

BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS



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IN THE MATTER OF:

JOSEPH B. CRUZ, JR.

Employee,

vs.

**DEPARTMENT OF LAND
MANAGEMENT,**

Management.

**ADVERSE ACTION APPEAL
CASE NO. 15-AA02S**

DECISION AND ORDER

11/09/15
8:30am
Alieto, Jean

2015 MAR 9 PM 9:10

This matter came before the Civil Service Commission at its regularly scheduled meeting on March 24, 2014 at 5:45 pm. The Commission deferred deliberations until the meeting scheduled for March 26, 2014. At the regularly scheduled meeting on March 26, 2014, the Commission requested supplemental briefing and deferred deliberations until April 23, 2015. After receiving supplemental briefs from both parties, the Commission resumed deliberations at its regularly scheduled meeting on April 23, 2015, at 5:45 p.m., at its office located in Sinajana, Guam.

Joseph B. Cruz, Jr. ("Employee") was present with his attorney, Louie J. Yanza. Director Michael J.B. Borja was present for Management, represented by Kristan K. Finney from the Attorney General's Office.

33-15-1030
Office of the Speaker
Judith T. Won Pat, Ed D

1030

Date: 11/9/15
Time: 8:55AM
Received By: [Signature]

ORIGINAL

I. JURISDICTION

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2 The Civil Service Commission has jurisdiction over this matter pursuant to 4 G.C.A. §
3 4401, *et. seq.*, and the Department of Administration's Personnel Rules and Regulations.

II. DISCUSSION

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5 Employee holds the position of Administrative Officer in the Department of Land
6 Management. On October 8, 2014, Employee plead guilty to the charge of Bribery Concerning a
7 Program Receiving Federal Funds in violation of 18 U.S.C. §§ 666(a)(2), (b) and 2 before a
8 magistrate judge in the Federal District Court. On October 10, 2014, Employee delivered a letter
9 to Management regarding the plea agreement. The guilty plea was accepted by the federal
10 district court judge on October 27, 2014, and the district court judge issued an Order Accepting
11 Plea of Guilty and Adjudicating Guilt and Notice of Status Hearing ("Order"). Employee's
12 conviction formed the basis of an Adverse Action in which Employee was suspended for a total
13 of 21 working days. Management served the Final Notice of Adverse Action on Employee on
14 December 24, 2014, within 60 days of the Order, but more than 60 days from the date that
15 Employee appeared before the magistrate judge.

16 Employee appealed the Adverse Action and listed two grounds for the appeal, both
17 reliant on 4 G.C.A. § 4406 that provides that "in no event may an employee in the classified
18 service be given notice and statement of the charges required by this Section after the sixtieth
19 (60th) day after management knew or should have known the facts or events which form the
20 alleged basis for such action." The primary basis of Employee's appeal was that Management
21 knew or should have known of the facts or events that form the basis of the Adverse Action on
22 October 10, 2014, and that the Final Notice of Adverse Action should therefore have been served
23 within 60 days of October 8. Employee also initially raised as grounds for the appeal that the
24 suspension imposed was to take effect more than 60 days after Management knew or should

1 have known the facts or events which form the basis for the Adverse Action, but the Commission
2 clarified at the hearing that it has consistently ruled that discipline need not be completed within
3 the 60-day notice period provided in 4 G.C.A. § 4406, and Employee offered no further
4 argument on that issue.

5 In response, Management maintains that even though Employee gave notice that he was
6 pleading guilty to Bribery Concerning a Program Receiving Federal Funds, he was not convicted
7 until the court accepted his plea. Because the Adverse Action was based on the conviction,
8 Management argues that the 60 day notice period could not have started prior to October 27,
9 2014.

10 III. FINDINGS OF FACT

11 After hearing arguments and carefully reviewing the briefs from both parties, the
12 Commission makes the following findings of fact:

13 1. On October 8, 2014, Employee plead guilty to the charge of Bribery Concerning a Program
14 Receiving Federal Funds in violation of 18 U.S.C. §§ 666(a)(2), (b) and 2 before a magistrate judge in the
15 federal district court.

16 2. Employee was convicted of the crime of Bribery Concerning a Program Receiving Federal
17 Funds in violation of 18 U.S.C. §§ 666(a)(2), (b) and 2 on October 27, 2014, when the federal district
18 court judge accepted Employee's guilty plea and issued an Order Accepting Plea of Guilty and
19 Adjudicating Guilt.

20 3. Employee's conviction formed the basis for the Adverse Action.

21 4. The earliest date that Management could have known of Employee's conviction was October
22 27, 2014, the date that Employee was convicted.

23 5. On December 24, 2014, Employee received the Final Notice of Adverse Action.

24 6. The Final Notice of Adverse Action was served on Employee within 60 days of the date that
25 Management first knew or should have known of the facts and events that formed the basis for the
adverse action.

IV. ANALYSIS

A. Conduct vs. Conviction

We note that “conviction” stands as an independent basis for an adverse action under various Personnel Rules and Regulations. For example, in this case Department of Administration PRR 11.303(G) “Conviction for a crime” is the stated basis for the adverse action. Thus, where an Employee commits a criminal action, Management might have two choices of when to pursue an adverse action. First, if Management becomes aware of underlying *conduct* that can form the basis of a conviction, then Management might choose to take action within 60 days of their notice. Yet, Management can choose to see if a *conviction* for the conduct occurs, and then take action based solely upon the conviction. If Management was unaware of the *conduct* until the *conviction* occurred, then both can serve as grounds for the adverse action.

