

財經事務及庫務局
(庫務科)

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9 May 2003

Ms Miranda Hon
Clerk to Public Accounts Committee
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Ms Hon,

**The Director of Audit's Report on the
Results of Value for Money Audits (Report No. 40)**

**Chapter 5: Subvention for Staff Emoluments
of the Legislative Council Commission**

The Director of Audit's report recommends FSTB to seek legal advice as to whether the Legislative Council Commission Ordinance, Cap. 443, confers discretionary powers on the LCC to offer contract gratuity to staff of the LegCo Secretariat at a level higher than that prescribed by the FSTB, without seeking the FSTB's prior agreement. I attach for your reference a note summarising the legal advice that we have received.

Yours sincerely,

(Ms Jennifer Chan)
for Secretary for Financial Services and the Treasury

Encl.

**A Note on the Legal Advice
on the Powers of The Legislative Council Commission
to Offer Contract Gratuity to Staff of the LegCo Secretariat**

Director of Audit has conducted a value for money audit on the subvention for staff emoluments of the Legislative Council Commission ("LCC"). Para. 5.14 of the Director of Audit's report ("the Audit Report") recommends that the Financial Services and Treasury Bureau (FSTB) seek legal advice as to whether the Legislative Council Commission Ordinance, Cap. 443 ("LCCO"), confers discretionary powers on the LCC to offer contract gratuity to staff of the LegCo Secretariat at a level higher than that prescribed by the FSTB, without seeking the FSTB's prior agreement. This note summarises the legal advice that we have received.

The powers of the LCC

2. According to our legal advice, s.10 of the LCCO provides for the powers of the LCC. The LCC may, among other powers, "employ staff in the Secretariat, and determine their numbers, grading, duties, remuneration and other terms and conditions of service" (s.10(1)(b)). The LCC may also "formulate and execute such managerial and financial policies as the Commission considers expedient to the performance of its functions" (s.10(1)(e)) and "receive and expend funds" (s.10(1)(h)).
3. The LCC is a statutory body independent of the Government (s.19) and in relation to the formulation and execution of managerial and financial policies, it shall not be "subject to any direction or control of any person" (s.17(1)), with the exception of the LegCo who may by resolution give directions of a general or specific character to the LCC in relation to the performance of its functions or the exercise of its powers (s.17(2)).
4. Though the LCC enjoys considerable statutory powers under the LCCO, those discretionary powers are not absolute or unlimited. So far as is relevant to the present problem, the LCC "shall ensure that the grading, remuneration and other terms and conditions of service of staff of the Secretariat are kept, **broadly in line** with those applicable to persons employed in the Civil Service of the Government" (s.10(2)). It is worth noting, however, that the LCCO does not require the LCC to ensure that the remuneration and other terms and conditions of the Secretariat staff are the same or no better than those employed in the Civil Service. They must only be "broadly in line" with those in the Civil Service. What is "broadly in line" is not defined in the LCCO. It is essentially a question of fact. The remuneration may therefore be fixed at a level exceeding that in the civil service and this will not infringe s.10(2) so long as the degree of excess is reasonable. Further,

the LCC may also deviate from this general requirement imposed under s.10(2) as this is "subject to the Commission's discretion to make exceptions in such cases as it sees fit". In short, the LCC enjoys considerable power in determining remuneration and other terms and conditions of its Secretariat staff.

5. However, the LCC is expected to exercise the statutory discretionary powers reasonably. The fixing of an arbitrary sum for wages without regard to existing labour conditions could amount to an improper exercise of the statutory powers. However, in the present case it appears that the LCC had carefully considered the level of payment before arriving at the decision. It cannot be said that its decision was arbitrary or otherwise irrational, though the Audit Commission has considered that on the basis of the employment market situations the LCC did not have "strong justifications" for its decision (para. 5.13 of the Audit Report).

The legal effects of FBCM No. 10/99

6. FBCM No. 19/99 does not prevail over the statutory provisions in LCCO or statutory powers enjoyed by the LCC under the LCCO. The memorandum was issued on 27 May 1999 by the then Secretary for the Treasury. It was addressed to Bureau Secretaries and Controlling Officers. (NB The Secretary General of the LCCO is designated as a Controlling Officer.) It appears to be a policy statement which "advises on the level of contract gratuity that subvented organisations may provide to their staff for the purpose of Government subvention" (para. 1). The memorandum requires the Controlling Officers to "bring this to the attention of subvented organisations under their purview" (para. 1). The memorandum also requires "the Controlling Officers to seek Finance Bureau's prior agreement in the light of financial implications involved where they support individual cases of appointment in subvented organisations providing gratuity at a level higher than the prescribed levels" (para. 7).

7. Being **administrative** in nature, FBCM No. 10/99 did not and could not override the **statutory** provisions or powers enjoyed by the LCC under the LCCO. More specifically, in determining remunerations the LCC is only obliged to ensure that they are kept "**broadly in line** with those applicable to persons employed in the Civil Service of the Government" (s.10(2)). Further, s.16(2) of the LCCO expressly provides that the Secretary General of the LCC is not required to obey such a regulation, direction or instruction which is concerned solely with the expenditure of the LCC unless the FS has consulted the LCC before it is issued. And the LCC had not been consulted in respect of the memorandum.

8. The statutory powers of the LCC under the LCC have not been reduced or otherwise prejudiced by the FBCM. Nevertheless, the FBCM might have provided guidelines for the LCC in exercising its statutory powers. And the LCC might have considered it before making a decision on the provision of contract gratuity for its non-professional and supporting staff at a higher rate.

Financial Services and Treasury Bureau
May 2003