



BEFORE THE
GUAM CIVIL SERVICE COMMISSION



32-13-672
Office of the Speaker
Judith T. Won Pat, Ed. D.

Date 8/21/13
Time 10:30 a
Received by [Signature]

IN THE MATTER OF:

ADVERSE ACTION APPEAL
CASE NO. 12-AA28T

FRANCES ARRIOLA,

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

DECISION AND JUDGMENT

J 50:01
8-08-13
2013 AUG - 8 AM 10:38

This matter came before the Civil Service Commission (the "Commission") on Employee's Motion to Void the Adverse Action For Procedural Defect Violation of 4 GCA 4406 "60 DAY RULE" at its regularly scheduled meeting on April 18, 2013 and May 1, 2013 at its office at or about 5:45 p.m. Present for Management was its General Manager Joanne Brown and its counsels of record Michael Phillips, Esq. and John Bell, Esq. of Phillip & Bordallo; also present was the Employee Frances Arriola and her counsel of record, Daniel S. Somerfleck, Esq. of Somerfleck & Associates, PLLC.

JURISDICTION

The jurisdiction of the Commission is based upon the Organic Act of Guam, 4 G.C.A., et. seq., and the Guam Personnel Rules and Regulations.

FACTS

1. Frances Arriola began working at the Port Authority of Guam in December of 1989 as a Clerk Typist III and at the time of her termination on December 18, 2013² she held the

ORIGINAL

672

1 position of a Personnel Specialist IV. During her twenty-three (23) years of service at the Port,
2 the Employee never had any previous concerns with her performance, reprimands or adverse
3 actions.

4 2. On December 5, 2012, the Employee received a letter informing her that a
5 proposed adverse action was being sought against the Employee for violation of the Port
6 Authority of Guam Personnel Rules and Regulations Chapter 11, Rule 11.303 to include: 1)
7 Actual or attempted theft of government or Port Authority property or properties of others; 2)
8 Disobedience to constituted authorities, or deliberate refusal to carry out any proper order from
9 any supervisor having responsibility for the work of the employee; Insubordination; 3)
10 Falsification, misstatement, or concealment of material facts in connection with an official
11 record; and 4) Covering up or attempting to conceal defective work; removing or destroying
12 same without permission. Based upon events that occurred on October 16, 2012 and October 18,
13 2012, the Notice of Proposed Adverse Action and the Notice of Final Adverse Action put
14 forward the following factual basis for the adverse action:

15 "On the morning of October 16, 2012, you e-mailed Royal Travel
16 to make the Honolulu itinerary change from October 22nd to
17 October 31st of 2012 to Mrs. Meno instead leaving Guam on
18 October 21st and leaving Honolulu on November 4th...

19 On October 18 when the board found out about this illegal travel

20 On October 18, 2012 you tried to get Ms. Ulbenario to release the
21 per diem. Ms. Ulbenario refused to release it because she knew it
22 was wrong..."

23 3. On December 14, 2012, the Employee met with Management in response to the
24 Notice of Proposed Adverse Action.

25 4. On December 18, 2012, Employee received the Final Notice of Adverse Action.

5. On December 21, 201², the Employee appealed her termination.

1 6. The Employee filed its motion seeking to void the personnel action on February
2 14, 2013 on the basis that Management violated 4 G.C.A. §4406 known as the "60 day rule".

3 7. Management filed its Opposition to Employee's Motion on February 21, 2013.

4 8. The hearing on the motion was held on April 18, 2012 and continued deliberation
5 occurred on May 1, 2013 based on the Commission's request for additional materials from
6 Management.

7 ISSUES

8 Whether Management violated 4 G.C.A. §4406 when it terminated the Employee.

9 ANALYSIS

10 Adverse actions taken 60 days after Management knew or should have known the material
11 facts are barred and any action taken with regard to such adverse action is void. As is explicitly
12 stated in 4 GCA 4406;

13 "In no event may an employee in the classified service be given
14 notice and statement of charges as required by this section after the
15 sixtieth (60th) day after management knew or should have known
the facts or events which form the alleged basis for such action.
Any action brought by management in violation of this section is
barred and any decision based upon such action is void."

