



Territory of Guam
Territorio Guam

OFFICE OF THE GOVERNOR
U.FINIAN I MAGA'LAHI
AGANA, GUAM 96910 U.S.A.

RECEIVED
OFFICE OF THE SPEAKER
DATE: 9/27/93
TIME: 4:55 PM
RECD BY: [Signature]

SEP 27 1993

The Honorable Joe T. San Agustin
Speaker, Twenty-Second Guam Legislature
155 Hesler Street
Agana, Guam 96910

Dear Mr. Speaker:

Transmitted herewith is Bill No. 336 which I have signed into law this date as
Public Law 22-36.

Sincerely yours,

Joseph F. Ada
JOSEPH F. ADA
Governor of Guam

220367

Attachment

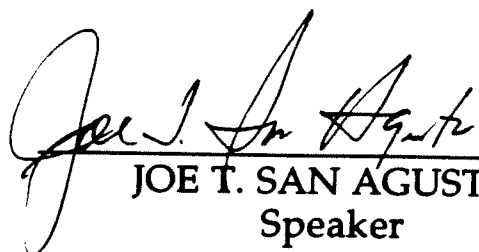


Commonwealth Now!

TWENTY-SECOND GUAM LEGISLATURE
1993 (FIRST) Regular Session

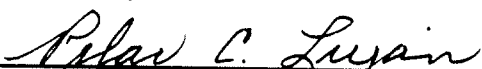
CERTIFICATION OF PASSAGE OF AN ACT TO THE GOVERNOR

This is to certify that Substitute Bill No. 336 (COR), "AN ACT TO AMEND SUBSECTION (c) OF §28064, TITLE XXIX, GOVERNMENT CODE, BY ADDING A NEW ITEM (16) TO ALLOW LAY REPRESENTATION BEFORE THE CIVIL SERVICE COMMISSION OR OTHER ADMINISTRATIVE BODY AND TO ADD SUBSECTION (h) TO §4403 OF TITLE 4, GUAM CODE ANNOTATED, ON RULES OF PRACTICE BEFORE THE CIVIL SERVICE COMMISSION," was on the 15th day of September, 1993, duly and regularly passed.



JOE T. SAN AGUSTIN
Speaker

Attested:



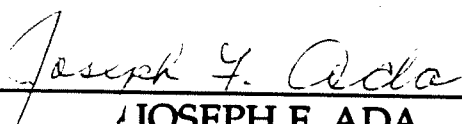
PILAR C. LUJAN
Senator and Legislative Secretary

This Act was received by the Governor this 17th day of September,
1993, at 10:20 o'clock A.M.



Assistant Staff Officer
Governor's Office

APPROVED:



JOSEPH F. ADA
Governor of Guam

Date: SEP 27 1993

Public Law No. 22-36

TWENTY-SECOND GUAM LEGISLATURE
1993 (FIRST) Regular Session

Bill No. 336 (COR)

As substituted by the
Committee on Rules

Introduced by:

H. D. Dierking
T. S. Nelson
J. T. San Agustin
C. T. C. Gutierrez
M. D. A. Manibusan
T. C. Ada
J. P. Aguon
E. P. Arriola
M. Z. Bordallo
P. C. Lujan
V. C. Pangelinan
D. Parkinson
E. D. Reyes
D. L. G. Shimizu
F. P. Camacho
A. C. Blaz
J. G. Bamba
D. F. Brooks
T. V. C. Tanaka
A. R. Unpingco

AN ACT TO AMEND SUBSECTION (c) OF §28064, TITLE XXIX, GOVERNMENT CODE, BY ADDING A NEW ITEM (16) TO ALLOW LAY REPRESENTATION BEFORE THE CIVIL SERVICE COMMISSION OR OTHER ADMINISTRATIVE BODY AND TO ADD SUBSECTION (h) TO §4403 OF TITLE 4, GUAM CODE ANNOTATED, ON RULES OF PRACTICE BEFORE THE CIVIL SERVICE COMMISSION.

1

BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

1 **Section 1.** Subsection (c) of §28064 of Title XXIX of the Government
2 Code is hereby amended by renumbering item (16) to (17) and by adding a new
3 item (16) to read as follows:

4 "(16) To appear, at no charge to the employee, before the Civil
5 Service Commission or other administrative body, including
6 autonomous agencies, to represent an employee of the government
7 of Guam in actions relating to such employee's government service,
8 or to a grievance;"

9 **Section 2.** A new subsection (h) is hereby added to §4403 of Title 4,
10 Guam Code Annotated, to read as follows:

11 "(h) The Civil Service Commission shall establish rules of
12 uniform practice for itself and for other administrative agencies to
13 govern legal and lay representation in any proceeding before the
14 Commission or such agency, as the Commission deems appropriate."

