

BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS



IN THE MATTER OF:

CYNTHIA JOHNSON,

Employee,

vs.

DEPARTMENT OF EDUCATION,

Management.

GRIEVANCE APPEAL
CASE NO. 14-GRE-57

DECISION AND JUDGMENT

Office of the Legislative Secretary
Senator Tina Rose Mufia Barnes
Date 06-01-15
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I. INTRODUCTION

This matter came before the Civil Service Commission of Guam for Motion Hearing on Thursday, April 16, 2015 and deliberations were held on Tuesday, April 21, 2105 . Attorney Georgette Bello Conception appeared on behalf of the Employee and Robert E. Koss, Lay Representative representing the Department of Education with Eloise Sanchez, Deputy Superintendent of Curriculum and Instruction for Management.

Management moved the Commission to dismiss the Employees grievance on two grounds:

1. The voluntary separation by retirement of the Employee before her appeal process was exhausted renders her complaint of harassment moot, since her voluntary separation effectively provided the employee relief and there is no other remedy the Commission could then provide.
2. The issue raised in 14-GRE57 were also raised and fully adjudicated in the Employee's prior Grievance CSC Case No. 13-GRE15 and the prior proceeding resulted in a final

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

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3. judgment of dismissal with prejudice. The prior resolution of the Employee's grievance has a preclusive effect on the Employee's repeated grievance at hand.

II. JURISDICTION

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

III. FACTUAL BACKGROUND

- Aug. 15, 2013 Employee was Transferred and Reassigned to the position classification of School Aide 1 at Adacao Elementary School as a reasonable accommodation to assure her continued employment pursuant to DOE PRR 912.102 A(3) and 906.005 and the ADA.
- Nov. 25, 2013 Based on her dissatisfaction with the reasonable accommodation provided, Employee filed a Step 4 grievance appeal at the CSC, Case No. 13-GRE15 alleging violation of ADA.
- May 29, 2014 Employee moved the Commission to dismiss her grievance appeal with prejudice (CSC Case No. 13-GRE15) by oral motion.
- June 13, 2014 Employee filed a step 4 Grievance Appeal (CSC Case No. 14-GRE57) at the Civil Service Commission of Guam.
- August 14, 2014 Employee retired from her employment with the DOE.
- August 19, 2014 CSC Commissioners signed its Judgment dismissing Cynthia Johnson's grievance appeal 13-GRE15 with prejudice pursuant to Conception's oral request made on May 29, 2014.

IV. FINDINGS

1. Notwithstanding that employee resigned or retired after filing a Grievance appeal with the Civil Service Commission, the Commission retains its jurisdiction to hear that appeal because the Appellant Employee was in the classified employment of DOE at the time the grievance appeal was filed. Under these circumstances, CSC retains jurisdiction pursuant to 4 GCA § 4403 and the Personnel rules and Regulations of the Department of Education.
2. On May 29, 2014 Employee brought an oral motion to dismiss her grievance appeal CSC Case No. 13-GRE15, with prejudice. The Commissioners voted unanimously to grant the Employee's motion.

- 1 3. August 19, 2014 CSC Commissioners signed a Judgment dismissing grievance appeal
2 13-GRE15 with prejudice.
- 3 4. The Commission's August 19, 2014 final judgment of dismissal with prejudice for CSC
4 Case 13-GRE15 precludes the Employee from repeating the same or substantially similar
5 grievance.
- 6 5. Based on the Employee's failure to seek any relief for alleged harassment and that grievance
7 14-GRE 57 is otherwise virtually identical to grievance 13-GRE15, the Commission finds
8 that the Employee's Grievance Appeal 14-GRE-57 is substantially similar to the Employee's
9 previous Grievance CSC Case No. 13-GRE-15 and based on the employee's dissatisfaction
10 with the reasonable accommodations she was provided.

11 **V. ANALYSIS AND HOLDINGS**

12 **A. Right to Use of an Attorney**

13 Management contended that Employee's use of an attorney in assisting with the filing of the
14 Grievance was improper. More specifically, Management cited Rules that read strictly would
15 indicate the Employee herself was required to personally file or initiate a Grievance, where Johnson's
16 attorney had done so on her behalf. We reject this strict interpretation and hold that an Employee
17 may have an attorney file documents on their behalf.

18 The right of an individual to retain an attorney to act on their behalf is widely recognized in
19 society. Particularly in merit system cases where an individual Employee is confronting the entirety
20 of a governmental agency, the assistance of an attorney should be permitted and encouraged. Rules
21 or Regulations that bar an individual from being afforded the assistance of counsel and forced to act
22 alone appear suspiciously violative of public policy. Some Employees might be frightened, such as
23 the present case involving allegations of harassment, to act on their own; other Employees might feel
24 overwhelmed by the number of Rules and benefit from assistance. No harm that can occur from an
25 Employee using counsel has been articulated or suggested. If anything, presence of counsel can
demonstrate the seriousness of the Employee's stance and encourage Management to take notice.

1 Thus, assuming all other rules are appropriately followed, we see no reason to dispose of a case
2 solely because an Employee retained counsel early in the process.

3 **B. Jurisdiction**

4 The Commission was presented with the novel question as to whether jurisdiction over a
5 grievance is lost when an Employee resigns or retires. We note that the relevant DOE Policies as
6 well as our Rules require only that an Employee *is* a current employee when the grievance is filed. It
7 is obvious that an Employee must not only be a current, classified employee when the grievance is
8 followed, but also have properly followed the Grievance Step process leading up to the filing.
9 Management and Employee disputed whether that was the case here; however, since this is
10 Managements motion to dismiss, we are inclined *for purposes of this motion only*, to view facts in the
11 light most favorable to the Employee and assume the Grievance Step process was properly followed
12 prior to Johnson filing the present grievance.

