs as a matter of right.

[45] Customs Officers also seek statutory interest for unpaid overtime compensation pursuant to 4 GCA § 6221, the statute governing interest on late overtime payments for public officers and employees. Appellant's Br. at 12. Section 6221 provides:

Any overtime not paid an employee within fifteen working days after a request for payment is submitted shall earn interest at the rate of ten percent (10%) per annum from the date due until the date paid the employee at the same time he receives his payment for overtime.

4 GCA § 6221 (2005).

[46] The Government does not address the question of statutory interest on appeal. Neither party has presented evidence in the record of when a "request for payment" was submitted by an employee, nor have the parties addressed in their brief the legal question of whether the filing of the complaint, without more, should be construed as a request for payment. Determination of this issue in this appeal would be premature and we remand this for determination by the Superior Court.

IV. CONCLUSION

[47] Having determined that 22 GCA § 3101 *et seq.* is applicable to the Customs Officers' claims, that the federal FLSA does not preempt applicable Guam law more favorable to employees, and that E.O. 96-08 did not implement the FLSA section 207(k) exemption for law enforcement personnel, we hold that the Guam Customs and Quarantine Agency violated the Guam Minimum Wage and Hour Act when it stopped paying Customs Officers compensation at the overtime rate of pay for every hour worked above forty hours in a workweek. The Superior Court abused its discretion when it denied the Customs Officers' request for injunctive and declaratory relief based on an erroneous interpretation of the Guam Minimum Wage and Hour Act, the FLSA, and E.O. 96-08. The order denying Customs Officers' request for injunctive and

declaratory relief is therefore **REVERSED**. We **REMAND** the matter for further proceedings consistent with this opinion.

Original Signed : F. Philip Carbullido

By
F. PHILIP CARBULLIDO
Associate Justice

Original Signed : Katherine A. Maraman

By
KATHERINE A. MARAMAN
Associate Justice

Original Signed : Robert J. Torres

By
ROBERT J. TORRES
Chief Justice

Appendix: E.O. 96-08



TERRITORY OF GUAM
OFFICE OF THE GOVERNOR
AGAÑA, GUAM 96910
U. S. A.

EXECUTIVE ORDER NO. 96-08

RELATIVE TO ALLOWING COMPENSATORY TIME OFF FOR LAW ENFORCEMENT PERSONNEL OR POLICE OFFICERS WHO ARE NOT EMPLOYED IN AN ADMINISTRATIVE, EXECUTIVE, OR PROFESSIONAL CAPACITY.

WHEREAS, the Federal Fair Labor Standards Act allows for accrual of a maximum of 480 hours of compensatory time off for law enforcement personnel, as well as a Seven (7) day work cycle; and

WHEREAS, Executive Order 95-11 standardized overtime compensation throughout the government by specifying administrative, executive, or professional personnel do not receive overtime payment, in accordance with the Federal Fair Labor Standards Act; and

WHEREAS, Executive Order 90-05 provides for law enforcement personnel to be paid overtime compensation for hours worked in excess of Forty (40) hours per week, however, restricts law enforcement personnel from accruing any compensatory time off; and

WHEREAS, it is desirable to further standardize personnel policies and payment practices throughout the government, and thereby allow the accrual of compensatory time off for law enforcement personnel or police officers not employed in an administrative, executive, or professional capacity up to a maximum of 480 hours, in conformity with the Federal Fair Labor Standards Act;

NOW, THEREFORE, I, CARL T.C. GUTIERREZ, Governor of Guam, by virtue of the authority vested in me by the Organic Act do order:

1. Executive Order 90-05 is rescinded.
2. Uniformed law enforcement personnel or police officers not employed in an administrative, executive, or professional capacity or whose position titles are not listed in Attachment I of Executive Order No. 95-11 may accrue compensatory time off in accordance with the provisions of the Federal Fair Labor Standards Act.

Executive Order No. 96-08
Compensatory Time Off for
Law Enforcement Personnel
or Police Officers
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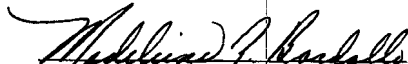


3. Uniformed law enforcement personnel or police officers shall work on a Seven (7) day work cycle, as provided for in the Federal Fair Labor Standards Act.

SIGNED AND PROMULGATED at Agana, Guam this 21st day of March, 1996.


CARL T. C. GUTIERREZ
Governor of Guam

COUNTERSIGNED:


MADELEINE Z. BORDALLO
Lieutenant Governor of Guam