TWENTY-SECOND GUAM LEGISLATURE
1993 (FIRST) Regular Session

6

Date: 9/15/93

VOTING SHEET

Bill No. 336

Resolution No. _____

Question: _____

NAME	AYE	NO	NOT VOTING/ ABSTAINED	ABSENT/ OUT DURING ROLL CALL
ADA, Thomas C.	✓			
AGUON, John P.	✓			
ARRIOLA, Elizabeth P.	✓			
BAMBA, J. George	✓			
BLAZ, Anthony C.	✓			
BORDALLO, Madeleine Z.	✓			
BROOKS, Doris F.	✓			
CAMACHO, Felix P.	✓			
DIERKING, Herminia D.	✓			
GUTIERREZ, Carl T. C.	✓			
LUJAN, Pilar C.	✓			
MANIBUSAN, Marilyn D. A.	✓			
NELSON, Ted S.	✓			
PANGELINAN, Vicente	✓			
PARKINSON, Don	✓			
REYES, Edward D.	✓			
SAN AGUSTIN, Joe T.	✓			
SANTOS, Francisco R.				
SHIMIZU, David L. G.	✓			
TANAKA, Thomas V. C.	✓			
UNPINGCO, Antonio R.	✓			

TOTAL 20



Committee on General Governmental Operations
and
Micronesian Affairs
Twenty-Second Guam Legislature

June 21, 1993

Sen. Ted S. Nelson

Chairman

Honorable Joe T. San Agustin

Speaker

21st Guam Legislature

155 Hessler Street

Agana, Guam 96910

Dear Mr. Speaker:

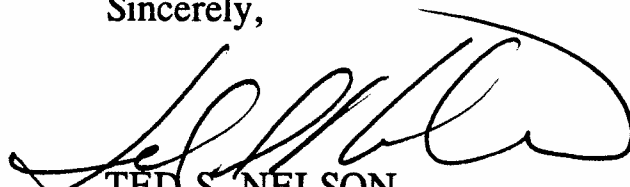
The Committee on General Governmental Operations and Micronesian Affairs, to which was referred **Bill No. 336** (*An Act to Amend Subsection (c) of §28064, Title XXIX of the Government Code, by adding a new item (16) to allow lay representation before the Civil Service Commission or other administrative body*) has had the same consideration and now wishes to report back the same with the recommendation to **do pass**.

The Committee votes are as follows:

To do pass	<u>9</u>
Not to pass	<u>0</u>
To report out	<u>1</u>
To place in inactive file	<u>0</u>
Abstain	<u>0</u>

A copy of the Committee Report and other pertinent documents are enclosed for your reference and information.

Sincerely,






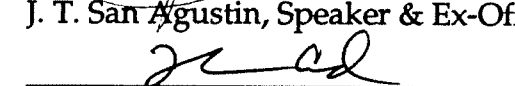
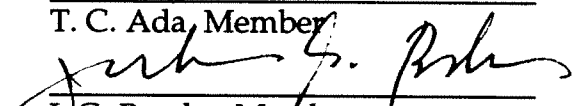

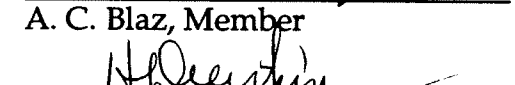
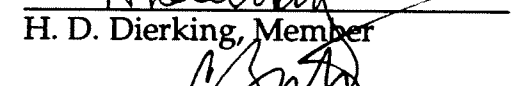
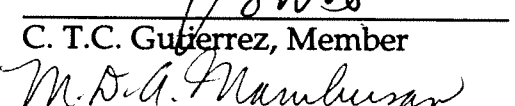
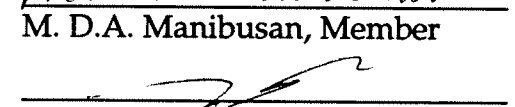
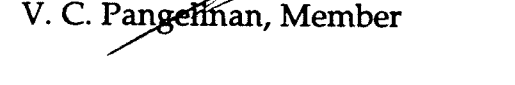
TED S. NELSON

Enclosures

COMMITTEE ON GENERAL GOVERNMENTAL OPERATIONS
AND MICRONESIAN AFFAIRS
VOTE SHEET
ON
BILL NO. 336

"AN ACT TO AMEND SUBSECTION (c) OF §28064,
TITLE XXIX OF THE GOVERNMENT CODE, BY
ADDING A NEW ITEM (16) TO ALLOW LAY
REPRESENTATION BEFORE THE CIVIL SERVICE
COMMISSION OR OTHER ADMINISTRATIVE BODY."

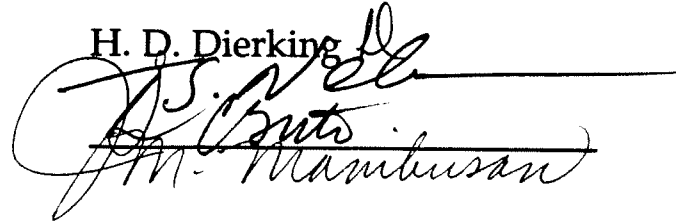
RECOMMENDATION TO DO PASS

<u>COMMITTEE MEMBERS:</u>	<u>TO DO PASS</u>	<u>NOT TO PASS</u>	<u>INACTIVE FILE:</u>	<u>ABSTAIN:</u>
 T. S. Nelson, Chairperson	✓			
 E. D. Reyes, Vice-Chairperson	✓			
 J. T. San Agustin, Speaker & Ex-Officio	✓			
 T. C. Ada, Member	✓			
 J.G. Bamba, Member				✓ Report out only
 A. C. Blaz, Member	✓			
 H. D. Dierking, Member	✓			
 C. T.C. Gutierrez, Member				
 M. D.A. Manibusan, Member	M.D.A. ✓ 6/1/93			
 V. C. Pangemanan, Member	✓			
 T. V.C. Tanaka, Member				

TWENTY-SECOND GUAM LEGISLATURE
1993 (FIRST) Regular Session

Bill No. 336

Introduced by:

H. D. Dierking


AN ACT TO AMEND SUBSECTION (c) OF
§28064, TITLE XXIX, GOVERNMENT CODE, BY
ADDING A NEW ITEM (16) TO ALLOW LAY
REPRESENTATION BEFORE THE CIVIL
SERVICE COMMISSION OR OTHER
ADMINISTRATIVE BODY.

