



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

KEVIN J.T. SUSUICO,

Real Party in Interest-Appellee.

OPINION

Cite as: 2019 Guam 15

Supreme Court Case No.: CVA17-026

Superior Court Case No.: SP0121-13

Appeal from the Superior Court of Guam

Argued and submitted on June 12, 2018

Hagåtña, Guam

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

MARAMAN, C.J.:

[1] Petitioner-Appellant Port Authority of Guam appeals from a final judgment of the Superior Court of Guam, which affirmed a July 30, 2013 Decision and Judgment issued by Respondent-Appellee Civil Service Commission. In its Decision and Judgment, the Civil Service Commission found that the Port Authority of Guam violated the 60-day rule of 4 GCA § 4406 and that Real Party in Interest-Appellee Kevin J.T. Susuico should be reinstated and awarded back pay, along with interest and attorney's fees. For the following reasons, we affirm the Judgment of the Superior Court.

I. FACTUAL AND PROCEDURAL HISTORY

[2] A full recitation of the facts of this case is set forth in our earlier decision, *Port Authority of Guam v. Civil Service Commission (Susuico)*, 2015 Guam 14 (“*Susuico I*”). See 2015 Guam 14 ¶¶ 2-9. We set forth here only those facts necessary to resolve the current appeal.

[3] In October 2011, Kevin Susuico began employment with the Port Authority of Guam (“Port”) in the position of Accountant II. In May 2012, the Port requested a post-audit of certain recruitment actions. That same month, the Civil Service Commission (“CSC”) approved the request and conducted a post-audit investigation regarding the recruitment of various employees, including Susuico. On September 26, 2012, the CSC issued a memorandum to the Port regarding the post-audit investigation, which presented factual findings, including that Susuico did not meet the requisite criteria of college credit hours in accounting or auditing subjects to qualify for the Accountant II position. On October 8, 2012, the Port, in response, issued a memorandum to the CSC acknowledging the findings, and did not contest the factual finding that Susuico did not meet the criteria for the Accountant II position.

[4] At a post-audit hearing conducted by the CSC on October 16, 2012,¹ the Port again did not contest the factual findings reported in the post-audit investigation report regarding Susuico's lack of requisite qualifications for the Accountant II position. The Port was given 90 days to present a remediation plan. At a subsequent post-audit hearing on January 15, 2013, the Port provided no remediation plan and indicated it would defer to the CSC. At this hearing, the CSC reaffirmed its original determination that Susuico's appointment was done in violation of the Port's personnel rules. As a result, the Port ultimately terminated Susuico's employment as of January 23, 2013, providing notice of that action on January 17, 2013.

[5] Susuico filed an appeal to the CSC from the final adverse action taken by the Port, in which he argued that the Port violated the 60-day rule of 4 GCA § 4406(a). The CSC found that the Port violated the 60-day rule and voided the adverse action. The Port petitioned the Superior Court for judicial review, and the court held that the CSC lacked jurisdiction to hear the adverse action appeal. On appeal to this court, we reversed the trial court's decision and remanded the case, holding that the CSC had jurisdiction under 4 GCA § 4406(b) because Susuico was a permanent classified employee subjected to an adverse action. *Susuico I*, 2015 Guam 14 ¶¶ 1, 27-28.

[6] On remand, the trial court found that there was substantial evidence in the record to support the CSC's finding that the Port violated the 60-day rule. The trial court then issued