Too often we see this fundamental distinction confused. Sometimes Management who knew of the earlier underlying *conduct* will wait over 60 days for *conviction* and then incorrectly bring adverse action for both. The interplay between the two is important to understand. Sometimes an Employee who receives an adverse action for *conviction* will argue that the 60 day rule has been violated because Management had long been aware of the underlying *conduct*. This is also incorrect.

A conviction is a conviction. We decline to hold that if Management becomes aware of *conduct* that can form the basis of a conviction then Management is forced to act and cannot elect to wait to see if a *conviction* follows. There seems to be no statutory or legal basis to foreclose this option from Management. Management should be allowed the discretion to either act upon the *conduct* right away or wait and see if there is a *conviction*.

The case of *Liberty Perez v. DPW*, 14-AA27T, (September 17, 2015) is illustrative. In

1 *Perez*, Management brought an adverse action soon after charges were brought. Management
2 then chose to settle the adverse action in a global settlement. Once *Perez* was actually convicted,
3 however, Management's settlement of the underlying *conduct* precluded action upon the
4 *conviction*. Thus, sometimes it might be in Management's best interest to wait and see.

5 Further, one can imagine a situation where Management is duped by an apparently
6 trustworthy, yet guilty Employee who persuades them that criminal charges against them have no
7 merit. Yet, upon actual conviction, Management should be free to act in the best interest of their
8 agency. The fact that "Conviction for a crime" stands as an independent basis, without
9 qualification, for an adverse action suggests conviction alone is sufficient. This is the case even
10 where the time to act upon the underlying conduct has passed.

11 B. Conviction Defined

12 In this case and *Perez* we were confronted with the question of "what precisely is a
13 conviction?" We received a great deal of briefing on the matter in both cases and summarize
14 here. The answer to what a "conviction" is turned out to be more complicated than anticipated.
15 The way such matters transpire in the real world is different than the truncated view presented by
16 television and movies.

17 Initially, it would seem there are three possible points in the criminal process that one
18 could define as "conviction" of crime. First, when a guilty plea is entered. Second, could be
19 when the court accepts the guilty plea and adjudicates guilt. The third possibility is upon the
20 court issuing the final judgment and sentencing.

21 From a laymen's perspective it might seem that entering a guilty plea is sufficient to
22 be considered a "conviction" under the law. This is the crux of Employee's argument in this
23 case: that he pled guilty on October 8th and the Final Notice of Adverse Action occurred on
24 December 24th, over 60 days later. After receiving much briefing, we are persuaded that a guilty
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1 plea is not materially equivalent to a conviction. An array of cases from the United States
2 Supreme Court, Ninth Circuit Court of Appeals, and Guam Supreme Court convinced us that a
3 guilty plea is but a precursor to an actual conviction. If the Legislature and Department of
4 Administration intended a guilty plea alone to be a sufficient basis, then the statutes and
5 regulations could say so.

6 At the earliest, actual conviction for Employee occurred on October 27th, when the court
7 accepted Employee's guilty plea and adjudicated guilt.

8 C. Notice of Guilty Plea

9 Finally, we address the effect of an Employee informing Management of a guilty plea
10 prior to conviction. We recognize that a well-meaning Employee might consider notice of a
11 guilty plea to Management as fulfilling the requirement of 4 GCA § 4202.1, providing notice of a
12 conviction. As in *Perez*, where the Employee provides actual notice of a guilty plea prior to a
13 conviction, it seems to fulfill the legislative intent of the statute in creating awareness in
14 Management of the Employee's criminal situation. Considering that it took multiple nights of
15 briefing for us to distinguish a guilty plea from a conviction, and that it might fit popular
16 understanding that they are the same, it would be picayune to hold otherwise. Thus, such notice,
17 made in good faith, appears to be substantial compliance.

18 Yet, notice of a guilty plea would not, as in the present case, allow the Employee to
19 accelerate the 60 day trigger by pre-empting the conviction date. In other words, Cruz giving
20 notice on October 10th of his October 8th guilty plea should be read as substantial compliance
21 with the requirement of 4 GCA § 4201; however, the October 10th notice does not immediately
22 trigger the 60 day notice of a conviction, since the actual conviction had not yet occurred. Thus,
23 Management was in compliance with the 60 day rule when it served the Final Notice of Adverse
24 Action on December 24th.

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V. CONCLUSION

By a vote of 7-0 the Commission rules that Employee failed to meet his burden of proof that Management violated 4 G.C.A. § 4406, and his Motion to Void Final Notice Adverse Action is hereby denied.

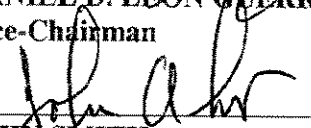
So Ordered this 3rd day of November, 2015.




LUIS R. BAZA
Chairman



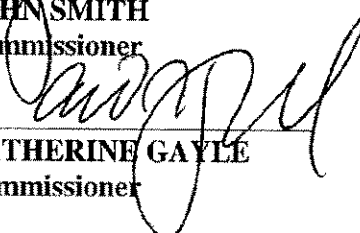
DANIEL D. LEON GUERRERO
Vice-Chairman



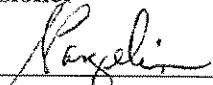
JOHN SMITH
Commissioner



LOURDES HONGYEE
Commissioner



CATHERINE GAYLE
Commissioner



EDITH PANGELINAN
Commissioner