


MINA'BENTE OCHO NA LIHESLATURAN GUÅHAN
TWENTY-EIGHTH GUAM LEGISLATURE
2005 (FIRST) Regular Session

Bill No. 186 (EC)

Introduced by:

A. B. Palacios, Sr. 

AN ACT TO STRENGTHEN EMPLOYEE RIGHTS AND DUE PROCESS IN DISCIPLINE PROCEEDINGS BY AMENDING §§4406 AND 4406.1, AND BY ADDING NEW §§4406A AND 4406.2 TO ARTICLE 4, CHAPTER 1, TITLE 4 OF THE GUAM CODE ANNOTATED, RELATIVE TO ADVERSE ACTION PROCEDURES AND APPEALS; AND TO AMEND §4408 OF TITLE 4 OF THE GUAM CODE ANNOTATED, RELATIVE TO ENFORCEMENT OF ORDERS OF THE CIVIL SERVICE COMMISSION.

BE IT ENACTED BY THE PEOPLE OF GUAM:

1 **Section 1. Legislative findings and intent.** *I Liheslaturan Guåhan* finds
2 that current employee disciplinary policies, rules, and procedures are a tremendous
3 improvement from the past disciplinary practice of 15 years ago. These policies,
4 rules, and procedures established adequate due process for employees who may be
5 under disciplinary inquiry or investigation.

6 *I Liheslaturan Guåhan*, however, finds that while there are adequate due
7 process protections for employees under disciplinary inquiry, these protections fall

1 short of giving full meaning to what these policies and procedures intend to achieve.
2 For example, the right of an employee to be represented by “a person of his/her own
3 choosing” does not apply until the disciplinary process reaches the issuance of the
4 Proposed Adverse Action/Rule CSC 11.306. By this time all questioning and
5 investigation of an employee have been completed. Charges have been formulated
6 and defined, without the assistance of a representative. Very damaging and
7 irreversible incriminating information are often times given by the employee who is
8 confused, scared, apprehensive, and uninformed of the technical disciplinary
9 processes. The issuance of the Proposed Adverse Action (PAA) sets the stage to
10 suspend, demote, or dismiss the employee.

11 *I Liheslaturan Guåhan* also finds that there are adverse actions on record that
12 have been successfully appealed due to agency non-compliance with standard, simple
13 rules such as the “60 day” statute of limitation, and the “10 day” employee answering
14 period. *I Liheslaturan Guåhan* can only imagine how many adverse actions that were
15 not appealed are technically faulty, and should have been voided. *I Liheslaturan*
16 *Guåhan* finds that while CSC is the authority and guardian of the rules and
17 regulations for adverse action, it needs to do more to protect fully the rights provided
18 for employees, because if the employee does not appeal an adverse action for any of
19 the reasons cited herein after 20 days, the adverse action is final.

1 *I Liheslaturan Guåhan* also finds that the right of an employee to appeal an
2 adverse action to the Civil Service Commission lacks spirit and commitment. While
3 the right to appeal is available, it only *is* available. CSC records will show that most
4 adverse actions are not appealed, because the employee lacks the knowledge and
5 understanding of the appeal process. The only guidance given to the employee by
6 CSC are that the employee has 20 days to file an appeal; that he/she has the right to
7 be assisted by a person of his/her own choosing. More than 95% of employees facing
8 an adverse action are “rank and file”, the bottom of the government workforce. They
9 lack knowledge and understanding of the complicated and technical adverse action
10 processes and the appeals processes. Available representation for these employees
11 are either an Attorney whose fees are beyond the reach of most employees, or a
12 voluntary CSC-trained lay representative, who are few, and who are prevented by law
13 from receiving from the employee reimbursement for expenses incurred in the course
14 of assisting the employee.

15 *I Liheslaturan Guåhan* further finds that persons delegated to represent
16 departments, agencies, or instrumentalities of the government do not have complete
17 authority to resolve matters and issues during administrative hearings, and oftentimes
18 request for recess so that the delegee may consult further with the appointing
19 authority. This condition causes delays in resolving the issue at hand. Considering
20 the always full calendar of the CSC, reconvening the hearing may be scheduled for

1 two to three months later. Yet, persons who represent the employee, right then and
2 there, may render a decision on any matter or issue.

