



Filed

Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

PORT AUTHORITY OF GUAM,
Petitioner-Appellant,

v.

CIVIL SERVICE COMMISSION,
Respondent-Appellee,

and

FRANCES ARRIOLA,
Real Party in Interest-Appellee.

Supreme Court Case No. CVA17-015
Superior Court Case No. SP0124-13

OPINION

Cite as: 2019 Guam 13

Appeal from the Superior Court of Guam
Argued and submitted March 12, 2018
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and MARIA G. FITZPATRICK, Justice *Pro Tempore*.

CARBULLIDO, J.:

[1] Petitioner-Appellant Port Authority of Guam (“Port”) appeals from a final judgment entered by the Superior Court affirming Respondent-Appellee Civil Service Commission’s (“CSC”) decision to void an adverse action taken against Real Party in Interest-Appellee Frances Arriola. The CSC determined that the Port violated the 60-day rule under 4 GCA § 4406. For the following reasons, we affirm in part, reverse in part, and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The factual allegations supporting the Port’s action are summarized as follows:¹

A. Adverse Action Against Arriola

[3] Frances Arriola, a Personnel Specialist for the Port, emailed a travel agency, directing a change to the travel dates of another Port employee, Bernadette Meno. Meno was supposed to fly to Hawaii for medical treatment connected to a slip-and-fall at the Port. As part of her duties in the Human Resources Department, Arriola prepared the travel request and authorization for Meno. Arriola extended Meno’s travel dates by five days and included a per diem three times the appropriate rate. On October 18, 2012, Arriola tried to have Meno’s per diem check released, but Port General Accounting Supervisor Miami Ulbenario refused to release the check because of the incorrect per diem rates. Arriola purportedly told Ulbenario she innocently used the federal Department of Defense per diem rate. At some point, however, Arriola prepared a

¹ We have issued opinions in several cases stemming from the same underlying matter. *See, e.g., Port Auth. of Guam v. Civil Serv. Comm'n (Javelosa)*, 2018 Guam 9; *Port Auth. of Guam v. Civil Serv. Comm'n (Guevara)*, 2018 Guam 1. The facts provided here are those relevant to Arriola’s involvement.

memo to file, which was backdated to October 16, stating that Port Safety Administrator Frank Roberto instructed her to use the higher per diem rate.

[4] On October 18, 2012, the Chairperson of the Port Board of Directors, Daniel Tydingco, emailed Port General Manager Mary Torres questioning Meno's travel expenditure and inquiring whether things were done legally. Record on Appeal ("RA"), tab 18 at 288-89 (Emails between Daniel Tydingco & Mary Torres, Oct. 18, 2012). Torres explained that the expenditure related to Meno's "on the job" injury because of a slip-and-fall. *Id.* at 288. Tydingco responded and stated that the handling and processing of Meno's claim and travel authorization "is not permissible." *Id.* On October 19, 2012—the day after—members of the Port's Board of Directors brought their concerns to the Port's legal counsel for investigation.

[5] On December 5, 2012, the Port served Arriola a Notice of Proposed Adverse Action, alleging she violated personnel rules through: (1) "[a]ctual or attempted theft of government or Port Authority property or property of others"; (2) "[d]isobedience to constituted authorities, or deliberate refusal to carry out any proper order"; (3) "[f]alsification, misstatement, or concealment of material facts in connection with an official record"; and (4) "[c]overing up or attempting to conceal defective work" and "removing [the] same without permission." RA, tab 18 at 132 (Notice of Proposed Adverse Action, Dec. 5, 2012).

[6] Arriola received her Final Notice of Adverse Action on December 18, 2012, which terminated her employment. RA, tab 18 at 137-41 (Final Notice of Adverse Action, Dec. 18, 2012). In the final notice, the Port found that Arriola violated the personnel rules as originally set forth in the proposed notice. *See id.* at 137; *see also* RA, tab 18 at 152-53 (Finds. Fact & Concl. L., Dec. 4, 2012). The Port further stated that it was "October 18th when the Board found out about this illegal travel." RA, tab 18 at 138 (Final Notice of Adverse Action).