13 Thus, under the circumstances where an Employee follows the proper step process and files
14 their grievance with us while currently a classified employee, we hold that we do not automatically
15 lose jurisdiction if the employee subsequently resigns or retires. A strict reading of the relevant law,
16 Rules, and policies do not ban the CSC from entertaining such cases. Indeed, there may be some
17 post-employment grievances for which this Commission can render relief and we do not foreclose
18 that possibility at this time, provided that the party was still a classified employee at the time of filing
19 their grievance. This holding does not overturn previous rulings that we have no jurisdiction over
20 cases where a party files their grievance after already resigning or retiring.

21 **C. Previous Filing of a Grievance**

22 Nothing prevents an employee from filing multiple grievances, even within a short
23 timeframe. The mere fact that Johnson previously filed a grievance does not bar her claims herein.
24 Yet, where a new grievance is substantially similar to a previous grievance, collateral estoppels or *res*
25 *judicata* may apply. Here, Johnson's earlier grievance was dismissed with prejudice and the current
grievance is virtually identical, but for additional claims of harassment tacked on. The prayer for

1 relief in both grievances read the same. Thus, the substantial similarity to the earlier grievance bars
2 the current case.

3 Even if the Commission were to subtract the earlier claims and leave only the new
4 harassment claims, problems remain with the current case. First, the relief sought is not appropriate
5 for a harassment claim. Second, while some post-employment grievance claims may survive
6 resignation or retirement, it would not appear that on-the-job harassment is such a claim. Therefore,
7 even if we permitted the harassment claim to survive, the motion to dismiss should be granted.

8 **D. Failure to State a Claim Upon Which Relief May Be Granted**

9 Although the Commission may have jurisdiction over particular claims, that does not
10 necessarily mean that the relief sought is of the kind that can be granted. Indeed, a given court might
11 have jurisdiction over the parties and subject matter of a particular case, but the relief requested is of
12 a kind the court cannot grant. This case appears to be of this kind.

13 The relief sought in this case is akin to that sought pursuant to 4 G.C.A. §4403(b), wherein a
14 termination from an adverse action is appealed to this body. Yet, the form of this action is that of a
15 grievance governed by §4403(c). In Personnel Rules "Grievances" are generally defined as a catch-
16 all encompassing a variety of claims, but specifically excluding adverse actions from being brought
17 as a grievance. Rules for the Department of Education recognize this distinction. Thus, it appears
18 this type of action with an adverse action clothed as a grievance would be impermissible under DOE
19 rules and beyond the type of relief that the Commission can give during a grievance.

20 Particularly we note Public Law No. 28-68 removed significant amounts of jurisdiction from
21 the Commission to set classification and compensation as we see fit. Although Public Law No. 30-
22 112 returned portions of jurisdiction removed by P.L. No. 28-68, it did not fully restore the
23 Commission to pre-P.L. No. 28-68 levels. Therefore, while the Commission might or might not have
24 been empowered to grant this type of relief on a grievance prior to September 30, 2005, we do not
25 believe we can at this time.

E. Constructive Dismissal

1 Similar to the *Bischoff v. AG Office*, CSC Case No. 14-AA03T, signed this same day, this
2 appears to allege a case of constructive discharge, where Johnson was effectively forced to resign.
3 The salient difference is that Bischoff undertook his case an adverse action after retiring, while
4 Johnson filed her case as a grievance while still employed then retired. We note that constructive
5 discharge is recognized in some other jurisdictions, including *inter alia*, states such as California,
6 Maryland, and West Virginia; the Merit Systems Protection Board of the United States; federal
7 Courts of Appeals circuits in relations to Title VII and Age Discrimination Act cases; and the
8 Supreme Court of the United States in relation to National Labor Relations Act cases. Indeed, there
9 is a reasonable argument that constructive discharge claims should be allowed, either under the
10 adverse action procedures or by the grievance method employed by Johnson, as managers should not
11 be allowed to circumvent the protections of a merit system by making a work environment so hostile
12 that an employee is forced to resign. Yet, in the several decades this Commission has existed we
13 have never recognized constructive discharge and a strict construction of 4 GCA § 4403(c) does not
14 permit it. Again, until *I Liheslaturan Guahan* or the courts recognize our authority to consider
15 constructive discharge claims, we decline to do so.

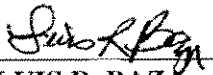
16 We do not hold that Johnson was not constructively discharged or that the allegations of
17 harassment are insufficient. The Commission did not proceed to a full hearing. Whether or not
18 Johnson would meet the requirements of constructive discharge if it were recognized is
19 something we did not reach. Our ruling is simply that we do not recognize constructive
20 discharge claims at this time.

VI. CONCLUSION

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22 The Civil Service Commission, by a vote of 7-0, dismisses the above referenced grievance appeal.
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SO ADJUDGED THIS 28th DAY OF May 2015.




LUIS R. BAZA
Chairman



MANUEL R. PINAUIN
Vice-Chairman




PRISCILLA T. TUNCAP
Commissioner



JOHN SMITH
Commissioner



LOURDES HONGYEE
Commissioner



DANIEL D. LEON GUERRERO
Commissioner



EDITH C. PANGELINAN
Commissioner