IN THE SUPREME COURT OF GUAM

PORT AUTHORITY OF GUAM,
Petitioner-Appellee,

v.

CIVIL SERVICE COMMISSION,
Respondent-Appellant,

and

JOSETTE JAVELOSA,
Real Party in Interest-Appellant.

Supreme Court Case No.: CVA15-025
Superior Court Case No.: SP0151-14

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on August 19, 2016
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Presiding Justice; KATHERINE A. MARAMAN, Associate Justice; ALBERTO E. TOLENTINO, Justice *Pro Tempore*.[1]

MARAMAN, J.:

[1] Real Party in Interest-Appellant Josette Javelosa appeals the trial court's Decision and Order, which reversed the Respondent-Appellant Civil Service Commission's (the "CSC") ruling in Javelosa's adverse-action appeal. Petitioner-Appellee Port Authority of Guam (the "Port") terminated Javelosa's employment on the basis that she committed alleged criminal acts, despite the fact that she was not criminally prosecuted. The main dispute in this case centers on what burden of proof the CSC should have used in considering Javelosa's appeal of the Port's adverse action, and we granted interlocutory review on that issue. For the reasons stated herein, we affirm the trial court's Decision and Order.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Javelosa started working as an employee of the Port in January 2000. On December 18, 2012, the Port took adverse action against Javelosa by terminating her employment pursuant to 4 GCA § 4406. The Port based Javelosa's termination on allegations that she attempted to help her supervisor obtain paid injury leave by backdating a memorandum to her own file to make it appear that management was timely addressing the issue. The Port claimed this amounted to criminal misconduct, including the violation of misdemeanors and "the felonies of forgery, unlawful influence, and tampering with public records." Record on Appeal ("RA"), tab 40 at 2 (Dec. & Order, Sept. 3, 2015).

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was argued and submitted. Chief Justice Robert J. Torres recused himself from this matter. Associate Justice F. Philip Carbullido, as the senior member of the panel, was designated Presiding Justice.

[3] Javelosa appealed her termination to the CSC. The CSC held six days of hearings, after which it issued a Decision and Judgment finding that the Port had not met its burden to show that its actions were correct under the default clear and convincing burden of proof contained in 4 GCA § 4407(a). The Port then petitioned for judicial review in the Superior Court of Guam, arguing that the CSC applied the incorrect standard. Alternatively, the Port argued that the CSC failed to state sufficient findings of fact in its decision.

[4] The trial court agreed with the Port's first contention, holding that the CSC incorrectly used the default clear and convincing standard of 4 GCA § 4407(a) in considering Javelosa's appeal of the Port's adverse action. Instead, the trial court held, the CSC should have used the substantial evidence standard contained in 4 GCA § 4407(c). The trial court did not address the second issue raised in the Port's petition regarding whether the CSC adequately stated its findings of fact. The trial court remanded the case to the CSC for a threshold determination of whether the allegations against Javelosa could constitute criminal acts. Javelosa timely requested permission to appeal this issue from the trial court's order, and we granted interlocutory review.

II. JURISDICTION

[5] This court has jurisdiction over interlocutory appeals pursuant to 48 U.S.C.A. § 1424-1(a) (Westlaw through Pub. L. 115-196 (2018)) and 7 GCA § 3108(b) (2005). *See Pineda v. Pineda*, 2005 Guam 10 ¶ 6 (citations omitted).

III. STANDARD OF REVIEW

[6] Before proceeding to the merits, this court must determine the appropriate standard of review. Both Javelosa and the CSC suggest that this appeal should be viewed through the lens of the *Chevron* doctrine. Javelosa's Br. at 6-9 (Feb. 26, 2016); CSC's Br. at 6 (Mar. 28, 2016).

The Port, on the other hand, argues that this is a pure statutory interpretation case reviewable *de novo*. Port's Br. at 3-4 (Apr. 1, 2016). We agree with the Port that *de novo* review is appropriate in this case.

[7] Under the *Chevron* doctrine, a court reviewing certain agency determinations must engage in a two-step review process. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *see also Guam Mem'l Hosp. Auth. v. Civil Serv. Comm'n (Chaco)*, 2015 Guam 18 ¶ 13. "First, applying the ordinary tools of statutory construction, the court must determine 'whether Congress has directly spoken to the precise question at issue.'" *City of Arlington*, 569 U.S. at 296 (quoting *Chevron*, 467 U.S. at 842). "If the intent of Congress is clear," the court and agency "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 842-43). If the statute is ambiguous, the court proceeds to the second step of the analysis and examines "whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843). Where the agency's interpretation of a statute is permissible, the court defers to the agency's interpretation. *Id.* at 307.

