

BEFORE THE
GUAM CIVIL SERVICE COMMISSION



IN THE MATTER OF:

SALVADOR GUEVARA,

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

ADVERSE ACTION APPEAL
CASE NO. 13-AA05T

DECISION AND JUDGMENT

32-10-492
Office of the Speaker
Judith T. Wron Pat, Ed. D.
Date 6/13/13
Time 3:08 PM
Received by [Signature]

This matter came before the Civil Service Commission (the "Commission") on Salvador Guevara's ("Employee") Motion to Revoke Termination for Procedural Defects and the Port Authority of Guam Management's ("Management") Motion to Dismiss Employee's Appeal for Lack of Jurisdiction at its regularly scheduled meeting on April 23, 2013. Present for Management was its General Manager Joanne Brown and its counsel of record Michael Phillips, Esq. and John Bell, Esq. of Phillips & Bordallo, P.C. Also present were Employee and his counsel of record, Daniel S. Somerfleck, Esq. of Somerfleck & Associates, PLLC.

2013 JUN 13 PM 3:14 [Signature]

JURISDICTION

The jurisdiction of the Commission is based upon the Organic Act of Guam, 4 G.C.A. §4401 *et. seq.*, and the Port Authority of Guam's Personnel Rules and Regulations. The issue of jurisdiction was specifically challenged by Management and is discussed further below.

ORIGINAL

FACTS

1. Employee, **SALVADOR GUEVARA**, applied for the position of Accountant II pursuant to Job Announcement No. 29-11 on August 2, 2011, was hired for the position of Accountant II and began work on December 5, 2011 at the Port Authority of Guam.
2. On September 26, 2012, the Civil Service Commission (the "Commission") issued a Memorandum to the Port Authority of Guam regarding an audit investigation in *Review of Recruitment Actions Accountant II Re: Port Auth. of Guam*, 12-PA-11, which presented initial findings that Employee did not possess twenty-four (24) semester credit hours of accounting/auditing subjects as required for the Accounting ^{ant} II position.
3. As part of *Review of Recruitment Actions Accountant II Re: Port Auth. of Guam*, 12-PA-11, on October 8, 2012, Management issued a written response to the Commission's initial findings in which Management did not contest the same. At a meeting conducted by the Commission with regard to *Review of Recruitment Actions Accountant II Re: Port Auth. of Guam*, 12-PA-11 on October 18, 2012, Management again articulated that it did not contest the findings that Employee did not hold the requisite credit hours in accounting/auditing, and Management was provided ninety (90) days to present a remediation plan.
4. On December 31, 2012, following a probationary period from December 5, 2011 through June 4, 2012, while the ninety day period was pending and notwithstanding that Management had been put on notice of Employee's deficient

1 qualifications; Employee was given a permanent appointment as a classified
2 employee at the Port Authority of Guam as an Accountant II.¹

3 5. On January 17, 2013, the Port Authority of Guam cancelled the Personnel Action
4 appointing the Employee citing the Commission's finding in *Review of*
5 *Recruitment Actions Accountant II Re: Port Auth. of Guam*, 12-PA-11.

6 6. On January 23, 2013, the Employee appealed the termination.

7 ISSUES

8 Whether the Civil Service Commission has jurisdiction to hear Employee's appeal and
9 whether Management violated 4 G.C.A. §4406 when it voided Employee's position without
10 issuing an adverse action after the employee had been accepted into the classified service.

11 ANALYSIS

12 In contending that the Commission lacks jurisdiction over this matter, Management
13 argued that because the Commission had found Employee unqualified for the position of
14 Accountant II in *Review of Recruitment Actions Accountant II Re: Port Auth. of Guam*, 12-PA-
15 11, Employee was not a classified employee entitled to appeal his dismissal before the
16 Commission. In opposing Management's dismissal motion, Employee contended that
17 Management's failure to take any action with regard to his employment when it became aware of
18 his qualification deficiencies and its affirmative action in approving his permanent appointment
19 to a classified position even after it was aware of the same operate to provide him with the
20 protections normally afforded to classified employees of the government of Guam. Indeed, the
21 Guam Supreme Court has stated:

22 A member of the classified service against whom management has
23 taken a personnel action of suspension, demotion, or dismissal is
entitled to appeal the action to the Civil Service Commission as an

24 ¹ The Notice of Results of Performance Evaluation Report indicated that Employee had performed satisfactorily
25 during the probationary period and was signed by Joanne M.S. Brown as the Port Authority of Guam's General
Manager on January 7, 2013.

adverse action even if the action was not predicated upon some malfeasance or incompetency on the job by the employee.