¹ The record includes conflicting dates in regard to the post-audit hearing or meeting. The CSC sometimes referred to the meeting as being held on October 18, 2012. *See, e.g.*, Record on Appeal ("RA"), tab 17 at 6 (Certification of Transcription, Dec. 20, 2013 (CSC Bd. of Comm'rs Mtg., July 30, 2013)); RA, tab 15 at 3 (Certification of R., Dec. 20, 2013 (CSC Dec. & J., July 30, 2013)). However, the CSC Notice of Post Audit Hearing to the Port indicates the hearing was scheduled for October 16, 2012. RA, tab 16 at 47 (Certification of R., Dec. 20, 2013 (Notice of Post Audit Hr'g, Oct. 2, 2012)); *see also Susuico I*, 2015 Guam 14 ¶ 3. Moreover, the record contains transcripts of an October 16, 2012 CSC Board of Commissioners meeting, but not of an October 18, 2012 meeting. *See* RA, tab 17 at 143-226 (Certification of Transcription (CSC Bd. of Comm'rs Meeting, Oct. 16, 2012)). Based on its review of the record, the Superior Court determined that the meeting was held on October 16, 2012. *See* RA, tab 42 at 7 & n.3 (Dec. & Order, Sept. 23, 2015). We will rely on October 16, 2012, as the relevant meeting date, as this particular discrepancy does not impact our ultimate analysis.

orders granting Susuico attorney's fees and prejudgment interest on the awarded back pay. The trial court issued a judgment to that effect, and the Port timely appealed.

II. JURISDICTION

[7] This court has jurisdiction over appeals from a final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-29 (2019)) and 7 GCA §§ 3107, 3108(a), and 25102(a) (2005).

III. STANDARD OF REVIEW

[8] Agency actions are reviewed according to the Administrative Adjudication Law. *See* 5 GCA § 9100 *et seq.* (2005); *see also Fagan v. Dell'Isola*, 2006 Guam 11 ¶ 10. Our review mirrors the standard of review that should be applied by the trial court. *Fagan*, 2006 Guam 11 ¶ 12. Questions of law are reviewed *de novo*, while questions of fact are reviewed for substantial evidence. *Id.* ¶¶ 10-12; *see also* 5 GCA § 9240.

[9] Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Fagan*, 2006 Guam 11 ¶ 12 (quoting *Bondoc v. Worker's Comp. Comm'n*, 2000 Guam 6 ¶ 6). It is “more than a mere scintilla, but less than a preponderance.” *Guam Mem'l Hosp. Auth. v. Civil Serv. Comm'n (Chaco)*, 2015 Guam 18 ¶ 15 (quoting *NLRB v. Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1053-54 (9th Cir. 2003)). “The substantial evidence standard requires the appellate court to review the administrative record as a whole” *Id.* ¶ 16. The “court must uphold the agency's findings [of fact] ‘unless the evidence presented would *compel* a reasonable factfinder to reach a contrary result.’” *Id.* (quoting *Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir. 2003), *amended by* 339 F.3d 1012 (9th Cir. 2003)). “Under a substantial evidence standard of review [a]n appellate court must not do its own weighing of the evidence or substitute its factual

determinations for that of the lower court.” *Sule v. Guam Bd. of Dental Exam’rs*, 2008 Guam 20 ¶ 26.

IV. ANALYSIS

[10] Classified employees of the Government of Guam are entitled to certain procedural protections related to dismissal, demotion, or suspension. 4 GCA § 4406 (as amended by Guam Pub. L. 30-112:3 (Mar. 12, 2010)); *see also Haeuser v. Dep’t of Law*, 97 F.3d 1152, 1156-58 (9th Cir. 1996) (discussing merit system protections in Guam). As set forth in 4 GCA § 4406, an employing agency has a limited period of time in which to provide employees notice of any proposed or final adverse action. *See* 4 GCA § 4406(a) (as amended 2010). This period of time begins to run from the point at which management “knew or should have known the facts or events which form the alleged basis for such action.” *Id.*; *see also Univ. of Guam v. Guam Civil Serv. Comm’n (Foley)*, 2002 Guam 4 ¶ 2 n.2. The failure to provide notice within this statutory time period renders the adverse action void. *See Port Auth. of Guam v. Civil Serv. Comm’n (Guevara)*, 2018 Guam 1 ¶ 41.

