

BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE MATTER OF:

DORIS FLORES BROOKS,

Employee,

vs.

GUAM VISITORS BUREAU,

Management.

POST AUDIT
CASE NOS. 15-PA02 & 15-PA03

DECISION AND JUDGMENT

93-16-1269
Office of the Speaker
Judith T. Won Pat, Ed.D

Date: 01-27-16
Time: 2:20pm
Received By: [Signature]

2016 JAN 27 PM 4:15

I. FACTUAL AND PROCEDURAL BACKGROUND

A. REQUEST

On July 27, 2015, Ms. Doris Flores Brooks, Public Auditor, filed a complaint regarding two (2) employees at the Guam Visitors Bureau ("GVB") and requested the review of two matters:

- (1) Ms. Lisa Linek's recruitment to the Accountant III position; and,
- (2) Ms. Rose Cuntliffe's recruitment to the position as a Controller, and, more specifically, an alleged recent pay increase putting her salary in excess of \$90,000.

As custodians of the merit system, we take requests for post audit investigations seriously. Where it is believed there have been personnel actions resulting from violations of the laws, rules, or regulations, under 4 G.C.A. §4403(d) it is within our ambit to investigate to either allay or confirm these suspicions. On July 29, 2015, the Executive Director noticed GVB of a

Office of the Legislative Council,
Senator Tina M. M. Torres
Date: 1-27-16
Time: 1:30
Received by: [Signature]

1269

Decision and Judgment
Re: GVB, Case Nos. 15-PA02 & 03

ORIGINAL

1 "Notice of Filing" for 15-PA02 and 15-PA03 relating to these two matters.

2 On August 03, 2015, Attorney F. Randall Cunliffe hand delivered a letter to the
3 Executive Director. The letter claimed in respect to the employees, "[w]hile they are classified
4 to the GVB, they do not fall under the Government of Guam classification and are not subject to
5 review by the Commission." The letter cited some cases and statutes (see below), but it was
6 unclear whether Attorney Cunliffe was officially representing GVB with this letter or intervening
7 on behalf of his spouse.

8 On September 1, 2015, staff presented the Staff Assessment report to the CSC for 15-
9 PA02 and 15-PA03. By a vote of 7-0 we voted to move forward with an investigation into the
10 matter.

11 B. INVESTIGATION

12 On September 3rd and 4th, 2015, the Executive Director sent requests to GVB for
13 documents pertinent to the investigation. On September 21, 2015, the General Manager of GVB
14 responded in a letter stating that GVB believed that the CSC, "does not have jurisdiction over
15 matters that pertain to GVB's policies on hiring, classification and salaries." GVB thereby
16 refused to provide any documentation.

17 On October 8, 2015, the CSC voted 6-0 to provisionally null and void both personnel
18 actions. Also on October 8, 2015, the CSC received a four (4) page "Memorandum" from F.
19 Randall Cunliffe expounding on the viewpoint that the CSC lacks jurisdiction to conduct a post-
20 audit of GVB personnel.

21 As no final decision was yet given, in compliance with §4403(d), Management was
22 given written notification on October 9, 2015, of the Commission's intention to declare the
23 personnel actions null and void. A hearing was set for October 20, 2015, to give Management an
24 opportunity to respond.

25 ///

C. MANAGEMENT'S RESPONSE

1 On October 20, 2015, the General Manager of GVB, Jon Nathan Denight, wrote a
2 response to the Commission. Also on October 20, 2015, the General Manager appeared before
3 the Commission, accompanied by counsel Thomas J. Fisher, Esq.
4

5 The arguments presented by Management are essentially as follows: (1) that §4403(d)
6 allows the Commission to only void personnel actions of Government of Guam classified
7 employees; (2) that GVB is not an instrumentality of the Government of Guam; therefore, the
8 CSC cannot null and void personnel actions of their employees; and, (3) that while the CSC has
9 jurisdiction to hear adverse action appeals through the GVB Personnel Rules and Regulations,
10 they do not confer the right to conduct a post-audit. "The Bureau has in fact adopted personnel
11 rules and regulations which allow appeal of adverse actions to the CSC. It bears repeating
12 though that the CSC's ability to hear appeals is because of a grant of limited authority by the
13 Bureau, not a grant of jurisdiction by the Legislature." Oct. 20, 2015, letter from Jon Nathan
14 Denight, General Manager of GVB, page 2.