[8] "*Chevron* is rooted in a background presumption of congressional intent," and this doctrine therefore applies only where the legislature "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 296 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996)); *cf. Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 18 (deference appropriate where "the agency has specialized knowledge in the area"); *Guerrero v. Santo Thomas*, 2010 Guam 11 ¶ 39 (stating that an agency receives deference when

it has "specialized knowledge in the area" (citation omitted)). "[I]nterpretive rules" issued by an agency "enjoy no *Chevron* status as a class." *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001). Rather, *Chevron* deference will apply only where the legislature expressly or implicitly intended it to apply. *See id.* at 229. In other words, "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington*, 569 U.S. at 306. Congress will "speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Id.* at 296.

[9] *Chevron* deference does not apply "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). The Supreme Court has "declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" *Id.* (quoting *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Id.* at 213.

[10] This court has applied a *Chevron* analysis that fully deferred to an agency decision in only one prior case. *See San Miguel v. Dep't of Pub. Works*, 2008 Guam 3 ¶¶ 25-34 (finding the term "legitimate reason" in public law was implicitly ambiguous, had a meaning indicating that the Legislature intended to defer to the agency's expertise, and deferring to agency's

determination that this included excessive slope gradient).[2] To be sure, we have alluded to and cited *Chevron* and its progeny in a number of our prior cases. But in each instance other than in *San Miguel*, we ultimately did not apply the deference contemplated by the second step of *Chevron*. In *Carlson v. Guam Telephone Authority*, for example, after explaining what a *Chevron* analysis entails, we stated: "Even assuming GTA's interpretation is an agency interpretation which should be accorded deference if reasonable, we decline to defer to GTA's interpretation in the instant case. Deference is generally given to an agency interpretation when the agency has specialized knowledge in the area." 2002 Guam 15 ¶ 18 (citations omitted). Similarly, in *Ada v. Guam Telephone Authority*, the court cited *Chevron* in dicta, but actually applied a *de novo* standard in its review of a statute. 1999 Guam 10 ¶¶ 10, 13. There are other cases in which we have alluded to *Chevron*, or its analytical framework, but did not actually apply a full, two-step *Chevron* analysis. *See, e.g.*, *Guerrero*, 2010 Guam 11 ¶¶ 39-40 (court "[a]ssum[ed] without deciding" that *Chevron* deference applied to executive orders); *Blas v. Guam Customs & Quarantine Agency*, 2000 Guam 12 ¶¶ 12-30 (stating that *Chevron* analysis applied to agency interpretations but reviewing under a *de novo* standard); *Guam Fed'n of Teachers v. Gov't of Guam*, 2013 Guam 14 ¶¶ 25, 66-68 & n.14 (stating agency interpretations of ambiguous statutes are subject to deference but conducting *de novo* textual analysis).

[2] In *Bank of Guam v. Guam Banking Board*, the court cited *Ada v. Guam Telephone Authority* for the proposition that *de novo* review is appropriate in reviewing an agency's interpretation of a statute. 2003 Guam 9 ¶ 8 (quoting *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10). The court, however, also discussed the deference that it afforded an FDIC letter approving a bank's application to open a new branch. *See id.* ¶¶ 33-38. This discussion incorporated language usually reserved for a *Chevron* analysis, and the court specifically stated that the FDIC's decision "merit[ted] deference," *id.* ¶ 36, even though the FDIC's letter was not "an opinion letter or interpretive rule," *id.* ¶ 33. This, however, does not support the notion that the court applied a *Chevron* analysis in that case. The court expressly "f[ou]nd the plain language of the above statutes to be conclusive and sufficient to decide the instant matter." *Id.* ¶ 26. Thus, the court correctly never applied *Chevron* to the FDIC's letter; rather, the reference to the FDIC's letter only lent additional support for the court's reading of the plain statutory language. *Id.* Any additional discussion regarding "deference" to the FDIC's letter approving a bank branch application was therefore mere dicta.