B. Proceedings Before the CSC

[7] Arriola appealed her adverse action to the CSC. Arriola moved to revoke the adverse action, arguing that the Port violated the 60-day rule of 4 GCA § 4406, RA, tab 18 at 31-33 (Emp.'s Mot. Revoke for Procedural Defect, Feb. 14, 2013), which requires the Port to serve Arriola with notice of the adverse action within 60 days “after management knew or should have known the facts or events which form the alleged basis for such action,” 4 GCA § 4406(a) (as amended by Guam Pub. L. 30-112:3 (Mar. 12, 2010)). The Port opposed Arriola’s motion. At the first hearing on the motion, the parties debated on the triggering date for when Port management knew or should have known about the alleged wrongdoing.

[8] In the filings regarding the motion to revoke, the Port submitted an affidavit from Carmelita Nededog—Arriola’s co-worker. In the affidavit, Nededog stated:

In early November of 2012, after Francine Rocio returned from off-island, I was present in the room when I overheard Frances Arriola tell Francine that Frank Roberto denied telling her to lengthen Bernadette Meno’s stay in Honolulu. I also heard Francine say something about Roberto “taking the fall.”

I then heard Francine instruct Frances to backdate a Memo to File representing that Frank Roberto told Frances Arriola to increase the length of stay in Hawaii. I asked Frances why she did not follow Frank Roberto’s memo, in which he did not lengthen Meno’s stay, but she just gave me a blank stare and said nothing.

See RA, tab 3 at 21 (Mgmt.’s Opp’n Mot. Revoke for Procedural Defect at Ex. A, Feb. 21, 2013).

[9] At the end of the hearing on Arriola’s motion to revoke, some of the CSC board members continued to express uncertainty about the facts related to management’s knowledge of the wrongdoing. RA, tab 19 (Certification of Transcription (Tr. of CSC Bd. of Comm’rs Mtg. at 59-64, Apr. 18, 2013)). The CSC voted to allow the Port to submit more information—namely,

minutes of specific Port board meetings—and to set the motion to revoke back for another hearing once the additional information was supplied. A few months later, the CSC reconvened. At this second hearing, the Port provided minutes of an October 25, 2012 Board of Directors meeting, but the Port's counsel stated there were no minutes of any meeting on October 19, 2012. *See* RA, tab 19 (Certification of Transcription (Tr. of CSC Bd. of Comm'rs Mtg. at 6-9, May 1, 2013)). The Port's counsel stated that certain Port board members did meet with the Port General Manager and Deputy General Manager on October 19, but there were no recordings or minutes taken during that meeting. *See id.* at 5.

[10] Following the hearing, the CSC deliberated and voted on Arriola's motion to revoke. The CSC unanimously ruled for Arriola and found that the Port violated 4 GCA § 4406 by serving Arriola with the Final Notice of Adverse Action 61 days after management knew or should have known of the facts underlying the adverse action. *Id.* at 22. The CSC issued a written Decision and Judgment.

C. Proceedings Before the Superior Court

[11] The Port filed a Petition for Judicial Review ("Petition") in the Superior Court. The Port challenged the CSC's Decision and Judgment, alleging that the CSC exceeded its statutory authority by: (1) improperly placing the burden of proof on the Port to demonstrate it did not violate the 60-day rule; (2) denying Port management the opportunity to present evidence regarding the 60-day rule; (3) denying Port management the opportunity to prove its allegations constituting criminal offenses; (4) impermissibly misapplying the 60-day rule; (5) granting Arriola back pay and other benefits without requiring a duty to mitigate damages; and (6) reinstating Arriola to her position as a Personnel Specialist IV. RA, tab 1 at 12-14 (Verified Pet. Judicial Review, Sept. 5, 2013).

[12] The trial court denied the Petition and upheld the CSC's decision reversing Arriola's adverse action. At a later hearing to determine whether Arriola mitigated damages by searching for employment, the trial court again ruled in Arriola's favor and also awarded attorney's fees. The Port moved for reconsideration of the attorney's fees award, which the trial court denied. The Port timely appealed.