3 *I Liheslaturan Guåhan* also finds that persons who are non-lawyers represent
4 government employees before the CSC and before a government entity on matters of
5 grievance and adverse action, and other types of personnel action. Commonly
6 referred to as “Lay Representatives”, these persons provide crucial assistance to
7 employees who are unable to secure the service of an attorney. Lay Representatives
8 communicate with Directors of agencies and departments, and facilitate discussions
9 towards the resolution of conflicts in behalf of employees. The end result is that this
10 process only strengthens the merit system and employee rights. However, lay
11 representation requires the commitment of valuable time to research, investigate, and
12 prepare a defense in behalf of the employee. Existing provision of law prevents the
13 reimbursement to Lay Representative for costs incurred and time dedicated to the
14 representation process.

15 *I Liheslaturan Guåhan* also finds that while the law provides for a
16 “reimbursement of cost and attorney’s fees” to the employee upon successful appeal,
17 it prohibits reimbursement for costs and reasonable fees incurred by a Lay
18 Representative only because the Lay Representative is not an attorney. This
19 condition seriously limits the employee’s ability to secure the assistance of a Lay
20 Representative. Government agencies when appearing before the CSC are always

1 represented by their own attorney. An employee who is appearing alone, before the
2 CSC or before the appropriate government entity, is a “sitting duck” against the
3 government attorney during the hearing process. The playing field is seriously tilted
4 in favor of the government agency. When this happens, employee rights and due
5 process become a hollow promise.

6 *I Liheslaturan Guåhan* also finds that employee grievances are handled within
7 government agencies and departments, with the opportunity to file such grievance
8 with the CSC for final resolution of the grievance if necessary. However, there is an
9 increasing practice by government agencies and departments to *ignore* decisions and
10 orders of the CSC on grievance matters, resulting in unnecessary delays and
11 additional costs to the employee in settling the grievance, absent an appeal by the
12 government agency or department of the CSC order.

13 It is the intent of *I Liheslaturan Guåhan*, therefore, to amend and strengthen
14 existing policies, rules, and procedures relative to employee disciplinary process and
15 other matters of personnel action, (a) by providing for lay representation at all
16 disciplinary inquiry proceedings, (b) by providing for an audit of all adverse actions,
17 (c) by providing for automatic appeal of all adverse actions, (d) by providing for
18 reimbursement of costs incurred and services rendered by Lay Representatives, (e)
19 by providing for delegation of *complete* authority to resolve issues, and (f) by
20 providing for sanction against government agencies and departments for non-

1 compliance with CSC orders when there is no appeal of the order filed in court by the
2 government agency or department.

3 **Section 2.** §4406 of Article 4, Chapter 1, Title 4, Guam Code Annotated, is
4 hereby *amended* to read as follows:

5 **“§4406. Adverse Action Procedures and Appeals.** (a) An employee
6 in the classified position against whom an adverse action *may* be sought, shall
7 be entitled to be represented by a person of his/her choosing before being
8 questioned. At no time may questioning of that person begin, until
9 management is sure that the person understands this right. In the event that the
10 person waived his/her right for representation at the inquiry or investigation
11 stage, management shall document such waiver in writing. Any information
12 obtained in violation of this Section shall be null and void. Any information
13 obtained as a result of the “null and void” information, shall themselves be null
14 and void.

15 (b) An employee in the classified service who is dismissed, demoted
16 or suspended shall be given immediate notice of the action, together with a
17 specific statement of the charges upon which such action is based in the
18 manner required by Article 2 of this Chapter. Copies thereof shall be filed
19 with the Commission and, if applicable, with the government entity charged
20 with hearing that person’s appeal under the personnel rules governing that

