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OAGHB: 2018-18

Rep. Ivan Blanco
Chairperson
Committee on Judicial &Governmental Operations
House of Representatives
20th Northern Marianas Commonwealth Legislature
Saipan, MP 96950

Re: HB 20-155 (citizen-centric report requirement); HB 20-157 (establishment of a Commonwealth retirement plan); HB 20-158 (medical leave for pregnancy and prenatal leave); and SB 20-51 SD1 (zero tolerance one strike rule for law enforcement positive drug test)

Dear Chairman Blanco:

Thank you for the opportunity to comment on HB 20-155 (citizen-centric report requirement); HB 20-157 (establishment of a Commonwealth retirement plan); HB 20-158 (medical leave for pregnancy and prenatal leave); and SB 20-51 SD1 (zero tolerance one strike rule for law enforcement positive drug test).

I have reviewed the versions of the bills that were attached to your March 14, 2018 letter and offer the following comments for your Committee's consideration.

1. HB 20-155:

The bill proposes to require all government departments and agencies to submit an annual citizen-centric report of their activities. The reports would be submitted to the Office of the Public Auditor and the presiding officers of the legislature in an electronic file. Every department and agency must also post the report on their respective websites; the reports must also be posted on the websites of the Office Governor, the CNMI Legislature, and the Office of the Public Auditor.

Patterned after a Guam statute, the bill goes further by proposing to impose a civil penalty of $50 to be assessed for each day that the government department or agency fails to submit the report. A second violation would double the fine to $100. The fine would be paid to the Office of the Public Auditor. Because the fines would be paid from the annual funding appropriated to the department or agency, the Committee

should consider whether imposing such a fine should be imposed, an alternative enforcement plan would be more feasible, or whether a penalty provision is at all warranted.

2. HB 20-157:

Although the proposed bill does not present a constitutional issue, there are several considerations that the Committee must weigh before reporting HB 20-157 for approval. First, whether the Commonwealth can afford another defined benefit retirement system given the fiscal crisis at the NMIRF which led to the creation of the Settlement Fund under the jurisdiction of the federal District Court. The Settlement Agreement reached in *Johnson v. Inos*, Civ. No. 09-00023 requires the Commonwealth Government to remit minimum annual payments until the death of the last settlement class member; in FY 2018 the minimum annual payment is $45 million in addition to a supplemental payment if the minimum annual payment is less than 17% of Commonwealth's total annual revenues. Although subsequent payments after FY 2018 will be reduced by $1 million each subsequent year, the annual outlay to the SF remains a significant portion of our annual budget. On top of the obligations to the SF, the Commonwealth Government has longstanding payments private landowners for land acquisition. Other obligations include the health and safety services and infrastructure of the Commonwealth Healthcare Center, the Commonwealth Utilities Corporation, and the Department of Public Works, Public School System, and the Department of Public Safety. Tacking on another government obligation, such as a new defined benefit retirement system, will divert much needed resources away from basic health and safety services and infrastructure funded by the Commonwealth.

Rather than establish a new defined benefit program outright, the Legislature should consider funding a comprehensive fiscal assessment and evaluation of the existing defined contribution plan which is voluntary. The study would also examine whether a new or supplemental retirement plan should replace the current one. As the Bill acknowledges, government pension rights are constitutionally protected. Without adequate information to guide lawmakers on the fiscal impact of this new plan, the bill, if enacted into law, may end up being another pension fiasco for the Commonwealth.

3. HB 20-158:

Patterned after Guam's statute (GCA § 4107 and 4107.1), the Bill proposes enhanced paid leave for female employees for medical conditions related to pregnancy or childbirth. The Bill, if enacted into law, raises a sex discrimination issue under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (Title VII). Statutory classifications that distinguish between males and females are subject to heightened scrutiny. See, *e.g.*, *Craig v. Boren*, 429 U.S. 190, 197–199, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). To withstand such scrutiny, the classification must serve important governmental objectives. *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (citations and internal quotation marks omitted). Further, gender-based discrimination must be substantially related to those objectives. *Id.* A state's justification for such a classification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* As to childrearing leaves, the federal Third Circuit Court of Appeals has held that allowing childrearing leave for female employees, but not for male

employees, without a showing of disability related to pregnancy or child bearing, contravened Title VII. *See Schafer v. Board of Pub. Education of the School District of Pittsburgh*, 903 F.2d 243 (3rd Cir. 1990) (also stating that child rearing by either parent must be on "the basis of full parity").

Although the Bill explains the objectives behind the enhanced paid leave and permits fathers, as well as mothers, to avail of parental leave, the enhanced leave for pregnancy or childbirth related medical conditions provides more generous paid leave to female employees than to male employees; the enhance paid leave would be granted without a showing of any disability to justify the paid leave. Under *Schafer*, the absence of such a requirement would constitute sex discrimination in contravention of Title VII. The Committee should consider amending the bill to include such a requirement.

4. SB 20-51, SD1:

The Bill proposes to exempt constitutional officers from urine testing and must propose further changes to the drug testing requirement in 1 CMC § 8602 to comply with the Constitution.

