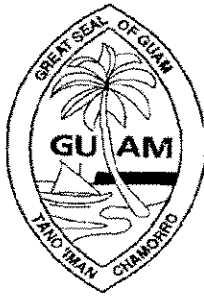


Date 7-17-15
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**BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS**



33-15-0641

IN THE MATTER OF:

RUDOLPH C. RIVERA,

Employee,

vs.

GUAM FIRE DEPARTMENT,

Management.

**ADVERSE ACTION APPEAL
CASE NO. 13-AA38T**

DECISION & JUDGMENT

**Office of the Speaker
Judith T. Won Pat, F.D.D**

Date: 07-17-15

Time: 12:25 PM

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This matter came before the Civil Service Commission (the "Commission") on Employee's Adverse Action Appeal at its regularly scheduled Merit Hearings on April 7, 9, 14 and 16, 2015 at its office at or about 5:45 p.m. Present for Management was Fire Chief Joey C. San Nicolas and its counsel of record, Assistant Attorney General Benjamin Abrams of the Office of the Attorney General; also present was the Employee, Rudolph C. Rivera, and his counsel of record, Daniel S. Somerfleck, Esq. of Somerfleck & Associates, PLLC.

I.
FACTS

1. Rudolph C. Rivera began working at the Guam Fire Department on October 14, 1985 as a Heavy Equipment Mechanic. During the course of his employment until this adverse action, Mr. Rivera always received at least "satisfactory" or better evaluations, never appeared impaired at work, and had his ability as a mechanic and work ethic praised by his supervisors.

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1 2. That on October 22, 2013, pursuant to the Department of Administration (DOA)
2 conducting a random drug test for the Guam Fire Department and its personnel in accordance
3 with the Drug-Free Workplace Program (DFWP) Operating Procedures, the Employee was
4 tested.

5 3. Prior to Management's written notification to Employee of his positive drug test,
6 Employee spoke with Dr. Espinola on October 28, 2013, regarding his testing positive for THC
7 ("marijuana/cannabis").

8 4. On November 6, 2013 at about 1400 hours, Management received the official
9 memorandum from Director Benita A Manglona, Department of Administration, regarding the
10 random drug testing results and that Employee had tested positive for illegal drugs according to
11 the memorandum.

12 5. On December 6, 2013, the Employee received the Notice of Proposed Adverse
13 Action against the Employee for violation of the Department of Administration Personnel Rules
14 and Regulations with the description of the circumstances and substance being 1) Refusal or
15 failure to perform prescribed duties and responsibilities; 2) Insubordination; 3) Unlawful use,
16 possession, or sale of illicit drugs; 4) Discourteous treatment to the public or other employees; 5)
17 Misuse or theft of government property; 6) Failure to comply with the Drug-Free Workplace
18 Program; and 7) Other misconduct not specifically listed.

19 6. On December 19, 2013, the Employee received the Notice of Final Adverse
20 Action which dismissed the Employee from his classified position as a Heavy Equipment
21 Mechanic II with the Guam Fire Department effective December 19, 2013 for violation of the
22 Department of Administration Personnel Rules and Regulations for 1) Refusal or failure to
23 perform prescribed duties and responsibilities; 2) Insubordination; 3) Unlawful use, possession,
24 or sale of illicit drugs; 4) Discourteous treatment to the public or other employees; 5) Misuse or

1 theft of government property; 6) Failure to comply with the Drug-Free Workplace Program; and
2 7) Other misconduct not specifically listed.

3 7. On April 7, 2015, at the hearing on this matter Management called the Employee
4 as its sole witness. The Employee asserted repeatedly that he did not knowingly consume
5 cannabis and was not a smoker or known ingester of cannabis, aside from some youthful
6 indiscretions long ago. Employee testified that when he received the results of his drug test he
7 was very shocked, had discussion with the Chief Medical Examiner and confronted his godson
8 who prepared the Chamorro Amot Medicine for the Employee. Until that time, the Employee
9 asserted that he had no knowledge that there was cannabis in any Chamorro amot that he had
10 ever used. Employee is an avid user of Chamorro Amot, receiving it from a variety of sources,
11 and only relatively recently to the test had he had his godson's mixture. The Employee provided
12 the medical examiner a sample of the amot for testing, but no testing was conducted by
13 Management to determine if the Chamorro amot medicine contained cannabis.

14 8. On April 9, 2015, the Employee called retired Chief John Wusstig as his sole
15 witness. Chief Wusstig testified that although the Drug-Free Workplace Program Operating
16 Procedures provide a process that involves the DSP, the MRO the Employee Assistance Program
17 Counselor, and the Employee's Supervisor to determine whether the Employee may return to
18 duty and receive rehabilitation and counseling program through the Employee Assistance
19 Program, this did not occur. The November 6, 2013 letter from the Director of the Department
20 of Administration clearly put forward that because this was the Employee's first offense,
21 Management was encouraged to inform Mr. Rivera to seek treatment and rehabilitation and the
22 Department may utilize the Employee Assistance Program. Because Chief Wusstig believed that
23 the Fire Department had a zero tolerance with regards to substance use the Employee was
24 terminated, however upon examination, Chief Wusstig was unable to provide the Commission

1 any General Order, Executive Order, Regulation or Law stating such. Chief Wusstig went on to
2 praise Mr. Rivera, both personally and professionally, and testified that it was with regret that he
3 dismissed Employee, but only did so because he thought that he had no other choice available.