II. JURISDICTION

[13] Decisions of the CSC are subject to judicial review. 4 GCA § 4406(d) (as amended 2010). A party obtains review of an agency personnel decision by filing a petition for judicial review in the Superior Court of Guam. *Carlson v. Perez*, 2007 Guam 6 ¶ 65. We have jurisdiction over final judgments of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-29 (2019)); 7 GCA §§ 3107(b), 3108(a), 25102(a) (2005).

III. STANDARD OF REVIEW

[14] In appeals involving an adverse action, we review the CSC's legal determinations *de novo* and its factual determinations under a "substantial evidence" standard. *See Port Auth. of Guam v. Civil Serv. Comm'n (Guevara)*, 2018 Guam 1 ¶ 14. In considering whether a decision is supported by substantial evidence, we "review the administrative record as a whole, weighing both the evidence that support the agency's determination as well as the evidence that detracts from it." *Guam Mem'l Hosp. Auth. v. Civil Serv. Comm'n (Chaco)*, 2015 Guam 18 ¶ 16 (citing *Mayes v. Massanari*, 276 F.3d 453, 458-89 (9th Cir. 2001)). Under this deferential standard, we must uphold the CSC's findings "unless the evidence presented would *compel* a reasonable factfinder to reach a contrary result." *Id.*

[15] We review *de novo* whether a lower tribunal addressed all the issues raised in the proceedings. *See Town House Dep't Stores, Inc. v. Ahn*, 2000 Guam 29 ¶ 6.

IV. ANALYSIS

[16] In the Final Notice of Adverse Action, the Port found that Arriola committed four separate acts of misconduct. First, the Port determined that Arriola added additional days to Meno's travel itinerary without authorization. Second, the Port found that Arriola intentionally or negligently requested a per diem for Meno in excess of the stated rate and attempted to get another employee to release the incorrect per diem. Third, the Port found that Arriola fraudulently backdated a memo to file stating that a supervisor told her to change the travel dates. Fourth, the Port found that Arriola conspired with the General Manager and Deputy General Manager in preparing the Travel Request and Authorization. RA, tab 18 at 137-40 (Final Notice of Adverse Action). According to the final notice, these actions violated several personnel rules, including:

- Actual or attempted theft of government or Port Authority property or property of others.
- Disobedience to constituted authorities, or deliberate refusal to carry out any proper order from any supervisor having responsibility for the work of the employee; [i]nsubordination.
- Falsification, misstatement, or concealment of material facts in connection with an official record.
- Covering up or attempting to conceal defective work; removing or destroying same without permission.

Id. at 137.

[17] Guam law prohibits adverse actions against government employees issued over 60 days after "management knew or should have known the facts or events which form the alleged basis

for such action.” 4 GCA § 4406(a) (as amended 2010).² We have held that the CSC can dismiss an adverse action case under the 60-day rule without holding an evidentiary hearing if there are no disputed facts on the merits and a decision can be made as a matter of law. *See Guevara*, 2018 Guam 1 ¶ 37; *Guam Hous. Corp. v. Guam Civil Serv. Comm'n (Potter)*, 2015 Guam 22 ¶ 22. In *Potter*, all parties agreed about the facts related to the alleged procedural violation. 2015 Guam 22 ¶ 22. The final notice of adverse action failed to include the factual basis for the adverse action. *Id.* ¶ 4. The Guam Housing Corporation did not dispute that the notice provided to Potter violated the statute, but instead argued no procedure in the administrative rules authorized the CSC to dispose of a case through a pre-merits motion and hearing. *Id.* ¶ 22. Because the parties agreed on the facts regarding the notice, we found that the CSC’s decision was supported by substantial evidence. *Id.* ¶ 25. Similarly, in *Guevara*, we held that an evidentiary hearing is not required when a party belatedly requests it. 2018 Guam 1 ¶ 37. The CSC had substantial evidence before it in documentary form supporting a procedural violation, and the Port waived its right to challenge this evidence on the merits by failing to submit documentary evidence and affidavits and by failing to request a live-testimony evidentiary hearing before the motion hearing. *Id.* The Port’s waiver resulted in there being no dispute over the material facts. We noted, however, that where there is a timely raised dispute over the evidence, “a fuller evidentiary hearing is required when hearing the merits.” *Id.* ¶ 36 n.5.