[11] In a number of recent decisions, we have expressly rejected the application of the *Chevron* doctrine as it applied to the CSC's interpretation of various statutory provisions under Title 4 of the Guam Code Annotated. In *Guam Housing Corp. v. Civil Service Commission (Potter)*, we expressly rejected the application of *Chevron* to the CSC's interpretation of 4 GCA § 4403 because "deference is only given to an agency's findings where there is no statute that directly speaks to the issue or where such statute is ambiguous." 2015 Guam 22 ¶ 14. Likewise, in *Chaco*, after briefly reviewing the *Chevron* doctrine, we rejected its application to the CSC's interpretation of 4 GCA § 4406 because section 4406 is not "an ambiguous statute left to [the CSC] by the legislature." 2015 Guam 18 ¶ 14. In a third case, *Guam Federation of Teachers v. Government of Guam*, we engaged in a *de novo* textual analysis of a statute and rejected the proffered interpretations from both parties, including the CSC's interpretation. 2013 Guam 14 ¶¶ 25, 66-68. Finally, in a fourth case dealing with the CSC's interpretation of a statute, *Attorney General of Guam v. Perez*, we discussed whether the CSC's interpretation was permissible or contrary to legislative intent, but we also made clear that our review was *de novo*. 2008 Guam 16 ¶¶ 20-24. In *Perez*, we specifically noted that the applicable statute was "clear on [its] face," *id.* ¶ 23, therefore *Chevron*'s second step (i.e., deference to the interpreting agency) was never reached.

[12] When compared with sections 4403 and 4406, we can see no justifiable basis upon which to determine that section 4407 is an ambiguous statute that the Legislature intended to leave to the CSC's interpretation. *Cf. Mead Corp.*, 533 U.S. at 219; *City of Arlington*, 569 U.S. at 306-07. As a review of our caselaw reveals, we have never deferred to the CSC's interpretation of a statute under a *Chevron* framework. Rather, like in *Chaco* and *Potter*, this case presents a pure question of statutory interpretation. It is clear that the Legislature sought to ascribe the

appropriate standard to apply when the CSC is reviewing an adverse action; it did not intend to leave this decision up to the CSC itself.

[13] Though we reject the application of the *Chevron* doctrine in this case, this does not mean that a thoughtful, consistent interpretation by an agency tasked with administering a statute is not persuasive evidence of the proper interpretation of that statute. In *United States v. Mead Corp.*, the United States Supreme Court held that the general persuasiveness of an agency's expertise under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), survived the advent of *Chevron*. *Mead Corp.*, 533 U.S. at 234-35. Under *Skidmore*, an agency interpretation is "eligible to claim respect according to its persuasiveness." *Id.* at 221. The weight a reviewing court should give an agency interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140; *see also Mead Corp.*, 533 U.S. at 228 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." (footnotes and citation omitted)); *accord Carlson*, 2002 Guam 15 ¶ 18 ("Deference is generally given to an agency interpretation when the agency has specialized knowledge in the area."). Properly conceived, this too is a form of deference. *See Mead Corp.*, 533 U.S. at 234 (describing *Skidmore* as holding that "an agency's interpretation may merit some deference whatever its form"); *see also id.* at 237 ("[T]he range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference." (footnote omitted)).

[14] In many of our prior cases discussing deference to an agency interpretation, we have often stated that "an agency's interpretation of a statute is a question of law reviewed *de novo*," but immediately followed that statement by articulating that "the court may defer to the agency's interpretation" and that our "[r]eview is limited to 'whether the agency's conclusion is based on a permissible construction of the statute.'" *Ada*, 1999 Guam 10 ¶ 10 (citations omitted); *see also Blas*, 2000 Guam 12 ¶ 12 (citations omitted); *Guam Fed'n of Teachers*, 2013 Guam 14 ¶ 25 (citations omitted). *De novo* review and *Chevron* deference, as it is fully understood, are competing ideas. True *de novo* review is not limited in any way by the interpretation of a lower court or agency; by definition it is a "new," non-deferential review of the issues presented. *See Judicial Review*, *Black's Law Dictionary* (10th ed. 2014) (defining *de novo* judicial review as "[a] court's nondeferential review . . . ."). As noted above, despite the citations to *Chevron*, *Ada* and its progeny did not actually apply the *Chevron* doctrine. We clarify today that the "deference" referred to in these cases is actually *Skidmore* deference, not *Chevron* deference.

[15] As we stated in *Guam Federation of Teachers*, "[t]hough we should lend great weight to the CSC's own interpretation of the scope of its enabling statute, ultimately the courts have the 'final responsibility' to interpret the law and determine whether a challenged administrative action was unauthorized and therefore void." 2013 Guam 14 ¶ 64 (citation omitted). For these reasons, the CSC "may surely claim the merit of its [interpretation's] thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." *Mead Corp.*, 533 U.S. at 235. But at the end of the day, "[t]he interpretation of a statute is a legal question subject to *de novo* review." *Chaco*, 2015 Guam 18 ¶ 17 (citation omitted). "[O]ur duty is to interpret statutes in light of their terms and legislative intent." *Carlson*, 2002 Guam 15 ¶ 46 n.7. *De novo* review is the standard that applies in this case.