[11] We have previously referred to this rule as the 60-day rule. *See, e.g., id.* ¶ 15. The legislature recently amended 4 GCA § 4406 from a 60-day period of time to a 90-day period of time in which management must provide notice of a proposed or final adverse action to an employee. *See* Guam Pub. L. 34-145:1 (Dec. 13, 2018). Because the facts of this case occurred while the prior version of the rule was in place, the 60-day rule remains applicable here. *See Foley*, 2002 Guam 4 ¶¶ 2-3, 15-18 (applying pre-amendment version of statute that was amended during pendency of adverse action proceedings). Therefore, we express no opinion regarding the amendment.

[12] Here, the question before the CSC was when “management knew or should have known the facts or events which form the alleged basis for [the adverse] action.” *See* 4 GCA § 4406(a)

(as amended 2010). The Port argues that it did not violate the 60-day rule because it was not until January 15, 2013, that the CSC reaffirmed its initial findings from the post-audit investigation—namely, that Susuico was improperly appointed—and that it was this reaffirmation that formed the basis of the Port's decision to terminate Susuico. *See* Appellant's Br. at 30 (Feb. 20, 2018). However, although the Port stated the basis of the adverse action was the CSC's ruling at the post-audit hearing on January 15, 2013, the underlying basis of the CSC's determination was its initial factual finding that Susuico failed to submit proof of the requisite college credits. The appropriate focus of our inquiry, therefore, is on when Port management knew or should have known that Susuico lacked the requisite educational qualifications for the Accountant II position. *Cf. Guevara*, 2018 Guam 1 ¶¶ 40-41 (finding that 60-day window ran from date of management's knowledge of underlying facts). It is from that date that the 60-day clock would have begun to run. *See* 4 GCA § 4406(a) (as amended 2010).

[13] The CSC had substantial evidence in the record before it to support the conclusion that the Port violated the 60-day rule. *Cf. Guevara*, 2018 Guam 1 ¶¶ 31, 41 (holding similarly). Upon review of the Port's adverse action against Susuico, the CSC determined that the Port violated the 60-day rule because the 60-day period began on October 16, 2012.² This date is when the post-audit hearing was held and when the Port learned of and did not contest the CSC's factual finding that Susuico did not have the requisite educational credit hours to qualify for the Accountant II position. The CSC's determination of the 60-day period derives from its own post-audit investigation report and its memorandum issued to the Port, which concluded that Susuico's resume and employment application did not meet the qualification determination sheet and requisite experience for the position of Accountant II. The CSC found that the Port violated

² *See supra* note 1.

the 60-day rule because it did not provide notice to Susuico until January 17, 2013—over 90 days following the Port’s knowledge of the underlying facts.

[14] The Port knew or should have known about Susuico’s lack of educational qualifications—which indicated that his appointment as an Accountant II violated the Port’s rules and regulations—no later than October 16, 2012,³ when the post-audit hearing was held and the Port did not contest the CSC’s factual findings. The Port should have notified Susuico of any adverse action within 60 days of receiving this post-audit report. However, it was not until January 17, 2013—well after the 60-day window closed—that the Port issued a Notification of Personnel Action to Susuico terminating his employment effective January 23, 2013. *See Susuico I*, 2015 Guam 14 ¶ 5. There was substantial evidence before the CSC to support its conclusion that the Port violated the 60-day rule, and the trial court, therefore, did not err in affirming the CSC’s decision.

V. CONCLUSION

[15] We **AFFIRM** the Superior Court’s Judgment dated October 12, 2017.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
MARIA G. FITZPATRICK
Justice *Pro Tempore*

/s/
KATHERINE A. MARAMAN
Chief Justice

³ There is additional evidence to support a finding that the Port knew or should have known of Susuico’s lack of requisite qualifications prior to the post-audit hearing on October 16, 2012. The CSC issued a memorandum to the Port on September 26, 2012, to which the Port replied on October 8, 2012, and did not contest the initial factual findings. *See* RA, tab 16 at 3 (Certification of R., Dec. 20, 2013 (CSC Dec. & J., Mar. 26, 2013)).