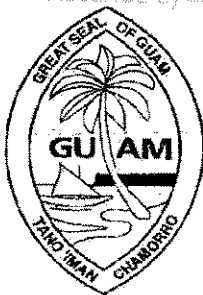


Senator Tina Rose Muffa Barnes
Date 7-31-13
Time 1:00 p.m.
Received by G. Meomel



BEFORE THE
GUAM CIVIL SERVICE COMMISSION



IN THE MATTER OF:

KEVIN T. SUSUICO,

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

ADVERSE ACTION APPEAL
CASE NO. 13-AA08T

DECISION AND JUDGMENT

32-13-046
Office of the Clerk
Judith T. Won Pat, Ed. D.

Date 7-31-13
Time 1:00
Received by [Signature]

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On May 23, 2013, this matter came before the Civil Service Commission (the "Commission") on Kevin T. Susuico's ("Employee") Motion to Void Adverse Action Termination and the Port Authority of Guam Management's ("Management") Motion to Dismiss Employee's Appeal for Lack of Jurisdiction. Both motions were filed 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, Gary Wayne Francis Gumataotao, Esq.¹

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.

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¹Employee's Motion was filed by himself, *pro se*, on April 23, 2013. Also filed on April 23 by Employee was a Motion for Continuance and Extension of Adverse Action Appeal Case No. 13-AA-08T. At the hearing on May 23, Employee was accompanied by Mr. Gumataotao, who had been retained to represent Employee in the matter. No further continuance was thus granted.

ORIGINAL

FACTUAL BACKGROUND

1 Kevin Susuico applied for the position of Accountant II pursuant to the Port Authority of
2 Guam's Job Announcement No. 29-11 on September 8, 2011. He was hired for the position of
3 Accountant II and began work on October 24, 2011 at the Port Authority of Guam.
4

5 On September 26, 2012, the Commission's staff issued a memorandum to the Port
6 Authority of Guam regarding an audit investigation in *Review of Recruitment Actions Accountant*
7 *II Re: Port Auth. of Guam, 12-PA-09*, which presented initial findings that Employee did not
8 possess twenty-four (24) semester credit hours of accounting/auditing subjects as required for the
9 Accounting II position. As part of *Review of Recruitment Actions Accountant II Re: Port Auth. of*
10 *Guam, 12-PA-09*, on October 8, 2012, Management issued a written response to the Commission
11 in which Management did not contest the Commission staff's initial findings. At a meeting
12 conducted by the Commission with regard to *Review of Recruitment Actions Accountant II Re:*
13 *Port Auth. of Guam, 12-PA-09* on October 18, 2012, Management again articulated that it did
14 not contest the findings that Employee did not hold the requisite credit hours in
15 accounting/auditing, and Management was provided ninety (90) days to present a remediation
16 plan.

17 On January 17, 2013, the Port Authority of Guam cancelled the Personnel Action
18 appointing the Employee citing the Commission's finding in *Review of Recruitment Actions*
19 *Accountant II Re: Port Auth. of Guam, 12-PA-09*. On February 11, 2013, the Employee
20 appealed the termination.

ISSUES

21 Whether the Civil Service Commission has jurisdiction to hear Employee's appeal and
22 whether Management violated 4 G.C.A. §4406 when it voided Employee's position without
23 issuing an adverse action after the employee had been accepted into the classified service.
24
25

ANALYSIS

1 The Guam Supreme Court has stated:

2
3 A member of the classified service against whom management has
4 taken a personnel action of suspension, demotion, or dismissal is
5 entitled to appeal the action to the Civil Service Commission as an
6 adverse action even if the action was not predicated upon some
7 malfeasance or incompetency on the job by the employee.

8
9 *Blas v. Civil Service Commission*, 2000 Guam 12 ¶ 17. Here, the Commission finds that
10 Employee became a classified employee by virtue of his satisfying the probationary period as
11 evidenced by Management's issuance of a Notice of Results of Performance Evaluation Report,
12 signed on April 27, 2012, in which Employee was given a satisfactory rating and given a
13 permanent appointment in the position of Accountant II.

14
15 Four G.C.A. §4406 requires the Commission to void actions where management fails to
16 comply take adverse action within sixty days of having known of the factual basis underlying the
17 action. Known as the "60 day rule," the prohibition against adverse actions outside of the sixty
18 day period is a statutory mandate not subject to waiver, estoppel, negotiation, or equitable
19 tolling. For purposes of the 60 day rule under 4 G.C.A. § 4406, the 60 day time period
20 commences on the first date that Management knew or should have known the facts or events
21 which form the basis for the action. See *Rodney T. Perez v. Department of Agriculture*, Adverse
22 Action Case No. 0308-AA11 (Decision and Judgment) dated February 22, 2005. More recently
23 in the matter of *Salbino v. Dep't. of Ed.*, Adverse Action Appeal Case No. 0303-AA02 dated
24 March 16, 2006, the Commission stated that management must issue Final Notice of Adverse
25 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 Guam Dep't. of Ed.*, Adverse Action
Appeal Case No. 0810-AA39 dated April 21, 2009.