IV. ANALYSIS

[16] The issue for which we granted interlocutory review is what standard the CSC should utilize in reviewing the correctness of a government agency's adverse action when that agency has alleged criminal misconduct but the adversely-affected employee has not been criminally prosecuted.[3] Pursuant to 4 GCA § 4407(c), "[i]n cases involving charges which could be a crime if the person was charged in a criminal action, the [CSC] shall determine the matter based upon *substantial evidence* that the employee committed the acts charged."[4] 4 GCA § 4407(c) (2005) (emphasis added). This burden of proof is lower than the default burden of proof placed upon the government to justify its adverse action in appeals taken to the CSC by affected employees under 4 GCA § 4407(a). The default standard of proof under subsection (a) requires "the government to show *clearly and convincingly* that the action of the Branch, department, agency or instrumentality was correct." 4 GCA § 4407(a) (emphasis added).

[17] On appeal, both the CSC and Javelosa argue that there must be formal criminal prosecution for the lower standard contained in subsection (c) to apply. Javelosa emphasizes the statute's language describing "criminal action" and "acts charged" to support the position that there must be an actual criminal proceeding to trigger the substantial evidence standard. *See* Javelosa's Br. at 10. The CSC argues that since CSC commissioners have no expertise in criminal law, they should not be called upon to interpret criminal statutes and substitute their

[3] The Port and Javelosa also dispute whether the CSC's written decision contained sufficient factual findings. That issue, however, is not before us. Javelosa's Statement of Issue contained in her Petition for Permission to Appeal stated: "Does 4 GCA § 4407(c) unequivocally require the Civil Service Commission to apply the 'substantial evidence' burden of proof in cases where management has merely alleged that an employee [sic] conduct that [sic] could possibly be construed as 'criminal conduct?'" Port Auth. of Guam v. Civil Serv. Comm'n (Javelosa), CVA15-025 (Pet. for Permission to Appeal at 2 (Oct. 2, 2015)). She did not seek review of how the CSC stated its findings of fact, *see id.*, and we decline to address it here.

[4] The origin of this language is uncertain. There is no indication in a Compiler's note or in the public law enacting this provision that it was borrowed from another jurisdiction. *See* 4 GCA § 4407; Guam Pub. L. 16-023 (Aug. 11, 1981). No other jurisdiction has adopted an identically worded statute.

judgment for that of prosecutors and judges. *See* CSC's Br. at 3-5. The Port, in contrast, argues the CSC must itself examine the employer's factual allegations and first determine whether the allegations "could be a crime," in order to then determine what standard of proof should apply. *See* Port's Br. at 15-17 (citations omitted). Upon review of the applicable statutory provisions, we agree with the Port's interpretation.

[18] "Generally, where the standard of judicial review of an agency action is enunciated by regulation or statute, such standard of review will govern." *Fagan v. Dell'Isola*, 2006 Guam 11 ¶ 9. This same rule applies to administrative review of agency action. "In cases involving statutory construction, the plain language of a statute must be the starting point." *Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23 (citation omitted). There are two separate clauses in section 4407(c). The first clause dictates the type of cases to which this subsection applies—i.e., "[i]n cases involving charges which could be a crime if the person was charged in a criminal action" (hereinafter, "Clause One"). 4 GCA § 4407(c). The second clause indicates the standard of review to be applied once it is determined that subsection (c) is applicable—i.e., "the [CSC] shall determine the matter based upon substantial evidence that the employee committed the acts charged" (hereinafter, "Clause Two"). *Id.*