4 II. 5 DISCUSSION

6 We note at the outset that this case is a clear example of over-charging an Employee.
7 Management might believe that using a "shotgun" approach would help its case, but it did not.
8 The burden in an adverse action is on Management to prove the allegations by clear and
9 convincing evidence, or at least by substantial evidence in some instances. Because
10 Management offered the Employee as its only witness, the Commission received limited
11 evidence regarding Management's allegations, other than with regards to the Employee testing
12 positive for cannabis. There was virtually no testimony offered to the Commission to support
13 allegations of refusal or failure to perform prescribed duties, insubordination, discourteous
14 treatment to the public or other employees, misuse or theft of government property, or other
15 misconduct. When Management makes allegations such as discourteous treatment to the public
16 or other employees, or misuse or theft of government property, then there should at least be a
17 scintilla of evidence available to present.

18 The limited nature of the evidence presented in this case makes it difficult to be relied
19 upon in the future as precedent. To be clear: we are not hereby creating a "Chamorro Amot
20 defense" that GovGuam employees can rely on in the future. Henceforth, employees should take
21 care with the ingredients of their Chamorro Amot, prepared by others or themselves. Yet, due to
22 the limited nature of the evidence presented in this matter, essentially the only story presented
23 was that of the Employee. While under initial questioning the Employee appeared to make
24 certain admissions, it was clear on follow-up that such misstatements were predicated on
25 nervousness, difficulty with accents, and a general confusion about whether a given question

1 about Chamorro Amot referred at any given time to said Amot containing cannabis or not. The
 2 Employee clearly denies knowingly using cannabis, but readily admitted using Chamorro Amot
 3 Medicine at night before going to bed. Further, he stated that after testing positive he theorized
 4 that his godson whom prepared the recent Chamorro Amot Medicine had, unknown to him,
 5 placed cannabis root within the mixture of the Chamorro Amot Medicine.

6 Employee explained that he would not have felt the effects of cannabis, nor gone to work
 7 under the influence, by using the Amot Chamorro at night. Although the Employee had
 8 provided a sample of the Chamorro Amot Medicine to Management for testing, Management did
 9 not have the sample tested. Because of the failure to test the sample, the Commission is unable
 10 to determine if the positive test results for cannabis were from the Amot or from other sources.

11 The Department of Administration Drug-Free Workplace Program Operating Procedures
 12 clearly provide under Section 28 a process that includes a rehabilitation and counseling program
 13 for the first instance if illegal drug use and this was referenced in the November 6, 2013
 14 Memorandum from then Director of the Department of Administration. This process was not
 15 followed by Management based upon an unsupported belief by Chief Wusstig that the Guam Fire
 16 Department operated on a zero tolerance to any positive drug test as no such policy was present
 17 by Management. We were particular impressed by Chief Wusstig's laudatory praise of Mr.
 18 Rivera's work habits, that the Chief only dismissed Employee with grave regret under the belief
 19 that he had no other choice, and the long-term, otherwise impeccable, record of the Employee.

20 We can surmise that if further evidence or law were presented, it might have bolstered
 21 Management's case, but it is not our role to surmise in favor of Management. The burden is
 22 upon Management to make their case. The Commission thus determines 6-0 that termination
 23 was not appropriate; however, the Commission is divided 3 to 3 whether some form of discipline
 24

1 should be included. Yet, with no majority in favor of other discipline, the Adverse Action for
2 dismissal is simply voided.

3 **CONCLUSION**

4 **WHEREFORE**, the Commission enters the following Judgment:

5 a) That the Employee shall be immediately reinstated to his position as a Heavy
6 Equipment Mechanic II with the Guam Fire Department.

7 b) Employee shall receive back pay for all wages withheld from Employee during
8 the period from termination on December 19, 2013 until he is reinstated.

9 c) Employee shall be credited with all sick leave and annual leave that he would
10 have accrued during the period from termination on December 19, 2013 until he is reinstated.


11 d) Management shall deduct Employee's retirement contribution from his back pay
12 and then pay both Employee's and Management's contributions to the Government of Guam
13 Retirement Fund during the period from termination on December 19, 2013 until he is reinstated.

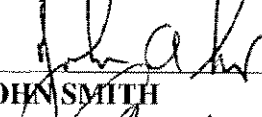
14 e) Attorney Daniel S. Somerfleck shall be paid for his reasonable attorney's fees and
15 costs.


16 IT IS SO ADJUDGED THIS 16th DAY OF July 2015.


17 
18 **LUIS R. BAZA**
19 **Chairman**


17 
18 **MANUEL R. PINAUIN**
19 **Vice-Chairman**

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

20 
21 **JOHN SMITH**
22 **Commissioner**

23 
24 **LOU HONGYEE**
25 **Commissioner**

23 
24 **DANIEL D. LEON GUERRERO**
25 **Commissioner**

23 
24 **EDITH C. PANGELINAN**
25 **Commissioner**