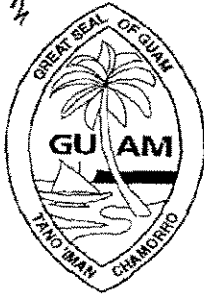


2.24.15



BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS



IN THE MATTER OF:

ADVERSE ACTION APPEAL
CASE NO. 12-AA29T

FRANCINE ROCIO,

Employee,

DECISION & JUDGMENT

vs.

33-15-0261
Office of the Speaker

PORT AUTHORITY OF GUAM,
Management.

Judith T. Won Pat, Ed.D

Date: 3/25/15

Time: 1:50 PM

Received By: [Signature]

INTRODUCTION

This matter came before the Civil Service Commission for a hearing on the merits on the following dates:

October 7, 8, 9, 14, 15, 21, 22, 23, 29 and November 5, 2014.

Present at the hearings were Employee Francine Rocio who was represented by Attorney Georgette Bello Concepcion. Present for Management Port Authority of Guam was Attorney Michael Philips and General Manager Joann Brown.

The Commission determined by a vote of 4-3 that the Notices of Proposed and Final Adverse Action were procedurally defective. Further, the Commission determined by a vote of 5-2 that Management had failed to meet its burden of proof.

JURISDICTION

The Civil Service Commission has jurisdiction over this matter pursuant to 4 GCA § 4401, *et seq.*, and the Port Authority of Guam ("PAG") Personnel Rules and Regulations.

Office of the Legislative Secretary
Senator Tina Rose Mufia Barnes

0261

3/25/15
Time 1:55 pm

Decision and Judgment
CASE NO. 12-AA29T

Received by: [Signature]

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ORIGINAL

FACTS

1. On December 5, 2012, Rocio was served a Proposed Notice of Adverse Action.
2. On December 9, 2012, Rocio submitted her written response to the Proposed Notice of Adverse action.
3. On December 18, 2012, was served a Final Notice of Adverse Action thus terminating her employment with PAG.
4. On October 7, 8, 9, 14, 15, 21, 22, 23, and 29, 2014, the parties put forth their respective cases.
5. On November 5, 2014, the Commission deliberated and based on the facts proven determined the PAG failed to meet its burden of proof that action taken against Rocio was proper.

STANDARD OF PROOF

Employee contended that the "clear and convincing" standard of proof under § 4407(a) was appropriate. Management contended that the more deferential "substantial evidence" standard under § 4407(c) should be applied, since PAG argued the alleged actions of Rocio could be a crime. The contention over the correct standard of proof was the most important legal issue in the present case.

In *Michael P. Atiogue v. Attorney General of Guam*, Adverse Action Appeal CY89-AA01, May 18, 1989, the Commission found it did not have to accept Management's contention that the alleged activity that resulted in termination was a crime. In *Joseph B. Cruz v. Department of Land Management*, Adverse Action Appeal CY90-AA12, Feb. 13, 1992, the Commission held that the substantial evidence standard of proof was proper where the employee had actually had criminal charges filed against them by prosecutors. In *Kenneth Terrell v. GIAA*, Adverse Action Appeal 0508-AA24, March 26, 2007, the Commission ruled that where "no facts presented whether a criminal charge was filed or whether one is pending... the standard of proof... shall be on the government to show clearly and convincingly that the action taken by Management was correct."

1 Prior to 2002, the standard of proof under § 4407(a) was preponderance of the evidence;
2 however, Public Law No. 26-88 changed that standard to clear and convincing evidence on May
3 17, 2002. Section 1 of that P.L. No. 26-88 reads, in relevant part:

4 *I Liheslaturan Guahan* finds that the standard of proof utilized by the
5 Commission in any adverse action appeal requires that management only
6 show "by a preponderance of the evidence" that its action was correct.
7 This standard of proof favors management to the detriment of the
8 employee appealing management's action. *I Liheslaturan Guahan* finds
9 that there is a need to "level the playing field" by requiring a greater
burden of proof. (Page 2, Lines 5-10).

10 Thus, it is apparent that *I Liheslaturan Guahan* determined that the clear and convincing
11 standard of proof was appropriate in most cases for adequately protecting the due process rights
12 of employees. In *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 41, the Supreme Court of
13 Guam held that "clear and convincing" evidence was evidence that "must be of extraordinary
14 persuasiveness" meaning that it "is so clear, direct, weighty, and convincing as to enable the trier
15 of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."

16 Consistent with its prior cases, the Commission finds here that the clear and convincing
17 evidence standard applies in the absence of actual criminal charges filed. We note pursuant to,
18 e.g., 8 GCA § 45.20 that the standard for prosecutors in securing a criminal indictment is
19 probable cause. From the findings of *I Liheslaturan Guahan* it appears inconsistent with
20 legislative intent to lessen the burden of proof by management from clear and convincing
21 evidence to substantial evidence without a successful probable cause showing that a crime may
22 have been committed. Commissioners are selected based upon their knowledge, experience, and
23 expertise in labor and employment-related matters, not their expertise with criminal law.
24 Requiring this quasi-judicial body to interpret criminal statutes and substitute our own judgment
25 in criminal matters for those of professional prosecutors and Superior Court judges seems
beyond our purview.

CONCLUSION

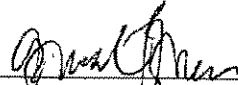
Management has failed to meet the burden of clear and convincing evidence required. Therefore, the adverse action taken against Rocio is NULL AND VOID.

The PAG is hereby ORDERED to immediately reinstate Rocio to her prior position of employment. The PAG is FURTHER ORDERED to fully compensate Rocio for all the time following her termination on December 18, 2012 until the date that she is reinstated, including, but not limited to, salary and benefits, sick and annual leave, retirement benefits, and all other benefits due and owed to Rocio under Guam law. Finally, the PAG is ORDERED to pay the reasonable attorney's fees and costs incurred by Rocio during this appeal.

SO ADJUDGED THIS 24th day of March 2015.



LUIS R. BAZA
Chairman



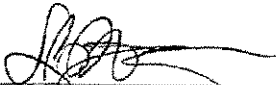
MANUEL R. PINAUN
Vice-Chairman



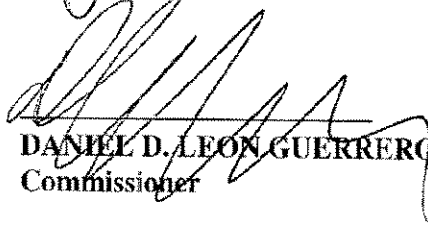
PRISCILLA T. TUNCAP
Commissioner



JOHN SMITH
Commissioner



LOU HONGYEE
Commissioner



DANIEL D. LEON GUERRERO
Commissioner



EDITH C. PANGELINAN
Commissioner