D. THE WAIT FOR AN ATTORNEY GENERAL OPINION

15 On October 20, 2015, GVB requested thirty (30) additional days before the CSC took
16 final action to await an Attorney General's Opinion Letter that they had requested. We told them
17 to return in two (2) weeks for a status conference. On November 3, 2015, GVB appeared for a
18 status conference and stated that they were still waiting on an AG's Opinion Letter. On
19 December 10, 2015, GVB again appeared before the CSC. GVB advised the CSC that an AG's
20 Opinion Letter was going to be forthcoming in the next two (2) weeks. A hearing was set for
21 January 12, 2016, where GVB again appeared and no AG's Opinion Letter had been produced.
22 Finally, after allowing nearly three (3) months for an AG's Opinion Letter, on January 14, 2016,
23 the Commission voted 4-1 (with one abstaining) to null and void the personnel actions at
24 question.
25

1 Following the decision, GVB's counsel argued additionally that the employees were
2 actually unclassified and/or that we should not penalize the employees for GVB's failure to
3 cooperate.

4 **II. JURISDICTION**

5 The jurisdiction of the Civil Service Commission is based upon the Organic Act of
6 Guam, 4 G.C.A., §§4401 *et seq.*, particularly §4403(d), and the Guam Visitors Bureau Personnel
7 Rules and Regulations.

8 **III. DISCUSSION**

9 We note at the outset that the GVB Personnel Rules and Regulations ("GVB Rules")
10 provide on pg. 149: "CSC reserves the right to post audit selection documentation records." On
11 page 48 the GVB Rules state: "Copies of all classification reviews shall be filed with the
12 Commission for post-audit purposes." ("Commission" on Page 154 of the GVB Rules "[s]hall
13 mean the Guam Civil Service Commission"). It is unprecedented for us that an agency has
14 refused to cooperate with a post audit investigation. In addition to various adverse action appeals
15 (14-AA19T & 12-AA13T) and other hearings (0711-GRE-16 & CY94-EEO), GVB has appeared
16 before the CSC for a post audit in the past without raising the issue of jurisdiction. *See*, Ruling
17 and Order, In the Matter of Regina Kono, Setsuko Otake, and Vivian I. Hogan, Post Audit Case
18 No. CY94-PA01, August 1, 1995.

19 The CSC investigation began on September 1, 2015, when we gave our staff the go ahead
20 to conduct an investigation on our behalf. Section 4403(d) states: "The agency head shall
21 cooperate and assist with the Commission's investigation." Here, the General Manager of GVB
22 refused to cooperate with the investigation by providing post audit selection documentation
23 records, in contravention of GVB's Rules. It would produce an absurd result if agencies could
24 avoid post audits merely by refusing to cooperate. By that reading, section 4403(d) would be
25

effectively meaningless and toothless. We do not believe *Lisheslatura* enacted a meaningless, absurd statute.

Further, refusal to cooperate with the investigation is a violation of personnel statutes, as section 4403(d) is itself a statute related to personnel actions. It is also a violation of GVB Personnel Rules & Regulations. We believe an adverse inference can be drawn from the failure to produce documents, similar to that in a spoliation case. Put simply: if an entity has nothing to hide, then why not produce the documents? The reasonable inference is that the documents would be bad for the entity.

Even if we accepted the reasoning of the October 20th letter, that it is the GVB Rules alone that provide jurisdiction to the CSC to hear adverse actions, then it should follow that since the GVB Rules discuss the "CSC right to post audit" on pages 48 and 149 there is jurisdiction here. In fact, the refusal to produce documents by GVB is refusing to produce the very "post audit selection documents" specified in the GVB Rules. This staunch refusal violates both the GVB Rules and section 4403(d).

Nowhere in the GVB Rules is an exception to post audit procedures provided. In fact, on page 3, they state: "Nothing in these rules and regulations is intended to limit or deprive the Civil Service Commission of jurisdiction or authority vested by the Organic Act or the laws of Guam." Rule 1.500. Even if they did, Rule 1.600 states: "In the event any rule or regulation is in conflict with statute, the statute shall prevail to the extent of inconsistency." Page 48 also states: "Departments shall not use the classification process to evade the principles of the Merit System and effect personnel changes for which other personnel processes exist." Far from being limited to adverse actions, GVB Rules provide for CSC to entertain cases involving administrative reviews (page 51), layoffs (page B8), political activity (page E5), EEO (page F3-5), and others.

Indeed, the GVB Rules defines "CLASSIFIED SERVICE" in a way contrary to GVB's current claims: "**Government** service of which employees have attained permanent status and

1 cannot be removed from employment without cause." Page 153 (emphasis added). In fact, GVB
2 and/or its employees participate in the MagPRO Awards for employees of the Executive Branch
3 of the Government of Guam. In 2015, GVB and/or its employees won eight (8) MagPRO
4 Awards.

5 In 12 GCA § 9116, it states that "present employees of the Guam Visitors Bureau... with
6 the exception of the General Manager, Deputy Manager, and Secretary, their positions shall be
7 classified positions." 12 GCA § 9110(a) requires that "[p]ursuant to the provisions of 4 GCA
8 Section 4105, the Board shall establish rules and regulations governing selection, promotion,
9 performance evaluation, demotion, suspension, removal and other disciplinary action for the
10 employees of the Bureau." On August 15, 2000, GVB's Board adopted Guam Visitors Bureau
11 Resolution Official Management Directive No. 2003 to adopt the Department of Administration
12 ("DOA") Personnel Rules and Regulations. This GVB Board Resolution was submitted to the
13 CSC who approved it through Civil Service Commission Resolution No. 2001-004 on January
14 23, 2001. Governor Guterrez then enacted Executive Order 2001-09 which implemented the
15 rules and regulations. *See*, Memorandum, CSC No. 2003-167, March 11, 2003.