[18] In both *Potter* and *Guevara*, the CSC’s decision was supported by substantial evidence, because there existed no genuine dispute over the material facts dispositive of the procedural motions under 4 GCA § 4406. If there is a dispute in the material facts, the case should not be

² We note that the limitations period under 4 GCA § 4406 has since been extended to 90 days, but we express no opinion on the amended statute. *See* Guam Pub. L. 34-145 (Dec. 13, 2018).

decided on a pre-merits procedural motion. Our cases contemplate that a merits hearing will occur when the evidence in the record shows a dispute between the parties over the merits. *See Guevara*, 2018 Guam 1 ¶ 36 n.5; *Potter*, 2015 Guam 22 ¶¶ 22-23. This leads to the ultimate question in this case: Was there a genuine issue of material fact between the Port and Arriola?

A. The Record Contains Substantial and Undisputed Evidence to Support the CSC's Application of the 60-Day Rule to Conduct Occurring On or Before October 18, 2012

[19] The first three factual charges of the final notice of adverse action can be summarized: (1) that Arriola extended Meno's itinerary without authorization, (2) that Arriola prepared and then tried to get a fellow employee to release an improper per diem, and (3) that Arriola conspired with the General Manager and Deputy General Manager. Consistent with our opinions in *Guevara*, 2018 Guam 1 ¶¶ 31-41, and *Potter*, 2015 Guam 22 ¶ 22, we hold that there was sufficient evidence to support the CSC's finding that these three allegations were barred by the 60-day rule. Therefore, in ruling on Arriola's pre-merits motion, the CSC correctly barred consideration of the charges of misconduct against Arriola that occurred on or before October 18, 2012.

[20] Under 4 GCA § 4406, the Port had to serve Arriola notice of the adverse action within 60 days "after management knew or should have known the facts or events which form the alleged basis for such action"—*i.e.*, the allegations against Arriola must have occurred within the 60 days prior to when the notice of adverse action was served on December 18, 2012. *See* 4 GCA § 4406(a) (as amended 2010). While the Port does not contest the facts regarding the changes in Meno's itinerary and the incorrect per diem rate, the Port suggests this statute should be read to mean that the 60 days start to run when management either begins its investigation or confirms the wrongdoing. *See* Appellant's Br. at 17 (Oct. 3, 2017). The Port misapprehends the language

and requirements of 4 GCA § 4406. The statute states that the 60 days start to run when management knew or should have known of “the facts or events” underlying the adverse action. The statute does not require management to determine or appreciate the wrongfulness of an employee’s conduct to trigger the adverse action limitations period; rather, the period is triggered when management knew or should have known “the facts or events which form the alleged basis for such action.” *See* 4 GCA § 4406(a) (as amended 2010).

[21] Arriola’s initial role in the “illegal travel” scheme involved her approval and attempted release of the per diem funds and the alteration of Meno’s travel dates. Based on our review of the record, we find no dispute regarding the material facts related to the itinerary changes, per diem approval, and alleged conspiracy with management. *See, e.g., Potter*, 2015 Guam 22 ¶ 22. When it determined that management knew or should have known of the relevant facts or events, the CSC relied specifically upon the following documents and evidence: (1) emails exchanged between Port Board Chairperson Daniel Tydingco and Port General Manager Mary Torres on October 18, 2012; (2) the language in the Notice of Proposed Adverse Action referencing October 18, 2012, as the date when the Board discovered this illegal travel; and (3) the General Accounting Supervisor’s October 18, 2012 refusal to release the per diem check. *See* RA, tab 18 at 7 (CSC Dec. & Judgment, Aug. 6, 2013).