1 Specifically, the Commission found that Management knew of the specific issues
2 surrounding Employee's hiring on October 18, 2012.² Management took no further action to
3 remove Employee from his position as Accountant II. It was not until January 17, 2013 that
4 Management attempted to remove Employee, by cancelling the personnel action that had initially
5 documented his hiring. But this action was far too late. Because Management waited 91 days
6 from when they knew there was a problem with Employee's hiring to the time that Employee
7 was released, Employee's termination is clearly a violation of the 60 day rule and is therefore
8 barred.

9 JUDGMENT


10 WHEREFORE based upon a unanimous decision of 5-0 denying Management's Motion
11 and based upon a decision of 4-1 in favor of Employee's Motion, the Commission enters the
12 following judgment:

- 13 1) That the Employee shall be immediately reinstated to his position as an
14 Accountant II with the Port Authority of Guam.
- 15 2) Employee shall receive back pay for all wages withheld from Employee during
16 the period from termination on January, 2013 until he is reinstated.
- 17 3) Employee shall be credited with all sick leave and annual leave that he would
18 have accrued during the period from termination on January 17, 2013 until he is
19 reinstated.
- 20 4) Management shall deduct Employee's retirement contribution from his back pay
21 and then pay both Employee's and Management's contributions to the
22 Government of Guam Retirement Fund during the period from termination on
23 January 17, 2013 until he is reinstated.
- 24
- 25

² Indeed, Management itself has adopted the position that the Personnel Action which initially hired Employee was nullified at the Commission meeting held on October 18, 2012.

5) In accordance with 4 G.C.A. § 4406.1, Employee is entitled to his reasonable attorney's fees and costs.

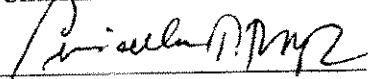
So ordered this 30th day of July, 2013 as determined by votes taken on May 23, 2013.



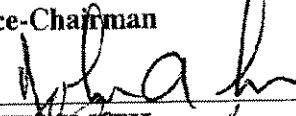
LUIS R. BAZA
Chairman



MANUEL R. PINAULA
Vice-Chairman




PRISCILLA T. TUNCAP
Commissioner



JOHN SMITH
Commissioner



LOURDES HONGYEE
Commissioner



DANIEL D. LEON GUERRERO
Commissioner



EDITH C. PANGELINAN
Commissioner

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**BEFORE THE
GUAM CIVIL SERVICE COMMISSION**



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IN THE MATTER OF:

JOHN POTTER,

Employee,

vs.

GUAM HOUSING CORPORATION,

Management.

**ADVERSE ACTION APPEAL
CASE NO. 13-AA10T**

DECISION AND JUDGMENT

This matter came before the Civil Service Commission (the "Commission") on Employee's Motion to Revoke for Procedural Defect at its regularly scheduled meeting on May 28, 2013. Present for Guam Housing Corporation Management ("Management") were Cesar Villanueva and Management's counsel, Minakshi Hemlani, Esq. of Fisher & Associates. Also present were Employee John E Potter ("Employee") and his counsel, Daniel S. Somerfleck, Esq. of Somerfleck & Associates, PLLC.

I. FACTUAL BACKGROUND

Employee John E. Potter began working at the Guam Housing Corporation in April of 1994 as a Senior Tenant Relations Advisor. On January 24, 2013, Employee received Notice of Proposed Adverse Action for violation of the Guam Housing Corporation Personnel Rules and Regulations. Specifically, the Notice of Proposed Adverse Action alleged Employee had engaged in "[d]iscourteous treatment to the public or other employees" and "[a]cts of prohibited discrimination to include sexual harassment." Additionally, the Notice of Proposed Adverse

ORIGINAL

1 Action cited a violation of “[o]ther misconduct not specifically listed.” (See Notice of Proposed
 2 Adverse Action (“NPAA”) dated January 24, 2013.) On February 1, 2013, Employee met with
 3 Management to respond to the allegations contained in the NPAA.

4 On February 18, 2013, Employee received the Notice of Final Adverse Action, dated
 5 February 5, which dismissed Employee from his classified position as a Senior Tenant Relations
 6 Advisor with the Guam Housing Corporation effective February 6, 2013. The Notice of Final
 7 Adverse Action set forth that Employee’s termination was for the same reasons articulated in the
 8 Notice of Proposed Adverse Action.

9 **II. DISCUSSION**

10 Four G.C.A. §4406 imposes a clear and unequivocal duty upon management not only to
 11 provide notice of the charges levied against an employee but also to provide, “a specific
 12 statement of the charges upon which the action is based in the manner required by Article 2 of
 13 this Chapter.”¹ At the hearing and in moving papers, Employee asserted that neither the NPAA
 14 nor the Notice of Final Adverse Action provide with sufficient specificity the factual allegations
 15 that served as the basis for the issuance of an adverse action.² Management countered that it had
 16 satisfied the specificity requirements when it included this single line: “This tenant has reported
 17 to me that, on or about September 2010, while meeting at our office to discuss rental issues, you
 18 hugged her and touched her inappropriately.” (See NPAA dated January 24, 2013.)