16 We note that no other agency that has adopted the DOA Rules has alleged that they do
17 not confer jurisdiction to the CSC to conduct post audit investigations. Most likely this is
18 because post audits are explicitly mentioned in the Rules. Although post audits are not given
19 their own chapters in the DOA/GVB Rules as adverse actions and grievances are that does not
20 mean such jurisdiction does not exist. Grievances and adverse actions have very detailed,
21 specific steps and/or procedures for personnel to follow, whereas post audits only require a
22 simple complaint to the CSC. If GVB's October 20th letter admits that jurisdiction for adverse
23 actions exists due to adoption of the GVB Rules, it must follow that the post audit jurisdiction
24 exists as well.

1 Further, 12 GCA § 9110 specifically mentions “selection” and “promotion” as facets of
2 the Rules that must comport with the merit system. The “demotion, suspension, removal”
3 portion of § 9110 relates to adverse actions, but it is the “selection” and “promotion” that falls
4 under the ambit of post audits. For as adverse action appeals allow an employee to appeal an
5 action by management that directly negatively impacts them, selections and promotions taken in
6 violation of the merit system are also negative impacts on others: namely, those that might be
7 more qualified for a recruitment or promotion are being passed over in favor of another
8 individual. It is precisely these “post audit selection documents” being referred to in the GVB
9 Rules.

10 It should be highlighted that GVB did not claim that the employees were unclassified
11 initially. We recognize that our jurisdiction does not extend to unclassified employees. Had
12 GVB produced simple, non-invasive documentation showing that the employees in question
13 were unclassified, that would have been reflected in our investigation and we would not have
14 voted to null and void. Instead, GVB refused to provide any documentation whatsoever. These
15 are not personal medical records at issue. The CSC has handled thousands upon thousands of
16 employment documents over the decades and there is no reason to not supply our staff with said
17 documents if GVB’s position were that the employees are unclassified.

18 In regards to the innocence of the employees in this matter, §4403(d) does not limit the
19 voiding of personnel actions to instances where the employees colluded with management.
20 Indeed, if in light of the violations of statutes and GVB Rules in refusing to cooperate with the
21 investigation and provide selection documents, then we are giving *carte blanche* to all
22 administrators to violate statutes and rules at will as long as the employees who benefit are not
23 complicit in the violations. *See, e.g., Decision and Judgment, Aguon v. DOC, 15-PA01.* The
24 vast majority of §4403(d) post-audits brought before us do not implicate the employee, but are
25 done to remind management that they need to follow the rules.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

We find it unnecessary to address the arguments by GVB that it is exempted from post audit jurisdiction by being a public corporation. The fact that the Board of Directors of GVB adopted the GVB Rules and submitted them to the CSC for approval is sufficient. Even if GVB would have had autonomy from the CSC by their public corporation status, their Board of Directors submitted to the jurisdiction of the CSC to conduct post audits through their adoption of the GVB Rules.

IV. CONCLUSION

For the forgoing reasons, the Civil Service Commission of Guam, by a vote of 4-1, finds null and void:

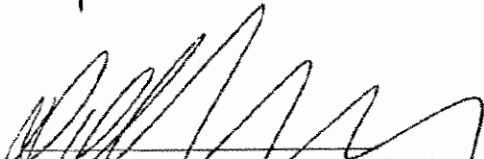
- (1) Ms. Lisa Linek's recruitment to the Accountant III position; and,
- (2) Ms. Rose Cunliffe's most recent personnel action, an alleged recent pay increase putting her salary in excess of \$90,000.

A copy of this final decision will be submitted to *I Lisheslatura* on the next working day.

SO ADJUDGED THIS 26th day of January 2016, *nunc pro tunc* to the date the votes were taken on January 14, 2016.



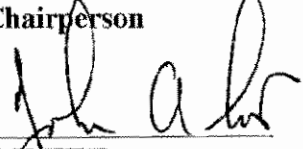
EDITH PANGELINAN
 Chairperson




DANIEL D. LEON GUERRERO
 Vice-Chairperson



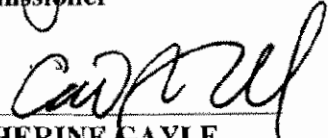
PRISCILLA T. TUNCAP
 Commissioner



JOHN SMITH
 Commissioner



LOURDES HONGYEE
 Commissioner



CATHERINE GAYLE
 Commissioner