1 BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF
2 GUAM:

3 Section 1. Subsection (c) of §28064 of Title XXIX of the Government
4 Code is hereby amended by renumbering Item (16) to (17) and by adding
5 a new Item (16) to read as follows:

6 "(16) To appear before the Civil Service Commission or other
7 administrative body to represent an employee of the government of
8 Guam in actions or proceedings;"

9 Section 2. A new Subsection (h) is hereby added to §4403 of Title 4,
10 Guam Code Annotated to read as follows:

11 "(h) The Civil Service Commission shall establish rules of
12 practice to govern legal and lay representation in any proceeding of
13 the Commission, as the Commission deems appropriate."

Twenty-Second Guam Legislature
Committee on General Governmental Operations and
Micronesian Affairs

Report on Bill No. 336

"An act to amend Subsection (c) of §28064, Title XXIX, Government Code, by adding a new Item (16) to allow lay representation before the Civil Service Commission or other administrative body."

Introduced by Senator H. D. Dierking

Preface:

The Committee on General Governmental Operations and Micronesian Affairs, to which was referred Bill No. 336, "An act to amend Subsection (c) of §28064, Title XXIX, Government Code, by adding a new Item (16) to allow lay representation before the Civil Service Commission or other administrative body," conducted a public hearing on Tuesday, April 27, 1993, at 9:00 a.m., in the Legislative Public Hearing Room. Committee members present were Senator Ted S. Nelson, Chairperson, and Senators Vicente C. Pangelinan and Anthoyn C. Blaz.

Notification:

Letters were sent to the Governor requesting that he send the appropriate cabinet member to attend the hearing.

Testimony:

At this time, Senator Nelson called on those persons wishing to testify on Bill No. 336. There being no witnesses present, the Chairperson requested the Committee staff to meet with members of the Civil Service Commission. There being no further discussion, the Chairperson of the Committee adjourned the hearing on Bill No. 336.

Committee Findings:

Please refer to Page 3 entitled "Profile on Bill No. 336."

Discussion:

Refer to Page 7 entitled "Discussion on Bill No. 984, Twenty-First Guam Legislature"

Recommendation:

The Committee on General Governmental Operations and Micronesian Affairs, to which was referred Bill No. 336, "An act to amend Subsection (c) of §28064, Title XXIX, Government Code, by adding a new Item (16) to allow lay representation before the Civil Service Commission or other administrative body," has had the same under consideration, and now wishes to report back the same with the recommendation to do pass.

Profile on Bill No. 336

Brief Title: "Lay Representation before the Civil Service Commission."

Main Sponsor: Senator Herminia D. Dierking.

Date Introduced: March 11, 1993.

Referral: To the Committee on General Governmental Operations and Micronesian Affairs on March 11, 1993.

Committee Hearing: Tuesday, April 27, 1993, in the Legislative Public Hearing Room.

Official Title: "An act to amend Subsection (c) of §28064, Title XXIX, Government Code, by adding a new Item (16) to allow lay representation before the Civil Service Commission or other administrative body."

Recommendation: To do pass.

Lay Representation: "What is It?"

The intent of Bill No. 336 is designed to allow lay representation before the Civil Service Commission. Lay Representation is a variation of "pro se" representation. It exists when an employee represents himself before the Civil Service Commission without the aid of legal counsel.

Also, it should be noted that it has been the Commission's practice to allow lay representation, especially when the employee is a member of a bargaining unit, (Guam Federation of Teachers), or a professional organizational, (Guam Nurses Association), and his representative is an agent thereof.

Lay representation before the Commission is set forth in the Commission's Rule 130(D)(2). This affords employees the right to be

accompanied, represented, and advised by a representative of his choosing.

Since the enactment of Public Law 20-175, the Attorney General's Office opined (February 14, 1992), that representation before the Civil Service Commission is considered a practice of law. Although the Attorney General's Office was probably correct in issuing its opinion, its inclusion in P.L. 20-175 was probably unintentional on the part of the Legislature. This is because of the Legislature's historic unremitting policy of protecting government employees. Furthermore, this is evidenced by the long standing right of employees to lay representation in adverse action proceedings before the Commission.

Unfortunately, P.L. 20-175 has been enacted and an opinion has been issued to the Commission disallowing lay representation. Presently, P.L. 20-175 effectively denies employees representation of their choosing, complicates further the Commission's proceedings, and seeks to increase the government's attorney fees expense.

Lay representation is not unique to the Civil Service Commission. Lay representation is a practice permitted by the Federal Merit System Protection Board [(5 U.S.C. §7701(a)(2)], and [(5 CFR §1202.31(b))]. Also, it is practiced in other jurisdictions.

The right of representation is recognized as a fundamental right. Appellants before the Commission are given broad discretion to select a representative. Although the proceedings are quasi-judicial in nature, they are an administrative proceeding and is therefore inherently flexible to ensure that lay represented appellants are not unfairly disadvantaged.