1 person's appointment not later than the working day next following the
2 effective date of the action. The Commission or appropriate entity upon
3 receiving copies of the adverse action shall immediately cause the adverse
4 action to be audited by its staff to ensure that the provisions of adverse action
5 were complied with. Upon completion of the audit, any action brought by
6 management if found to be in violation of the rules for adverse action shall be
7 voided by the Commission or by the appropriate entity, *notwithstanding that*
8 *the person has not or did not appeal the action.* In the event that the audit fails
9 to discover any violation of law or rule, and such violation is later discovered
10 by the employee within the three (3) years following the effective date of the
11 adverse action, the employee *may* submit to the Commission or appropriate
12 entity such discovery for immediate consideration. The Commission or
13 appropriate entity shall be required to accept such submittal, and consider and
14 render a decision. Any decision rendered may be appealed to the courts by the
15 employee, *notwithstanding that the appeal period has lapsed or a waiver of the*
16 *right to appeal has been submitted.*

17 (c) In no event may an employee in the classified service be given
18 notice and statement of the charges required by this Section after the sixtieth
19 (60th) day after management knew or should have known the facts or events
20 which form the alleged basis for such action. Any action brought by

1 management in violation of this Section is barred and any decision based upon
2 such action is void.

3 ~~[While an employee's appeal is pending, the employee may be~~
4 ~~suspended by the department, instrumentality or agency. The Commission or~~
5 ~~appropriate entity may order the employee reinstated to active duty during~~
6 ~~pendency of the appeal.]~~

7 (d) The employee within twenty (20) days of effective date of the
8 action, may appeal to the Commission or appropriate entity by filing that
9 person's written answer to the charges against the employee, regardless
10 whether the employee has tendered any resignations, which shall have no
11 effect upon the employee's appeal rights. In the event an employee resigns
12 before the issuance of the final notice of adverse action, the employee's twenty
13 (20) day appeal period to the Commission shall begin to run at the time the
14 employee submits the resignation, which notice of Proposed Adverse Action
15 shall be deemed a final notice of adverse action. Management may not fill the
16 employee's position until the appeal time frames or appeal, if taken, has been
17 exhausted.

18 (e) Any adverse action brought against an employee shall be deemed
19 appealed by such employee whether or not such employee actually filed a
20 written appeal within the twenty- (20-) day appeal period. However, if no

1 written appeal is actually filed after the twentieth (20th) day following service
2 of the adverse action, the Commission shall contact such employee within a
3 reasonable time to confirm if indeed the employee does not wish to appeal the
4 action. A waiver of right to appeal shall be documented. Failure of the
5 employee to file a written appeal within twenty (20) days after having been
6 contacted by the Commission or by the appropriate entity shall deem such
7 failure as a voluntary waiver of the right to appeal. In this instance, no
8 documentation from employee is necessary.

9 (f) The Commission or appropriate entity shall then set the matter for
10 hearing as expeditiously as possible. The employee, or that person's
11 representative, shall be given the opportunity to inspect any documents
12 relevant to the action which would be admissible in evidence at the hearing,
13 and to depose, interview or direct written interrogatories to other employees
14 having knowledge of the acts or omissions upon which the dismissal, demotion
15 or suspension is based. The Commission or appropriate entity may sustain,
16 modify or revoke the action taken. The decision of the Commission or
17 appropriate entity shall be final, but subject to judicial review."

18 **Section 3.** A new §4406A is hereby added to Article 4, Chapter 1, Title 4 of
19 the Guam Code Annotated, to read as follows:

1 “§4406A. **Authority to Resolve Issues.** The appointing authority of a
2 department, an agency, or instrumentality of government shall be present at all
3 hearings on appeals of adverse action; employee grievance decision; other
4 administrative hearings when the presence of the appointing authority is
5 required. The appointing authority *may* delegate to another person within his
6 or her department, agency, or instrumentality of government, the authority to
7 represent such government entity before the Civil Service Commission or
8 appropriate hearing body, provided that such delegation be in writing, and shall
9 include the *authority to resolve any matter* or issue at any stage of the hearing
10 process without the need to consult further with the appointing authority.”