16 In taking actions against an Employee, the legislative intent is very clear. 4 G.C.A. §4406
17 requires the Commission to void actions where Management fails to comply with the 60 Day
18 Rule. See *e.g. Drs. Richard Matheny, Robert Hall and Richard Mezzo v. University of Guam*,
19 Adverse Action Appeal Nos. CY92-AA07/CY92-AA08/and CY92-AA09 (Decision and Order)
20 dated August 26, 1993, the 60 Day Rule is a compelling mandate which statutorily determined
21 outcome and is not subject to waiver, estoppel, negotiation, or equitable tolling. For purposes of
22 the 60 Day Rule under 4 GCA §4406, the 60 days commences to run on the first date that
23 Management knew or should have known the facts or events which form the basis for the action.
24 See *Rodney T. Perez v. Department of Agriculture*, Adverse Action Appeal Case No. 0308-AAII

1 (Decision and Judgment) dated February 22, 2005. More recently in the matter of *Luna Dawn P.*
2 *Salbino v. Department of Education*, Adverse Action Appeal Case No. 0303-AA02 dated March
3 16, 2006, sets forth that Management must issue a Final Notice of Adverse Action within 60
4 days after the first day the offense commences whether or not the offense is continuing. Thus,
5 the 60 days runs when the Employee's superiors are in a position to take or recommend adverse
6 action (see *Ulric J. Mark vs GDOE*, Adverse Action Appeal Case No. 0810-AA39 dated April
7 21, 2009).

8 Management's assertion that the Commission's rulings in *Montgomery v. Guam*
9 *International Airport Authority*, Adverse Action Appeal Case No. CY 9903 -AA07 (January
10 2000), the Superior Court ruling in the *Department of Public Works V. Civil Service Commission*
11 *and Franklin B. Castro*, the Superior Court of Guam, Special Proceeding Case No. SP099-09
12 (July 2012) and *Antonio T. Lorenzo v. Guam Memorial Hospital*, Adverse Action Appeal Case
13 No. CY 92 - AA 04 (April 1993) are controlling in this action to toll the 60 Day Rule is
14 misplaced. In *Montgomery* the commission specifically found not that the 60 day statute was
15 tolled based upon fraudulent concealment, but instead found that when Management had
16 reasonable knowledge to know the material facts underlying the adverse action the 60 Day Rule
17 applies. In that case involving an employee who had misrepresented his qualifications in his job
18 application and this Commission specifically found;

19 Allowing job applicants for classified service positions who make
20 material misrepresentations or fraudulent claims or statements on-
21 the-job application to escape adverse action until eventually
22 discovers by relying on an absolute strict application of the 60 day
rule, not only awards them for their dishonesty, but more
importantly, it deprives other truly eligible applicants of the
opportunity to compete fairly for the same position even though
they were honest. *Montgomery* at 9.

23 Since that Decision, a number of cases as put forward above have found that strict application of
24 the 60 Day Rule is required. See *Luna Dawn P. Salbino and Ulric J. Mark*. Equally so the

1 decision in Castro does not support the proposition that fraudulent concealment of material facts
2 tolls the 60 day statute. To the contrary, the decision in Castro requires the commission to
3 conduct an evidentiary hearing and addressed whether the continuing wrong doctrine applies in
4 that case. The Lorenzo case is also clearly distinguishable from this action where the 60th day
5 did not fall upon a weekend or holiday but fell upon a Monday after the Employee had answered
6 the Notice of Proposed Adverse Action, the preceding Friday based on these facts nothing
7 prevented Management from timely issuing the adverse action in this matter other than
8 Management's own internal inadequacies.

9 Specifically, the Commission finds that Management waited 61 days from when they
10 knew there was an alleged problem to the time that they terminate Frances Arriola, the
11 termination is clearly a violation of the 60 Day Rule and is therefore barred. In addition to the
12 Notice of Proposed Adverse Action stating and email indicating that the Port Board of Directors
13 were aware of the alleged illegal travel on October 18, 2012, the Notice of Proposed Adverse
14 Action also asserts that the General Accounting Supervisor; a member of Management, refused
15 to release the per diem because she knew it was wrong on October 18, 2012 clearly supports that
16 Management knew of the alleged material facts from October 18 to December 18, 2012 which is
17 61 days. Because the material facts that make up the basis of this adverse action are outside the
18 time provided under 4 GCA 4406 the charges of the adverse action are barred and the adverse
19 action is void.