Committee Findings

1. An adverse action proceeding involves an adjudication of disputed rights. It is therefore a quasi-judicial proceeding and representation is of a semi legal nature.
2. The right of representation in an adverse action proceeding is recognized as a fundamental right. The appellants are given broad discretion to select a representative. This is not to say, however, that the Commission will allow incompetent representation if such is

evident. Although the proceeding is quasi-judicial, it is still an administrative proceeding and is therefore inherently flexible to ensure that lay represented appellants are not unfairly disadvantaged.

3. The Committee also finds that the Commission's counterpart, the Merit System Protection Board, among other federal agencies, permits lay representation in its proceedings. [(5 USC, §7701 (a)(2) and 5 CFR, §1201.31b)]
4. The fact that lay representation in a Commission adverse action proceeding is not listed as "not" constituting the illegal practice of law under §28064 (c), does not give rise to the conclusion that the Legislature intended to prohibit such representation. It is common knowledge that the Legislature is highly protective of employee rights. It would be unreasonable to deprive employees of what has been recognized as a basic right through custom and practice.
5. The Committee does not believe that the statutory purpose of §28064 was to abrogate the rule making authority of the Commission and the Department of Administration, as well as autonomous agencies, but rather to develop cohesive and consistent guidelines on the issue of lay representation before administrative tribunals and agencies.
6. The Commission and the Department of Administration pursuant to §§4105, 4401, Title 4, Guam Code Annotated, have enacted CSC Rule 100D.2 and DOA Rule 14.34. Since then these rules have been in full force and effect.
7. The Committee's contention in support of lay representation is the fact that the rule making powers of the Civil Service Commission have not been repealed by Public Law 20-175.
8. The Commission has historically recognized the right to be represented before the Commission by anyone of a party's choosing. The Legislature recognized this when it enacted the Civil Service reform Act (public Law 16-23, amended by Public Law 16-41, and codified in Title 4, Guam Code Annotated.
9. The Legislature, in the Committee's opinion, vested the Commission with the authority to adopt its own rules to govern its procedures

by enacting §4402 of Title 4, Guam Code Annotated. In doing so, the Legislature made a deliberate and explicit reference to the employee's representative without confining the term to mean "legal" representative.

10. The Committee further finds that Public Law 20-175 permits government agencies to employ lay representation in proceedings before the Commission, although there doesn't appear to be any articulated rational basis for discriminating between management and the employees.

Twenty-First Guam Legislature

Discussion between members of the Civil Service Commission and the Chairperson and members of the Committee on General Governmental Operations on Bill No. 984 "An act to amend Subsection (c) of §28064, Title XXIX, Government Code, by adding a new Item (16) to allow lay representation before the Civil Service Commission or other administrative body," on Thursday, December 10, 1992.

Senator Herminia D. Dierking: Lay representation exists when an employee represents himself before the Civil Service Commission without the aid of legal counsel.

Also, it has been the Commission's practice to allow lay representation, especially when the employee is a member of a bargaining unit, (Guam Federation of Teachers), or a professional organizational, (Guam Nurses Association), and his representative is an agent thereof.

Since the enactment of Public Law 20-175, the Attorney General's Office opined (February 14, 1992), that representation before the Civil Service Commission is considered a practice of law. Unfortunately, P.L. 20-175 has been enacted and an opinion has been issued to the Commission disallowing lay representation. Presently, P.L. 20-175 effectively denies employees representation of their choosing, complicates further the Commission's proceedings, and seeks to increase the government's attorney fees expense.

At this time, I would like to call on the representatives from the Civil Service Commission. For the record, please introduced yourself.

Mr. Gerald A. Taitano, Chairman, Civil Service Commission: Thank you Madame Chairperson. To my right is the Acting Executive Director John Salas, and to my left is the staff leal counsel Ron Aguon, and my name is Gerald A. Taitano, Chairman, Civil Service Commission.

Senator Dierking, the Civil Service Commission endorses Bill No. 984 permitting lay representation in Civil Service Commission proceedings.

Bill No. 984 restores the right to lay representation which had been abrogated by Public Law 20-175, probably through legislative oversight. This practice had existed since the Commission's inception in 1967.

The Commission believes that individuals with cases before the Civil Service Commission should continue to have the option to choose lay representatives, just as government agencies are permitted to do under Public law 20-175. There is no justification for discrimination or despair treatment.

The Commission believes that Bill No. 984 would also authorize the Civil Service Commission to adopt rules of practice before it. Specifically, rules of procedures and rules of evidence. A copy of the Attorney General's opinion on the issue is attached and was submitted to the Committee for it perusal. Thank you.

Senator Dierking: Is it to my understanding that lay representation has been practiced by the Commission prior to the enactment of Public Law 20-175?

Mr. Taitano: Yes, Senator. The Civil Service Commission law guarantees employees of the government the right to representation of their own choosing.

Senator Dierking: It could be a lay person; it could be an attorney.

Mr. Taitano: Yes, Senator. Now, based on that, there are really two types of representation. One is called pro se, which means you represent yourself. That was not in anyway abrogated by Public Law 20-175. The other, is called pro per, which is the right to be represented by another person not necessarily a member of the bar. This would mean, for example, that an individual would be represented by a personnel specialist or someone who does not have any conflict of interest with the case or the issue at hand.

What basically happened with Public Law 20-175 is that it defined all of the proceedings before the Civil Service Commission as a practice of law. And that extended that definition to require that the practice of law within the government be performed only by those persons who are members of the bar. Technically, what has happened is that it has essentially denied employees the right to representation in the pro per

sense, not necessarily in the pro se, which is the right to represent one self.