11 **Section 4.** §4406.1 of Article 4, Chapter 1, Title 4, Guam Code Annotated, is
12 hereby *amended* to read as follows:

13 “§4406.1. **Attorney Fees and Costs on Appeal.** If an employee in the
14 classified service retains an attorney to represent him or her before the Civil
15 Service Commission or other applicable administrative body to challenge an
16 adverse action, grievance, post-audit investigation, or any other type of
17 personnel action brought against the employee, and the employee prevails in
18 whole or in part before the Civil Service Commission or other applicable
19 administrative body by either receiving a favorable decision from the
20 Commission or body or a withdrawal of the adverse action by the department,

1 agency or instrumentality that brought the adverse action, or resolution of
2 grievance, post-audit investigation, or any other type of personnel action
3 against the employee satisfactory to the employee, the employee shall be
4 awarded and paid, in addition to the lost salary amount, costs incurred in
5 pursuing this matter, if any, and reasonable attorney's fees because of such
6 attorney representation from funds of the department, agency or
7 instrumentality in which the employee was or is employed. This Section shall
8 apply to attorney fees and costs incurred in any appeal filed before the Civil
9 Service Commission or other applicable administrative body [~~on or after~~
10 ~~January 1, 1983~~].

11 In the event that an employee does not have an attorney before the Civil
12 Service Commission or other administrative body, and subsequently retains
13 one to represent him or her before the courts and the employee prevails, the
14 attorney shall be entitled to reasonable attorney fees."

15 **Section 5.** A new §4406.2 is hereby added to Article 4, Chapter 1, Title 4 of
16 the Guam Code Annotated, to read as follows:

17 **"§4406.2. Reimbursement for Costs and Services.** Notwithstanding
18 the provision of §9215 of Title 7, Guam Code Annotated, relative to the
19 practice of law, Lay Representatives shall be entitled to receive from the
20 employee who desires to, and retains their services, reimbursement for costs

1 for: gas, copying, services of documents, paper supplies, and other
2 miscellaneous items from the employee prior to a determination made by the
3 Civil Service Commission or appropriate entity. Lay Representatives who do
4 wish to recoup costs incurred in representing the employee, must inform the
5 employee, and the employee must agree in writing to the reimbursement of
6 costs incurred. Such costs reimbursement to the Lay Representatives by the
7 employee, shall be reimbursed to the employee by the government agency or
8 department should the employee prevail in appeal.

9 Lay Representatives may also be entitled to receive costs for personnel
10 service in the amount up to Two Hundred Fifty Dollars (\$250.00) for the
11 service rendered and approved by the Civil Service Commission or appropriate
12 entity. Acknowledging the difficulties and hardship in retaining legal
13 representation for administrative hearings, *I Liheslaturan Guåhan* finds it fair
14 that reimbursement to Lay Representatives for costs and reasonable personnel
15 services as approved by the Civil Service Commission or the appropriate
16 entity, does not constitute the practice of law as defined in §9215 of Title 7,
17 Guam Code Annotated.

18 'Lay Representative' as used in this Section shall mean a person who is
19 a non-lawyer and who is selected by the employee to represent that employee
20 at any administrative hearing in which disciplinary or other personnel action

1 against that employee may later be sought, inclusive of internal investigation,
2 grievance proceedings, post-audit investigation, proposed adverse action, final
3 adverse action, appeal of adverse action, and appeal of other adverse personnel
4 action.”

5 **Section 6.** §4408 of Article 4, Chapter 1, Title 4 of the Guam Code
6 Annotated, is hereby amended to read as follows:

7 **“§4408. Enforcement of Orders.** The Civil Service Commission may
8 seek enforcement of its decision and orders in all manners by application to the
9 Superior Court for the appropriate remedy. In seeking enforcement of its
10 decisions and orders, the application for enforcement shall be entitled, “The
11 Civil Service Commission v. (department, agency, instrumentality or officer).”
12 ~~[No enforcement shall be commenced against any department head or other~~
13 ~~employee or officer of the Government in his personal capacity.]~~ Should the
14 Civil Service Commission prevail in its enforcement, a penalty fee for failure
15 to comply with its order shall be not less than One Thousand Dollars (\$1,000)
16 as determined by the court to be paid to the Civil Service Commission. An
17 action may also be commenced against any department head or other employee
18 or officer of the Government in his or her personal capacity if there was a
19 failure to comply and no appeal against the order has been filed with the
20 courts.”