Blas v. Civil Service Commission, 2000 Guam 12 ¶ 17. Here, the Commission finds that Employee became a classified employee by virtue of his satisfying the probationary period as evidenced by Management's issuance of a Notice of Results of Performance Evaluation Report, signed on January 7, 2013, in which Employee was given a satisfactory rating and given a permanent appointment in the position of Accountant II.

Four G.C.A. §4406 requires the Commission to void actions where management fails to take adverse action within sixty days of having known of the factual basis underlying the action. See *e.g. Drs. Richard Matheny, Robert Hall and Richard Mezzo v. University of Guam*, Adverse Action Appeal No. CY92-AA07/CY92-AA08/and CY92-AA09 (Decision and Order) dated August 26, 1993. Known as the "60 day rule," the prohibition against adverse actions outside of the sixty day period is a statutory mandate not subject to waiver, estoppel, negotiation, or equitable tolling. For purposes of the 60 day rule under 4 G.C.A. § 4406, the 60 day time period commences on the first date that Management knew or should have known the facts or events which form the basis for the action. See *Rodney T. Perez v. Department of Agriculture*, Adverse Action Case No. 0308-AA11 (Decision and Judgment) dated February 22, 2005. More recently in the matter of *Luna Dawn P. Salbino v. Department of Education*, Adverse Action Appeal Case No. 0303-AA02 dated March 16, 2006, the Commission set forth that Management must issue Final Notice of Adverse Action within 60 days after the first day of the offense commences whether or not the offense is continuing. Thus, the 60 day time period begins when the employee's superiors are in a position to take or recommend adverse action (see *Ulric J. Mark vs GDOE*, Adverse Action Appeal Case No. 0810-AA39 dated April 21, 2009).

Specifically, the Commission found that Management knew of the specific issues surrounding Employee's hiring on October 18, 2012. Management took no further action to

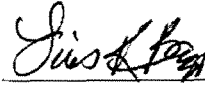
1 remove Employee from his position as Accountant II and, instead, on January 7, 2013,
2 Management signed off on giving Employee a permanent, classified appointment at the Port
3 Authority of Guam. It was not until January 17, 2013 that Management attempted to remove
4 Employee, by cancelling the personnel action that had initially documented his hiring. But this
5 action was far too late. Because Management waited 91 days from when they knew there was a
6 problem with Employee's hiring to the time that Employee was released, Employee's
7 termination is clearly a violation of the 60 day rule and is therefore barred.

8 JUDGMENT

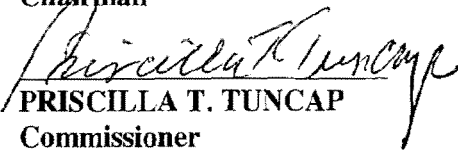
9 WHEREFORE based upon a unanimous decision of 7-0 denying Management's Motion
10 and based upon a unanimous decision of 7-0 in favor of Employee's Motion, the Commission
11 enters the following judgment:

- 12 1) That the Employee shall be immediately reinstated to his position as an
13 Accountant II with the Port Authority of Guam.
- 14 2) Employee shall receive back pay for all wages withheld from Employee during
15 the period from termination on January, 2013 until he is reinstated.
- 16 3) Employee shall be credited with all sick leave and annual leave that he would
17 have accrued during the period from termination on January 17, 2013 until he is
18 reinstated.
- 19 4) Management shall deduct Employee's retirement contribution from his back pay
20 and then pay both Employee's and Management's contributions to the
21 Government of Guam Retirement Fund during the period from termination on
22 January 17, 2013 until he is reinstated.
- 23 5) In accordance with 4 G.C.A. § 4406.1, Employee is entitled to his reasonable
24 attorney's fees and costs in the amount of \$5,087.50.


1 So ordered this 12th day of June, 2013 as determined by a vote of 7-0 on
 2 April 23, 2013.

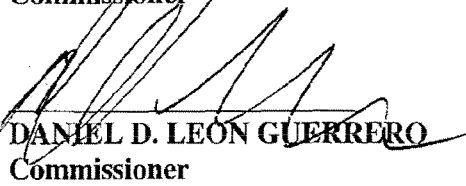
3 
 4 **LUIS R. BAZA**
 5 **Chairman**

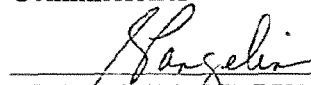

MANUEL R. PINAUIN
Vice-Chairman

6 
PRISCILLA T. TUNCAP
Commissioner

NOT PRESENT
JOHN SMITH
Commissioner

8 
LOURDES HONGYEE
Commissioner


DANIEL D. LEON GUERRERO
Commissioner

10 
EDITH C. PANGELINAN
Commissioner

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25