We do have numerous cases before the Civil Service Commission that are pro per cases and the Civil Service Commission, of course, to reflect the intent of the Legislature in its enactment of the Civil Service Commission law, has traditionally allowed to give more lee way as far as evidentiary and procedural presentations to those individuals. Because of the fact that we in the administrative law areas should not give undue hardship to those individuals representing their cases before the Civil Service Commission.

Senator Dierking: At this time, I recognize Speaker San Agustin.

Speaker Joe T. San Agustin: My concern is just what is the rationale of Public Law 20-175? Because with respect to the Civil Service Commission, it is administrative in nature, and the rules of law practiced in the courts are not necessarily applicable to that. The Commission was designed that way; otherwise, you would not get anything done from an employee's stand point.

When Public Law 20-175 was enacted, it was to preclude the Civil Service Commission from operating outside the rules of evidence or the civil court procedures in what you would do in a court of law, and the Civil Service Commission is not a court of law. It should be understood that the Civil Service Commission is an administrative board in itself, and is basically to represent the employee's interest, and not the employer.

Unfortunately, it has always been the practice of the Civil Service Commission, that they tend to represent the interest of the employer because of the nature of their appointment which comes from the Governor.

I was part of the people that originally drafted the Civil Service Commission law. That is the reason why we intended that the Commission members should not be a member of any other board or commission in the government. We intended that so that the Civil Service Commission may be purely objective and on the side of the employee. In other words, you give the benefit of the doubt to the employee, not the employer.

That was the underlying principle why the Civil Service Commission was created. Now to say that anybody who goes before the Commission must be a lawyer admitted to the Bar Association is tantamount to going against the basic principle of the Civil Service Commission when it was created.

I don't know if you are familiar with how the Civil Service Commission was organized. It was established when we had a Labor Personnel Board; then we established the Guam Memorial Hospital Authority, and the employees of Guam Memorial Hospital could not appeal beyond the Board. There was concern as to where does this employee go?

That was when we created the Civil Service Commission as an appeal body, not as a court of law. If you notice, the employee still has an option to go to court. He does not have to go to the Civil Service Commission. However, if the employee chooses to go to the Civil Service Commission, he should not be precluded by the fact that he has to hire an attorney to represent him. The employee should be able to represent himself or obtain someone else to represent him. The rules of evidence have been modified, and I hope that the Commission proceedings follow that practice to allow the benefit of the doubt to the employee at all times. If you follow the rules of law pertaining to the courts, the Commission would never be able to follow or abide them. So, therefore, we have to find out the background of Public Law 20-175, and amend it.

Mr. Taitano: If I can just respond to your comments Mr. Speaker. The Attorney General did infer that the Legislature's thinking was probably reflected in your comments just now. However, we are faced with a law that is in the books and absent sending, or absent a case to bring the issues of lay representation before the court, we really have no interpretive guidelines other than an Attorney General's opinion. And that is what we requested from the Attorney General, and the Attorney General did come back with some points:

1. Representation before the Civil Service Commission is a practice of law; and
2. Only attorneys licensed by the Guam Bar Association are able to practice law.

Technically, based at least on the definition of Public Law 20-175, we have to go by that. And that is the purpose of our request to amend that section of the law to make it specific that it does not include lay representation.

Senator Dierking: Based on the recommendation, the law must be amended so that lay representation can continue before the Civil Service Commission instead of having to hire an attorney. Have you had trouble at all in having cases overturned because a lawyer was not present?

Mr. Taitano: No. Essentially what we did is we re-scheduled all cases pending before the Civil Service Commission that have lay representation. But it was brought up in a case Palacios v. Guam Police Department. In that case, we had two representatives. One of course for the appellant and the other for management.

Management's representative was an attorney, and the appellant's representative was not an attorney. Basically what happened right at the onset of the case, a motion was made by management to disqualify the appellant's representative based on the public law. Of course, there is some merit to that because of the law and the Attorney General's opinion was sent out.

As Chairperson of that case, we held it in abeyance, basically taking it under advisement. And that case is still on our docket. We still need to address that.

Speaker San Agustin: Is the Commission precluded from having or appointing an administrative judge to hear the case outside of the Commission's proceedings?

Mr. Taitano: Right now as I understand and Ron is here . . .

Speaker San Agustin: Is he precluded? Suppose the Commission voted to appoint an Administrative Judge to hear the appeals of case. Because once you do that, it becomes under the realm of the law.

Mr. Ron Aguon, CSC Counsel: That's right Mr. Speaker, the Commission could do that, but the ultimate decision would have to be . . .

Speaker San Agustin: But the ultimate decision is only the presentation of the conclusion of the Administrative Judge, and that would be a recommendation to approve or disapprove. But then in Administrative Judge hearings you don't need a lawyer to be represent both parties. It is not within the law. That could be a temporary measure until we correct the law.

Mr. Taitano: My understanding of the law is that what you're recommending would also be excluded. Because it does indicate a catch all administrative proceeding in there. What is being restricted right now is lay representation not administration; the trier of fact does not have to be an attorney.

That is why you have a Civil Service Commission with seven lay people. It's the representation. Even if the Civil Service Commission were to appoint an Administrative Judge who is a member of the Bar it won't do any good because the restriction is in the representatives themselves not the trier of fact.

Senator Marilyn D.A. Manibusan: . . . the representation based on the person appealing the case at the Civil Service Commission.