[22] Applying the substantial evidence standard, we will uphold a decision of the CSC where there is no dispute between the parties over the material facts and the CSC’s decision is correct as a matter of law. *See Guevara*, 2018 Guam 1 ¶ 39; *Potter*, 2015 Guam 22 ¶¶ 22-25. In *Guevara*, we found that the CSC’s decision was supported by substantial evidence because there was no record that the Port objected to the documents dispositive of the 60-day rule. 2018 Guam

1 ¶ 39 (“There is no record that the Port objected to the consideration of any of these documents.”).

[23] We find the CSC’s conclusion that management knew about these first three points on or before October 18, 2012, to be undisputed and supported by substantial evidence. Both adverse action notices state: “The reason for the delay is that it took HR from at least October 18th when the Board found out about this illegal travel to November 15th to have their story straight.” *See* RA, tab 18 at 133 (Notice of Proposed Adverse Action); RA, tab 18 at 138 (Final Notice of Adverse Action). This is factually similar to *Potter*, because there is not a material dispute in the record regarding the 60-day rule’s triggering date. *See* 2015 Guam 22 ¶ 22. Absent such dispute, the CSC properly resolved the triggering date of the first three points of the final notice of adverse action in a pre-merits motion.

[24] Because the final notice of adverse action was not served until December 18, 2012, or 61 days after October 18, 2012, the CSC did not err in dismissing or revoking the portions of the adverse action predicated on Arriola’s involvement in Meno’s itinerary change, in approving and attempting to release the per diem, and in conspiring with management regarding the “illegal travel.”

B. In Granting the Motion to Revoke, the Civil Service Commission Erred By Not Separately Addressing the Factual Allegations Pertaining to the Backdated Memo

[25] The last allegation of misconduct from the Final Notice of Adverse Action is that Arriola backdated a memo to file to conceal her involvement in Meno’s “illegal travel.” We conclude that the CSC’s failure to separately address this allegation requires us to reverse and remand for further proceedings on this issue.

[26] Here, a threshold question exists regarding the proper standard the CSC must apply in deciding a pre-merits procedural motion to dismiss or revoke an adverse action based on an alleged violation of the 60-day rule. This appeal comes down to whether the CSC considered all of the individual charges of misconduct listed in Arriola's Final Notice of Adverse Action before granting Arriola's pre-merits motion to revoke. The Port seeks reversal, arguing, in part, that it was entitled to a merits hearing and that the CSC failed to address the effect of the backdated memo on the 60-day rule. In response, Arriola argues that the Port waived its objections to the lack of an evidentiary hearing and to the standard applied to the pre-merits motion by failing to raise the objections before the CSC.³ Further, Arriola argues that an evidentiary hearing is not required under our prior precedent. *See, e.g., Potter*, 2015 Guam 22.

[27] As earlier observed, in granting the pre-merits motion to revoke, the CSC relied on three principal facts: (1) emails exchanged between Port Board Chairperson Daniel Tydingco and Port General Manager Mary Torres on October 18, 2012; (2) the language in the Notice of Proposed Adverse Action referencing October 18, 2012, as the date the Board discovered Meno's illegal travel; and (3) the General Accounting Supervisor's refusal to release the per diem check on October 18, 2012.

[28] This factual analysis was incomplete, however, because the CSC failed to address the backdated memo. The CSC admitted there was a dispute over the timing of the backdated memo and had evidence before it supporting a violation within 60 days of the final notice of adverse action. But, it failed to consider any facts regarding the backdated memo. Instead of analyzing Arriola's specific acts of misconduct, the CSC considered the approval of the "illegal travel" as a

³ Arriola's waiver argument is without merit as the Port specifically raised its objections with the CSC. *See, e.g., RA*, tab 19 (Certification of Transcription (Tr. of CSC Bd. of Comm'rs Mtg. at 23-27, May 1, 2013)).