20 JUDGMENT

21 WHEREFORE based upon a Unanimous Decision of 5-0 in favor of Employee's Motion,
22 the Commission enters the following judgment:

23 1) That the Employee shall be immediately reinstated to her position as a Personnel
24 Specialist IV with the Port Authority of Guam.


2) Employee shall receive back pay for all wages withheld from Employee during the period from termination on December 18, 2012 until she is reinstated.

3) Employee shall be credited with all sick leave and annual leave that she would have accrued during the period from termination on December 18, 2012 until she is reinstated.

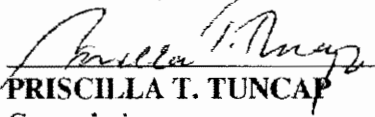
4) Management shall deduct Employee's retirement contribution from her back pay and then pay both Employee's and Management's contributions to the Government of Guam Retirement Fund during the period from termination on December 17⁸, 2012 until she is reinstated.

5) Attorney Daniel S. Somerfleck shall be paid for his reasonable attorney's fees and costs in the amount of \$13,082.63 within 30 days of this Judgment.

SO ADJUDGED THIS 6th DAY OF August 2013 nunc pro tunc to May 1, 2013.

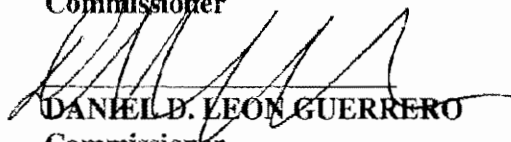

MANUEL R. PINAUIN
Chairman


EDITH C. PANGELINAN
Commissioner


PRISCILLA T. TUNCAP
Commissioner

NOT PRESENT
JOHN SMITH
Commissioner


LOURDES HONGYEE
Commissioner


DANIEL D. LEON GUERRERO
Commissioner

Somerfleck & Associates, PLLC

866 Rte.7, Nelson Bldg #102

Maina, Guam 96932

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Invoice Date: 5/8/2013

Invoice # 576

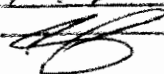
Bill To:

Frances Arriola


Reference: Frances Arriola vs Port Authority of Guam. CAsE No: 12-AA28T.

Serviced	Description	Hours/Qty	Rate	Amount
12/19/2012	Consult with client.	1	0.00	0.00
12/20/2012	Review Adverse Action.	3	250.00	750.00
12/21/2012	2nd Consult with client.	1	0.00	0.00
12/21/2012	Prepare Adverse Action Appeal.	0.5	250.00	125.00
12/24/2012	Appointment with client to discuss case.	1	250.00	250.00
12/26/2012	Prepare Request to Seal Attachments to Employee's Adverse Action Appeal and Pc with Roland @ CSC.	0.5	250.00	125.00
12/26/2012	Review Acknowledgement of Appeal & Notice of Status Call Conference from Civil.	0.2	250.00	50.00
12/30/2012	Review email from client.	0.2	250.00	50.00
1/8/2013	Attend Status Hearing.	1	250.00	250.00
1/9/2013	Pc's with client.	0.4	250.00	100.00
1/10/2013	Review Notice of Motion Hearing and Review Entry of Appearance from P.Bordallo.	0.1	250.00	25.00
1/11/2013	Meeting with other Atterony and Review Discovery: Non-Disclosure from P.Bordallo.	3.3	250.00	825.00
1/14/2013	Review Notice of Status Call Conference.	0.2	250.00	50.00
1/15/2013	Review Materials.	2.5	250.00	625.00
1/15/2013	Attend Status Hearing.	1	250.00	250.00
1/17/2013	Review Response to Order Re:Discovery from P.Bordallo.	0.3	250.00	75.00
1/17/2013	Pc with client and other atterony regarding port.	1.2	250.00	300.00
1/18/2013	Review 5 emais from client.	1	250.00	250.00
1/21/2013	Appointment with client to discuss case, Remai emails.	1.4	250.00	350.00

Office of the Speaker
Judith T. Won Pat, Ed. D.

Date: 2/21/13
 Time: 10:12
 Received by: 

Invoice Total:

Office of the Secretary
 Received by: Bo Barnes
 Date: 8-08-13
 Time: 10:05
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Invoice Date: 5/8/2013

Invoice # 576

Bill To:

Frances Arriola

Reference: Frances Arriola vs Port Authority of Guam, Case No: 12-AA28T.