Mr. Taitano: Yes. Representation in this case is defined as "the individual who is selected by the appellant to represent him or her before the Civil Service Commission."

Senator Marilyn D.A. Manibusan: . . . In most cases called administrative actions or activities, and in this case, the Civil Service Commission, isn't lay representation usually given

Mr. Taitano: Yes it was, up until the passage of this law.

Senator Marilyn D.A. Manibusan: . . . attorneys protecting the interest of attorneys.

Mr. Taitano: Yes that's exactly the bottom line.

Senator Marilyn D.A. Manibusan: I'm glad that we have two attorneys here because I have worked with people that do arbitration, and lay representation is almost a very common component of

administrative remedies. That is why I don't understand the rationale behind the intent of Public Law 20-175.

Mr. Taitano: It is also a tremendous expense to the government. A lay representative will, at times, charge nothing.

Senator Marilyn D.A. Manibusan: A para-legal does all the work and does not charge, the attorney charges.

Mr. Taitano: With the passage of this amendment, we are looking at a tremendous savings to the government.

Senator Marilyn D.A. Manibusan: What is admirable is that we have practicing attorneys before us who recommend and see the need for lay representation. It's not that you're asking for an exception, but this a very common practice and a common component of administrative remedies. I am of the opinion that we should support and pass this bill Madame Chairperson.

Senator Dierking: At this time, the Committee would like to hear from Mr. Adolpho Palacios. For the record please identify yourself and whether you are for or against the bill.

Mr. Adolpho Palacios: My name is Adolpho B. Palacios, I am here to testify in support of Bill 984. Madame Chairperson, members of the Committee, lay representation is nothing new to the Civil Service Commission.

As far back as 1978, when I was still employed with the Guam Police Department, I used to represent employees against whom adverse actions were served. Later on, I prepared cases and this time represented management before the Civil Service Commission.

Whenever an employee of the government of Guam is given a suspension notice, or any adverse action, they always read to the employee, "you have the right to appeal, and you have the right to appoint any one of your own choosing to represent you."

Now when this employee selected a person of his own choosing to represent him before the Civil Service Commission, the government agency is saying "no" because that representative is not an attorney. The

employee is relying on the Personnel Rules and Regulations of the government of Guam promulgated by an Executive Order. These rules and regulations guarantee the employee the right to select and appoint a representative of his own choosing.

Unfortunately, the passage of Public Law 20-175, as interpreted by the Attorney General, effectively denies the employee the right to select and appoint a representative of his own choosing. However, I rely on the existing rules and regulations which guarantee the employee the right to be represented by his own choosing. Bill 984 is the answer to the predicament of many, innocent employees who have to debate whether or not to appeal a one (-1-) or two (-2-) day suspension and pay \$1,500 or \$2,000, or to just forego the suspension.

The passage of Bill No. 984 will allow the employee the right to obtain a lay representative or to pursue and hire an attorney of his choosing. Furthermore, the passage of this bill will give rise and credence to the employee's guaranteed right to be represented by anyone whom he/she so desires. This is a basic right.

The bottom line is that this legislation still gives the employee the option to engage the service of an attorney, and there is no denying that. More importantly, there is no danger that the employee might perhaps misjudge a certain individual and be represented by an incompetent person. The attorney for the Civil Service Commission is present at all Civil Service Commission proceedings. If he finds that the lay representative is incompetent, he would safeguard the right of the employee to still make an intelligent choice in his selection for lay representation. For these reasons, I strongly support the passage of Bill No. 984.

Senator Dierking: Thank you Mr. Palacios. Again on behalf of the Committee I would like to thank each and everyone for coming here to testify on Bill 984. Before we adjourn, Mr. Speaker would like to say a few words.

Speaker San Agustin: You mention something about the Executive Order which guarantees the right for representation was that Executive Order issued before or after the enactment of Public law 20-175?

Mr. Palacios: Before. It has always been there.

Speaker San Agustin: So, therefore, Public Law 20-175 nullified that Executive Order. Is that what you are saying?

Mr. Palacios: The provision that has to do with lay representation was nullified by the Attorney General's opinion.

Speaker San Agustin: Because this law was enacted after the Executive Order was issued the Attorney General's opinion nullified that Executive Order.

Mr. Aguon: The Executive Order, Senator, was the one that promulgated the Department of Administration's Rules and Regulations providing for lay representation.

Speaker San Agustin: Yes, but Public Law 20-175 nullified that because the **Organic Act** gave the governor the authority to promulgate rules in the absence of law. As an attorney, is the Governor still in a position to issue an Executive Order to allow for lay representation? I understand that there is provision in the law pertaining to the promulgation of rules and regulations.

Mr. Aguon: I don't think that you can issue an Executive Order that will contradict the statutes.

Speaker San Agustin: "except as allowed by the rules and regulations promulgated pursuant to law . . ." We are talking about Public law 20-175, Section 28064 (b) (3) "representing any other person or advising any other person as to any lawsuit or action before any court, board, agency, or administrative tribunal, except as allowed the rules and regulations to be promulgated pursuant to this Section 28064 or as allowed by Section 28064." Has there been any rules and regulations promulgated subsequent to this Act?

Mr. Aguon: Not to my knowledge.

Speaker San Agustin: Did you research that?

Mr. Aguon: I did. The Ethics Committee or the Judicial Council was suppose to prepare rules of practice based on Public Law 20-175 that would be consistent with that statute.