[19] Javelosa and the CSC both focus heavily on the use of the term "charge" in their respective briefs. *See, e.g.*, Javelosa's Br. at 7-8, 10; CSC Br. at 5. "Charge" is not defined in the context of adverse-action appeals. It should, therefore, be ascribed its common and ordinary meaning. *See Carlson*, 2002 Guam 15 ¶ 34 (citations omitted). The word "charge" can easily refer, depending on the circumstance, to both formal charges and factual allegations. *See* Merriam–Webster Dictionary, Charge, http://www.merriam-webster.com/dictionary/charge (last visited July 24, 2018) (defining charge as "a formal assertion of illegality" and as "a statement of

complaint"). Examining the use of the word "charge" in surrounding statutory provisions is generally unhelpful in this case as well; the adverse action procedure statutes appear to use the word "charge" and its derivatives to refer to both formal criminal proceedings and the factual allegations of the employer. *See, e.g.*, 4 GCA §§ 4106, 4106(h), 4201, 4202.1, 4202.2, 4406 (2005). But, we do not interpret statutory text in a vacuum. *See Aguon v. Gutierrez*, 2002 Guam 14 ¶ 9. Words or phrases cannot "be interpreted in isolation from the" relevant context in which they appear. *See Pangelinan v. Camacho*, 2011 Guam 9 ¶ 10 (interpreting court's prior mandate); *see also Roethlein v. Portnoff Law Assocs., Ltd.*, 81 A.3d 816, 822 (Pa. 2013) ("[W]e should not interpret statutory words in isolation, but must read them with reference to the context in which they appear."); *In re City of Nashua*, 68 A.3d 288, 289 (N.H. 2013) ("[W]e do not merely look at isolated words or phrases, but instead we consider the statute as a whole." (citation omitted)).

[20] Javelosa draws the court's attention to the first use of the term charge ("involving charges") in Clause One and the final use of the word charge ("acts charged") in Clause Two. *See, e.g.*, Javelosa's Br. at 7-8, 10; CSC Br at 5. Directly after the first use of the word "charge" in Clause One, the statute provides conditional language indicating that a pending criminal charge is not necessary for this provision to apply. The first use of the word "charges" in Clause One must be read along with the separate phrases "*could* be a crime" and "*if* the person *was* charged in a criminal action." 4 GCA § 4407(c) (emphasis added). This context indicates that the first use of the word "charges" is intended to refer to allegations of the employer—not formal criminal charges—and that criminal charges need not be actively pending for this provision to apply. The phrases "could be a crime" and "if the person was charged" are anticipatory in nature in that they speak hypothetically about a potential present or future condition; they do not speak

of an actual present condition. Even the CSC admits in its opening brief that this is the most obvious reading of this statute. *See* CSC Br. at 3.

[21] The phrase "acts charged" as used in Clause Two of section 4407(c) must also be examined in context. Under the statute, Clause Two sets the appropriate standard of review for the CSC to apply in the proceedings before it. The CSC, of course, can be asked only to determine the matters actually presented to it. It would make no sense for the Legislature to have dictated that the CSC must resolve charges filed in a separate proceeding. Moreover, adopting this reading of the statute would also raise significant constitutional concerns. *See* U.S. Const. amend. V; 48 U.S.C.A. § 1421b(e), (u). Where possible, we must interpret statutes so as to avoid potential constitutional infirmities. *See, e.g.*, *Camacho v. Estate of Gumataotao*, 2010 Guam 1 ¶ 23 (collecting cases); *cf. Guerrero*, 2010 Guam 11 ¶ 40 (rejecting agency interpretation as unreasonable because it would violate Organic Act). Javelosa's attempt to contort the statute does not withstand scrutiny.

[22] Indeed, the CSC's own officially promulgated administrative rules similarly reject its current litigation position and Javelosa's interpretation of the statute.[5] Pursuant to Rule 11 of the Civil Service Commission Rules of Procedure for Adverse Action Appeals ("CSC AA Rules"), if "*Management's allegations would* constitute criminal charges, then Management bears the burden of proof to prove the *allegations* by substantial evidence." CSC AA R. 11 (emphasis

[5] While the *Chevron* doctrine does not apply in this case for the reasons discussed at length above, if the court were to apply the *Chevron* doctrine in this case, deference would be owed to this officially promulgated rule—not the contrary position set forth by appellate counsel in this case. *Accord Bowen*, 488 U.S. at 213; *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency [orders]; . . ."); *cf. City of Arlington*, 569 U.S. at 306 (noting that "*Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking"). Under the applicable *Skidmore* deference, the fact that the CSC has taken an interpretation in this case apparently at odds with its officially promulgated rule is good reason for us to afford its current interpretation little to no weight. *See Skidmore*, 323 U.S. at 140 (weight to accord agency interpretation depends upon, among other things, "its consistency with earlier and later pronouncements").