Serviced	Description	Hours/Qty	Rate	Amount
1/22/2013	Attend Court Status Hearing.	1	250.00	250.00
1/25/2013	Review email from client.	0.2	250.00	50.00
1/29/2013	Pc with client to discuss case and Review 2 emails from client.	0.6	250.00	150.00
2/5/2013	Review 3 emails from client.	0.6	250.00	150.00
2/7/2013	Review email from client.	0.2	250.00	50.00
2/11/2013	Review 2 emails from client.	0.4	250.00	100.00
2/12/2013	Pc with John Bell at Phillips and Bordallo to discuss case.	0.2	250.00	50.00
2/13/2013	Telephone conference with client to discuss case.	0.2	250.00	50.00
2/14/2013	Appointment with client to discuss case and Review Motion for Discovery Order from Bordallo.	1.3	250.00	325.00
2/14/2013	Prepare Employee's Motion to Revoke for Procedural Defect and Prepare Declaration of Employee.	2.6	250.00	650.00
2/21/2013	Review Letter from AG's office.	0.3	250.00	75.00
2/21/2013	Review Management's Opposition to Employee Frances Arriola's Motion to Revoke for Procedural Defect from P. Bordallo.	0.75	250.00	187.50
2/26/2013	Review 6 emails from client.	1.2	250.00	300.00
2/28/2013	Appointment with client to discuss case.	1	250.00	250.00
3/7/2013	Review Request for Disclosures from P. Bordallo.	0.3	250.00	75.00
3/13/2013	Review Management's Submission of Responses.	2.3	250.00	575.00
3/14/2013	Prepare for Motion, Attend Motion Hearing and Review 5 emails from client.	3	250.00	750.00
3/15/2013	Review of Status Call Conference from Civil.	0.3	250.00	75.00

Invoice Total:

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Invoice Date: 5/8/2013

Invoice # 576

Bill To:

Frances Arriola

Reference: Frances Arriola vs Port Authority of Guam. CAsc No: 12-AA28T.

Serviced	Description	Hours/Qty	Rate	Amount
3/19/2013	Attend Status Hearing and Review Notice of Motive Hearing from Civil.	0.5	250.00	125.00
3/25/2013	Review Management's Supplemental Report and Exhibits Re: Management's Lack of Knowledge and the Sixty Day Rule.	2.5	250.00	625.00
3/25/2013	Review Management's Supplemental Discovery of March 25, 2013 from P. Bordallo.	0.4	250.00	100.00
3/26/2013	Review Management's Supplemental Discovery of March 26, 2013 from P. Bordallo.	1.5	250.00	375.00
3/29/2013	Review Management's Addition of An Exhibit to Supplemental Report.	2	250.00	500.00
4/1/2013	Review email from client.	0.2	250.00	50.00
4/8/2013	Review Letter from Atty Bell.	0.2	250.00	50.00
4/16/2013	Review Letter from Atty Bell and Review Letter to Atty Bell.	0.4	250.00	100.00
4/17/2013	Review email from client.	0.6	250.00	150.00
4/18/2013	Prepare for Hearing and Attend Motion Hearing.	2.5	250.00	625.00
4/19/2013	Review email.	0.2	250.00	50.00
4/21/2013	Review 5 emails from client.	1	250.00	250.00
4/22/2013	Review email.	0.2	250.00	50.00
4/24/2013	Review 6 emails from client.	1.2	250.00	300.00
4/29/2013	Review 2 emails and 2 emails from client.	0.8	250.00	200.00
5/1/2013	Attend Motion Hering, Review emails and email from client.	1.4	250.00	350.00

Invoice Total:

Somerfleck & Associates, PLLC

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Invoice Date: 5/8/2013

Invoice # 376

Bill To:

Frances Arriola

Reference: Frances Arriola vs Port Authority of Guam. CAsE No: 12-AA28T.

Serviced	Description	Hours/Qty	Rate	Amount
5/2/2013	Review email.	0.2	250.00	50.00
5/13/2013	Draft Judgement.	1.5	250.00	375.00
12/21/2012	COST: Fast Copy.	1	195.13	195.13

Invoice Total: \$13,082.63