Speaker San Agustin: But it does not preclude the Civil Service Commission or the Governor from executing rules and regulations pursuant to this exemption.

Mr. Aguon: The rules and regulations would have to conform to the statute.

Speaker San Agustin: That's why I'm asking. Has there been an opinion directed to this fact that the Governor is precluded from issuing rules and regulations pursuant to this Act?

Mr. Aguon: There has been none.

Speaker San Agustin: No question has been asked. In other words, you have not explored it. You left it up to the Ethics Committee.

Mr. Aguon: We never addressed the issue of the Governor's powers to issue Executive Order.

Speaker San Agustin: From the Civil Service Commission's position you did not provide an option to the lay people. From the Commission's side you never investigated or explored other options that may be available.

Mr. Aguon: Basically, yes.

Speaker San Agustin: I just want to know, because we want to explore all other administrative remedies before enactment of a law.

Mr. Aguon: We have in one case permitted a person to represent his wife in the form of a facilitator. That was a practicable option that we provided. But we weren't too comfortable with it. But under the circumstances it was something we thought we had to do.

Speaker San Agustin: Has that been challenged?

Mr. Aguon: No.

Speaker San Agustin: Then why are you uncomfortable with the law continuing that practice, called facilitator?

Mr. Aguon: Because the other side . . .

Speaker San Agustin: Has it been challenged?

Mr. Aguon: It's a challengeable issue.

Speaker San Agustin: Everything is challengeable. Even if a lawyer were there, it would be challengeable.

Mr. Aguon: But if we were to do this for a hundred cases all these cases are subject to reversal.

Speaker San Agustin: It's an avenue you never tried.

Mr. Aguon: We tried in that particular case.

Speaker San Agustin: So you took the course of allowing a hundred cases set aside because these people were not adequately represented. What I am saying is that you did not take the usual course of trying to get the maximum until challenged.

Mr. Taitano: Mr. Speaker, if I can just respond? When Attorney Klitzkie made his motion to dismiss in Palacios v. Guam Police Department, and presented the law, and we asked for an Attorney General's opinion on that. As Chairperson, I was not really interested in looking at other alternatives to reinstating the basic right of an employee to choose his or her own representation.

Should we go on, and Ron did come up with the position of facilitator, we make sure that we indicate that in the records that this is a facilitator and not a representative. It's a semantic dilemma. Until we get rid of the offending language in the public law, I would be very uncomfortable in allowing lay representation and risking judicial review over that issue. Even if we were to encourage the Governor to issue rules and regulations, the law is the law.

Speaker San Agustin: But shouldn't that be, if you pursue options available would create a sense of urgency on the part of the Governor as well as the Commission and the employee. Because right now, this bill was introduced by a member, not by you, through the Executive Branch.

Why was it not introduced by the Governor with a sense of urgency. What I am saying is that we are talking about a basic right of an employee to be represented. And the Commission is suppose to be the protector of employee rights. You did not initiate the legislation. You didn't explore other options.

Mr. Taitano: I believe that what happened with this legislation is that it was initiated by a letter from myself as Chairman to the Chairperson of the Committee.

Speaker San Agustin: But where is the Governor's position on this. Have you explored just what his position would be.

Mr. Taitano: I don't . . .

Speaker San Agustin: I am talking about the sense of urgency, or concern. You have 10,000 government employees out there and you say that this is a basic right.

I would think that you (the Commission) would explore options, and then postpone these cases. That would develop a sense of urgency. My main concern is that this issue may be "so so". Quite frankly, this is the first time I've heard of it. There is no sense of urgency created to take care of the basic rights of representation for 10,000 government employees. I am very much concerned about that and I would want to push this at the next session.

Back to my original question, "What is the Administration's position on this bill?" Where is your liaison with the Governor's Office. That's what I meant earlier. It seems that the Board in the past have leaned towards the employer. They always seem to protect the government's side. An issue such as this, should it be reversed, you'll hear and read about it in the media.

We'll try to work it and rectify it. But we are concerned about options not explored, or a sense of urgency to prevail over the Administration to get this thing done.

Again, I reiterate my support, and I will urge Senator Dierking to report this out at the next legislative session.

Mr. Taitano: Thank you.

Senator Dierking: Thank you Mr. Speaker. Mr. Palacios . . .

Mr. Palacios: I would just like to share a comment with the Senators on the case that is still on the Civil Service Commission docket. It is a three (-3-) day suspension that was given to the employee in December 1990. I have been notified by the Civil Service Commission that it is scheduled for hearing sometimes in March. Here is a three (-3-) day suspension that has been more than two (-2-) years. The employee that has been suspended, has been promoted to a Sergeant, but nevertheless, I think that more than two (-2-) years is too long.

Senator Dierking: Thank you Mr. Palacios. Again on behalf of the Committee, we would try to correct this problem that you have within the Civil Service Commission as soon as possible, and you have our assurance that we will try to rectify it.

Anyone else to testify for or against on Bill No. 984. If none, the Committee hearing on Bill 984 is hereby adjourned.

-end-



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May 18, 1993

MEMORANDUM

To: The Chairman, Committee on General
Governmental Operations and Micronesian Affairs

From: Senator Herminia D. Dierking

Subject: Testimony on Bill No. 336

Mr. Chairman, Members of the Committee on General Governmental Operations and Micronesian Affairs, the intent of Bill No. 336 is to allow lay representation before the Civil Service Commission. Lay representation, Mr. Chairman, exists when an employee decides to represent himself before the Civil Service Commission without the aid of legal counsel or to employ the services of a specialist who is not a member of the Guam Bar.