The troubling language of 1 CMC § 8602 as amended by PL 20-24

The present language of 1 CMC § 8602 as amended by PL 20-24, that took effect in November 2017, requires the drug testing of 100% of "law enforcement officials," as defined in 1 CMC § 8282, regardless of the availability of funds. It includes not just Justices and Judges of the Judicial Branch and the Attorney General but also unarmed government employees who spend their entire workday behind a desk. Section 8602 is overly broad and would lead to Fourth Amendment violations for a significant number of CNMI employees. It is important to keep in mind that the Commonwealth constitutional protections are more expansive than the U.S. Constitution's Fourth Amendment. Due to this, only the Fourth Amendment issues are discussed in this analysis because violations of the CNMI Constitution are legally similar.

Unconstitutional drug testing

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."1 CMC § 8602, presently and as amended in House Bill No. 20-66, runs afoul of the current US Constitutional standards regarding the Fourth Amendment. Generally, government-required "collection and testing of urine **intrudes upon expectations of privacy** that society has long recognized as reasonable."[1] Only under special circumstances can the government require drug testing of its employees categorically. Even with the exemption of justices and judges of the Judiciary and the Attorney General, the list is so broad that many of the employees listed will not meet the special circumstances required to make drug testing mandatory.

[1] *Chandler v. Miller*, 520 U.S. 305, 313, 117 S. Ct. 1295, 1300, 137 L. Ed. 2d 513 (1997).

The current law of public employee drug testing began with the Supreme Court's decisions in *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989), and *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989). In these cases, the Court held that the government is allowed to conduct drug tests without individualized suspicion when there is a "special need" that outweighs the individual's privacy interest. In *Skinner*, the court found that public safety was such a special need. In *Von Raab*, the court found a special need in relation to customs agents who carry firearms or are directly involved in drug interdiction.

Drug tests appear universally upheld as reasonable if the employee tested has "duties fraught with such risks of injury to others that even momentary lapse of attention can have disastrous consequences."[2] Similarly, at least with regard to employees in safety sensitive positions, it is permissible to require a drug test as part of a routine employment-related medical examination, such as an annual physical.[3] By contrast, if the government cannot show a "special need" due to public safety concerns, the drug test is unconstitutional. HB 20-66 makes no effort to distinguish between safety sensitive jobs and jobs that are not affiliated with safety sensitive jobs.

Examples of job duties that the courts have found to be safety or security sensitive sufficient to warrant random drug testing include: driving passengers as United States Department of Transportation licensed drivers; operation of trucks that weigh more than 26,000 pounds; tending to or driving school children as school bus attendants and drivers; teaching at schools; armed law enforcement officials whose duties include interdiction of drugs; nuclear power plant duties; and working on gas pipelines.[4] Examples of employees whose job duties have not been sufficient to warrant drug testing according to a court include federal prosecutors who prosecute drug cases, political candidates and judges, and library workers.[5] Also, the Supreme Court has held that the requirement to carry a firearm by an employee is a strong reason weighing in favor of suspicion-less drug testing.[6] When determining where it is constitutional to require government job drug testing, Courts will do a case-by-case analysis of the relevant job activities and expect employers to have done the same. In this case, the legislature has not made fact specific determinations about certain job duties, but simply lumped in an already defined group from a different part of the Commonwealth Code relating to death benefits.

1 CMC § 8282 only provides for death benefits in specified circumstances

The use of 1 CMC § 8262 as a working definition of "law enforcement officers" subject to mandatory annual drug testing is misplaced. Section 8262 provides a listing of law enforcement positions for which death benefits would be paid to their respective survivors; the benefits would be paid out only if the law enforcement officer listed in Section 8262 "die[s] as the direct and proximate result of a personal injury

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[2] *Am. Fed'n of State, Cty. & Mun. Employees Council 79 v. Scott*, 717 F.3d 851, 868 (11th Cir. 2013).
[3] *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987).
[4] *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007) (licensed drivers); *Int'l Bhd. of Teamsters, v. Dep't of Transp.*, 932 F.2d 1292 (9th Cir. 1991) (large trucks); *Nat'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (employees involved in interdiction of drugs); *Jones v. McKenzie*, 628 F.Supp. 1500 (D.D.C. 1986) (school bus); *Crager v. Bd. of Educ. of Knott County*, 313 F.Supp.2d 690 (E.D. Ky. 2004) (teachers); *IBEW, Local 1245 v. United States Nuclear Regulatory Comm'n*, 966 F.2d 521 (9th Cir.1992) (nuclear power plant, gas pipelines).
[5] *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (prosecute drug cases); *Chandler v. Miller*, 520 U.S. 305 (1997) (Political candidates / judges); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (library workers).
[6] *Von Raab*, 489 U.S. at 672.

sustained in the line of duty regardless of employment status." The compilation of the list is not based on whether the officers performed safety-sensitive functions. In fact, as discussed above, a number of the job positions listed have already been ruled as ineligible for forced drug testing by courts because they are not sufficiently "safety sensitive."

As presently written and under the proposed revisions of SB 20-51, SD1, Section 8602 would not pass constitutional muster for compelled drug test because many of the officers listed are unarmed and spend their entire workday behind a desk. I recommend further revisions to Section 8602 that would impose the annual drug testing on only those officers listed in Section 8262 who perform sufficiently safety sensitive functions; regulatory authority could be given to the Civil Service Commission to identify the officers subject to testing.

Sincerely,

EDWARD MANIBUSAN
Attorney General

cc: Deputy Attorney General
All Members, House of Representatives