19 Guam Housing Corporation’s Personnel Rules and Regulations (“PR&R”) further
 20 provide in Section 11.306 that an employee is entitled to written notice “stating any and all
 21 reasons specifically and in detail for the proposed notice of adverse action.” The PR&R also
 22 provide, pursuant to Section 11.311, with regard to final adverse action “that the notice shall be
 23 in writing; be dated; state the specific facts found upon which such action is based.”

24 ¹ “No person in the classified service shall be removed except for such cause as will promote the efficiency of the
 25 service and for the reasons given in writing. The person whose removal is sought shall have notice of the same and
 of any charges preferred against him, and be furnished a copy thereof...and also be allowed a reasonable time for
 personally answering the same in writing with affidavits in support thereof...” 4 G.C.A. §4201.

² Employee additionally argued that he had not received due process as required under the United States
 Constitution.

1 Management was fully aware of its obligations under the PR&R; indeed, the two notices
2 provided by Management to Employee specifically reference sections 11.306 and 11.311.

3 Provision of a the generic explanation of the nature of charges against an employee who
4 is faced with an adverse employment action is not sufficient to provide him or her with the
5 ability to defend against the same, thus denying due process rights. *See Mackin v. Civil Service*
6 *Commission*, 155 W.Va. 139, 181 S.E.2d 684; *Rapaport v. Civil Service Commission of State of*
7 *California et al.*, 134 Cal.App. 319, 25 P.2d 265; and *People Ex Rel. Miller v. Elmendorf*, 42
8 A.D. 306, 59 N.Y.S. 115.

9 Even if this Commission were to accept Management's contention that the NPAA
10 contained sufficient specificity to allow Employee to meaningfully respond to the charges, the
11 Final Notice of Adverse Action issued to Employee similarly lacked the requisite specificity.
12 Guam Housing Corporation's PR&R Section 11.311 provides:

13 An employee is entitled to written notice of the department's
14 decision within 10 days after receipt of the employee's answer to
15 the charge(s). The decision shall be made by the
16 department/agency head and shall be delivered to the employee at,
17 or before the time of action will be made effective. The notice
18 shall be in writing, be dated, state the specific facts found upon
19 which such action is based.

20 Since the Final Notice of Adverse Action contained essentially the same statement of with regard
21 to the factual assertions underlying the basis for the adverse action, there can be no finding that
22 the Final Notice of Adverse Action satisfied the specificity requirements where the NPAA did
23 not. They were essentially the same.

24 Because the Notice of Final Adverse Action fails to provide the Employee notice of the
25 factual basis for the Final Adverse Action the Commission is without jurisdiction and the adverse
action must be voided.

JUDGMENT

1 **WHEREFORE** based upon a unanimous decision of 5-0 in favor of Employee's Motion,
2 the Commission enters the following Judgment:

3 a) That the Employee shall be immediately reinstated to his position as a Senior
4 Tenant Relations Advisor with the Guam Housing Corporation;

5 b) Employee shall receive back pay for all wages withheld from Employee during
6 the period from termination on February 06, 2013 until he is reinstated;

7 c) Employee shall be credited with all sick leave and annual leave that he would
8 have accrued during the period from termination on February 06, 2013 until he is reinstated.

9 d) Management shall deduct Employee's retirement contribution from his back pay
10 and then pay both Employee's and Management's contributions to the Government of Guam
11 Retirement Fund during the period from termination on February 06, 2013 until he is reinstated.

12 e) Employee shall recover his reasonable attorney's fees and costs pursuant to 4
13 G.C.A. § 4406.1.

14 So ordered this 30th day of July, 2013 as determined by votes taken on May 28,
15 2013.

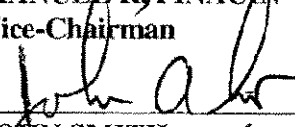
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18 **LUIS R. BAZA**
19 **Chairman**

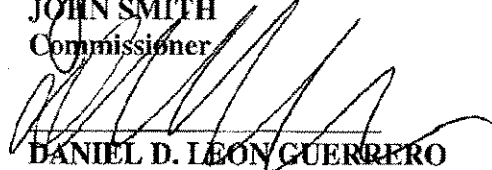
20 
21 **PRISCILLA T. TUNCAP**
22 **Commissioner**

23 
24 **LOURDES HONGYEE**
25 **Commissioner**


EDITH C. PANGELINAN
Commissioner


MANUEL R. PINAUN
Vice-Chairman


JOHN SMITH
Commissioner


DANIEL D. LEON GUERRERO
Commissioner