added). Under this official interpretation—not the CSC's mere litigation position adopted for purposes of this appeal—the first use of the word "charges" in Clause One of section 4407(c) is interpreted as "Management's allegations" in the adverse-action proceeding. *See id.* Further, use of the conditional term "would" indicates that actively pending criminal charges are not required for the substantial evidence standard of section 4407(c) to apply under this official interpretation of the statute. *See id.* The term "acts charged" in Clause Two is also interpreted as meaning the "allegations" filed in the CSC proceeding under this rule. *See id.* Thus, the CSC's official interpretation similarly adopts the statute's most plain, logical meaning. *See id.*

[23] In addition to the statute's plain meaning, accepting the CSC's and Javelosa's interpretation would, as the trial court reasoned, essentially nullify the substantial evidence exception in many instances. *See* RA, tab 40 at 8 (Dec. & Order). Criminal prosecutions operate entirely apart from the 60-day rule applicable in adverse-action proceedings. While a statement of charges justifying an adverse action must be provided within 60 days after the alleged improper conduct is known or should have been discovered, *see* 4 GCA § 4406 (2005), the timing of criminal charges are controlled by longer statutes of limitations that often extend up to several years after the alleged misconduct took place, *see* 8 GCA § 10.20(c) (2005) (setting the default limitations period for felonies at three years); 8 GCA § 10.30 (2005) (setting the limitations period for misdemeanors at one year). Despite the fact that conduct by an employee might be cause for both termination and criminal prosecution, there is no pertinent connection between the initiation of an adverse-action proceeding and the process and reasoning for instituting formal criminal charges. Based upon the structure of the statute itself, subsection (c) logically appears intended to apply a lower standard of proof necessary for an employer to justify an adverse action where potential criminal misconduct is at issue. *Compare* 4 GCA § 4407(a),

with 4 GCA § 4407(c). Applying the substantial evidence standard only where formal criminal charges have been filed risks frustrating the intent of the statutory scheme. *See Ada*, 1999 Guam 10 ¶ 10 (citations omitted).

[24] We are mindful of the policy concerns inherent in giving discretionary decision-making authority to an agency that feels incapable of faithfully executing that authority. *See* CSC's Br. at 3-5. We also believe, however, that the CSC's fear of being left to interpret criminal statutes with no knowledge of how to do so is overstated. There are numerous situations where the CSC must apply legal standards and knowledge of the law in its decision-making, despite not being composed of legal experts. *See, e.g.*, 5 GCA § 9226 (2005) (requiring understanding of hearsay and privilege in administrative adjudication proceedings); 5 GCA § 9228 (2005) (allowing official notice of facts that courts of Guam would judicially notice). Thus, this is not an isolated, extraordinary, or unusual statute. *See, e.g.*, N.Y. Civ. Serv. Law § 75(4) (McKinney 2018) (18-month statute of limitations for removal or disciplinary proceedings not applicable "where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime"). Additionally, the CSC employs legal counsel and may have its own infrastructure in place to make legal determinations. *See* 4 GCA § 4405 (2005) (CSC must employ Administrative Law Judge or hire a private attorney to serve as an Administrative Law Judge to assist with "adjudicatory responsibilities"); CSC AA R. 11.2.2 (decisions on admissibility of testimony or evidence are made after consulting with administrative counsel). Furthermore, the CSC need not decide whether the employee actually committed a crime; it is merely determining a threshold issue of what burden of proof applies. And if the CSC were incorrect in this determination, this error would presumably be reversed under judicial review. *See* 5 GCA § 9240 (2005); *see also Fagan*, 2006 Guam 11 ¶¶ 10-12. In

other words, there are procedural protections that would prevent the parade of horribles that the CSC imagines. The law gives the CSC the authority and obligation under 4 GCA § 4407 to determine what standard of proof applies to a given adverse action appeal. If this is found unacceptable, legislative action would be the proper remedy—not a judicial rewrite of the statute.

[25] We find that, pursuant to 4 GCA § 4407(c), where an employer alleges misconduct by an employee, the CSC must make a threshold determination whether the factual allegations correspond to statutory prohibitions in the criminal code. If so, the CSC "shall determine the matter based upon substantial evidence that the employee committed the acts charged." 4 GCA § 4407(c). If the allegations of the employer would not constitute a crime if proved in a court of appropriate jurisdiction, the clear and convincing standard of section 4407(a) applies.

V. CONCLUSION

[26] For the reasons set forth above, we **AFFIRM** the Superior Court's decision and order and **REMAND** the case to the Superior Court so that it may remand the matter to the CSC for a threshold determination of the proper standard of review in Javelosa's case.

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ALBERTO E. TOLENTINO
Justice *Pro Tempore*

/s/
F. PHILIP CARBULLIDO
Presiding Justice