whole and took that as the triggering date for the 60-day rule. However, Arriola was charged with specific acts of misconduct including that she created a fraudulent memo to file. The Port submitted a supporting affidavit from Carmelita Nededog—Arriola’s fellow Port employee. In the affidavit, Nededog stated that in early November 2012, she overheard Francine Roccio instruct Arriola to backdate a memo to file representing that Frank Roberto told Arriola to increase the length of Meno’s stay in Hawaii. *See* RA, tab 3 at 21 (Mgmt.’s Opp’n Mot. Revoke for Procedural Defect at Ex. A). While the memo was dated October 16, 2012, the evidence reasonably suggested that the memo was created weeks later. If this is true, then there would have been a material dispute in the facts, and the violations stemming from the falsified memo may have fallen within the 60-day window.

[29] The record shows that the CSC knew the backdated-memo charge was a merits issue and refused to consider it before revoking the adverse action. During the hearing on the motion to revoke, Port counsel brought up the fact that the backdated memo may have occurred long after the original travel memos were prepared. RA, tab 19 (Certification of Transcription (Tr. of CSC Bd. of Comm’rs Mtg. at 23, May 1, 2013)) (“Chairman: Well, there were arguments for [the timing of the backdated memo]. But I don’t think it’s conclusive that it cannot be proven until the merits hearing. But since the 60-day’s violated, then we are barred from hearing this.”). The CSC’s failure to consider all of the factual allegations warrants remand. Contrary to Arriola’s position, both *Potter* and *Guevara* support the need for an evidentiary hearing when there is a dispute over the merits. *See supra* Part IV.

[30] Even if the CSC correctly barred consideration of any misconduct before October 18, 2012, it was error not to consider the merits of the misconduct that fell within the 60-day period before the final notice of adverse action was issued. On remand, the CSC should separately

analyze the merits of the 60-day rule regarding the backdated memo. If the CSC finds that the allegations regarding the backdated memo fall within the 60-day window and that Port management has sufficiently proven the allegations, then the CSC can determine whether Arriola's back-dating of the memo supports the agency-imposed sanction or whether the sanction should be modified. *See* 4 GCA § 4406(d) (as amended 2010).

[31] We note the Port's contention that the Nededog affidavit shows that the memo was backdated. However, this factual finding is not ours to make. It is enough for us to observe that the CSC failed to consider this factual allegation. Therefore, the CSC's determination is incomplete, and we must remand this case for consideration of all the factual charges in the final notice. *See, e.g., Guam Waterworks Auth. v. Civil Serv. Comm'n (Mesngon)*, 2014 Guam 35 ¶ 22. On remand, the CSC should conduct "a fuller evidentiary hearing" because there are material issues of fact regarding the merits of the 60-day rule.⁴ *See Guevara*, 2018 Guam 1 ¶ 36 n.5.

[32] Because we are reversing and remanding for further proceedings on the merits, we also reverse the portion of the judgment determining the issues of mitigation of damages and attorney's fees. Based on the current disposition, those determinations are premature and negated. *See, e.g., Gov't of Guam v. Gutierrez*, 2015 Guam 8 ¶ 34 (declining to address issues unnecessary to resolving the case); *Guam Fed'n of Teachers v. Gov't of Guam*, 2013 Guam 14 ¶ 72 (finding the CSC without jurisdiction to prematurely rule on matters).

⁴ In the briefs, the parties also disagree over the applicable standard of review applied by the CSC. We need not reach this question because we are reversing in part on other grounds. However, on remand, the CSC should consider the issue in the first instance consistent with our opinion in *Port Authority of Guam v. Civil Service Commission (Javelosa)*, 2018 Guam 9.

V. CONCLUSION

[33] We **AFFIRM** in part and **REVERSE** in part the Judgment of the trial court. The action is **REMANDED** to the Superior Court to remand to the CSC for consideration of the merits of the allegation that Arriola backdated a memo to file and for other proceedings not inconsistent with this opinion.

/s/

F. PHILIP CARBULLIDO
Associate Justice

/s/

MARIA G. FITZPATRICK
Justice *Pro Tempore*

/s/

KATHERINE A. MARAMAN
Chief Justice