As Chairperson of this Committee in the Twenty-First Guam Legislature, it was brought to our attention that it has always been the Civil Service Commission's practice to allow lay representation, especially when the employee is a member of a bargaining unit, (Guam Federation of Teachers), or a professional organization, (Guam Nurses Association), and his representative is an agent thereof.

On February 14, 1992, when Public Law 20-175 was enacted, the Attorney General's Office ruled that representation before the Civil Service Commission is to be

considered a practice of law. An opinion was then issued to the Commission disallowing lay representation. Since the enactment of P.L. 20-175, employees have effectively been denied representation of their choosing. Furthermore, it complicates the Commission's proceedings, and threatens to increase the government's attorney fees expense.

It should be remembered that the right to representation in an adverse action proceeding is a fundamental right. The appellant should be given broad discretion to select a representative. This is not to say, however, that the Commission will allow incompetent representation if such is evident. Although the proceeding is quasi-judicial, it is still an administrative proceeding and therefore must be inherently flexible to ensure that lay represented appellants are not unfairly disadvantaged.

Mr. Chairman, it should be noted that the Commission's counterpart, the Merit System Protection Board, among other federal agencies, permits lay representation in its proceedings.

It is common knowledge that the Legislature is highly protective of employee rights. It would be unreasonable to deprive employees of what has been recognized through custom and practice as a basic right.

As the former Chairperson of the Committee on General Governmental Operations, I do not believe that the statutory purpose of Section 28064 was to abrogate the rule making authority of the Civil Service Commission, Department of Administration, or any other autonomous agencies.

Therefore, I am of the opinion that the purpose of Section 28064 would develop cohesive and consistent guidelines on the issue of lay representation before administrative tribunals and agencies. The Commission and the Department of Administration pursuant to §§4105, 4401, Title 4, Guam Code Annotated, have enacted rules and regulations governing lay representation. Since then these rules have been in full force and effect.

It is my contention that the rule making powers of the Civil Service Commission have not been repealed by Public Law 20-175, and the fact that the Civil Service Commission has historically recognized the right to be represented before the Commission by anyone of an employee's choosing, I urge your support.

Also, it should be mentioned that the Legislature recognized this right when it enacted Public Law 16-23, the Civil Service Reform Act, as amended by Public Law 16-41, and now codified in Title 4, Guam Code Annotated.

More importantly, I am of the opinion that the Legislature has vested the Commission with the authority to adopt its own rules to govern its procedures by enacting §4402 of Title 4, Guam Code Annotated. In doing so, the Legislature made a deliberate and explicit reference to the employee's representative without confining the term to mean "legal" representative.

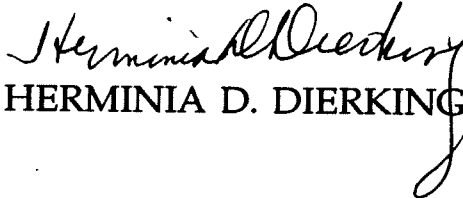
Another reason in sponsoring Bill No. 336 is the fact that Public Law 20-175 permits government agencies to employ lay representatives to represent management in proceedings before the Commission, although there doesn't appear to be any articulated rational basis for discriminating between management and the employees.

To further assist you and the members of your Committee during your deliberation, the following documents are submitted for your review:

1. Testimony of Mr. Gerald A. Taitano, Chairperson of the Civil Service Commission in support of Bill 984.
2. The Attorney General's opinion regarding lay representation before the Civil Service Commission.
3. Memorandum to the Speaker from Mr. Felix P. Camacho, Executive Director of the Civil Service Commission concerning the Attorney General's opinion.

4. §7701 of Title 5, United States Code, Merit System Protection Board.
5. Civil Service Commission Resolution No. 85-001 pertaining to hearing procedures for adverse actions appeals, suspensions, demotions and dismissals.
6. Civil Service Commission Hearing procedures for adverse actions appeals, suspensions, demotions and dismissals.
7. Department of Administration's Adverse Action Rules and Regulations.

In closing, I strongly urge you and your Committee to take favorable action on Bill No. 336 and to recommend its passage at the next legislative session.


HERMINIA D. DIERKING

Attachment:



GOVERNMENT OF GUAM

**CIVIL SERVICE COMMISSION
KUMISION I SETBISION SIBIT**

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P.O. Box 3156, Agana, Guam 96910

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CSC NO. 93-121

DEC 10 1992

COPY

The Honorable Herminia Dierking
Chairperson, Committee on General
Governmental Operations
Twenty-First Guam Legislature
Agana, Guam 96910

Dear Senator Dierking:

The Civil Service Commission endorses Bill No. 984 permitting lay representation in CSC proceedings.

Bill No. 984 restores the right to lay representation which had been abrogated by Public Law 20-175, probably through legislative oversight. This practice had existed since the Commission's inception in 1967.

The Commission believes that individuals with cases before the CSC should continue to have the option to choose lay representatives, just as government agencies are permitted to do under P.L. 20-175. There is no justification for discrimination.

The Commission believes that Bill No. 984 would also authorize the CSC to adopt rules of practice before it.

A copy of the Attorney General's opinion on the issue is attached.

Sincerely,

GERALD A. TAITANO
Chairperson

cc: Lay Representation File
Legal Office
Chrono



Commonwealth Now!