I. FACTUAL AND PROCEDURAL BACKGROUND

A. REQUEST

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

(1) Ms. Lisa Linek’s recruitment to the Accountant III position; and,

(2) Ms. Rose Cunliffe’s recruitment to the position as a Controller, and, more specifically, an alleged recent pay increase putting her salary in excess of $90,000.

As custodians of the merit system, we take requests for post audit investigations seriously. Where it is believed there have been personnel actions resulting from violations of the laws, rules, or regulations, under 4 G.C.A. §4403(d) it is within our ambit to investigate to either allay or confirm these suspicions. On July 29, 2015, the Executive Director noticed GVB of a
“Notice of Filing” for 15-PA02 and 15-PA03 relating to these two matters.

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

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

B. INVESTIGATION

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

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

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

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C. MANAGEMENT’S RESPONSE

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

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

D. THE WAIT FOR AN ATTORNEY GENERAL OPINION

On October 20, 2015, GVB requested thirty (30) additional days before the CSC took final action to await an Attorney General’s Opinion Letter that they had requested. We told them to return in two (2) weeks for a status conference. On November 3, 2015, GVB appeared for a status conference and stated that they were still waiting on an AG’s Opinion Letter. On December 10, 2015, GVB again appeared before the CSC. GVB advised the CSC that an AG’s Opinion Letter was going to be forthcoming in the next two (2) weeks. A hearing was set for January 12, 2016, where GVB again appeared and no AG’s Opinion Letter had been produced. Finally, after allowing nearly three (3) months for an AG’s Opinion Letter, on January 14, 2016, the Commission voted 4-1 (with one abstaining) to null and void the personnel actions at question.
Following the decision, GVB’s counsel argued additionally that the employees were actually unclassified and/or that we should not penalize the employees for GVB’s failure to cooperate.

II. JURISDICTION

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

III. DISCUSSION

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

The CSC investigation began on September 1, 2015, when we gave our staff the go ahead to conduct an investigation on our behalf. Section 4403(d) states: “The agency head shall cooperate and assist with the Commission’s investigation.” Here, the General Manager of GVB refused to cooperate with the investigation by providing post audit selection documentation records, in contravention of GVB’s Rules. It would produce an absurd result if agencies could avoid post audits merely by refusing to cooperate. By that reading, section 4403(d) would be
effectively meaningless and toothless. We do not believe *I Licheslatura* enacted a meaningless, absurd statute.

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

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

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

Indeed, the GVB Rules defines "CLASSIFIED SERVICE" in a way contrary to GVB's current claims: "**Government** service of which employees have attained permanent status and
cannot be removed from employment without cause.” Page 153 (emphasis added). In fact, GVB
and/or its employees participate in the MagPRO Awards for employees of the Executive Branch
of the Government of Guam. In 2015, GVB and/or its employees won eight (8) MagPRO
Awards.

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

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

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

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

In regards to the innocence of the employees in this matter, §4403(d) does not limit the voiding of personnel actions to instances where the employees colluded with management. Indeed, if in light of the violations of statutes and GVB Rules in refusing to cooperate with the investigation and provide selection documents, then we are giving carte blanche to all administrators to violate statutes and rules at will as long as the employees who benefit are not complicit in the violations. See, e.g., Decision and Judgment, Aguon v. DOC, 15-PA01. The vast majority of §4403(d) post-audits brought before us do not implicate the employee, but are done to remind management that they need to follow the rules.
We find it unnecessary to address the arguments by GVB that it is exempted from post audit jurisdiction by being a public corporation. The fact that the Board of Directors of GVB adopted the GVB Rules and submitted them to the CSC for approval is sufficient. Even if GVB would have had autonomy from the CSC by their public corporation status, their Board of Directors submitted to the jurisdiction of the CSC to conduct post audits through their adoption of the GVB Rules.

IV. CONCLUSION

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

(1) Ms. Lisa Linek’s recruitment to the Accountant III position; and,

(2) Ms. Rose Cunliffe’s most recent personnel action, an alleged recent pay increase putting her salary in excess of $90,000.

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

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

EDITH PANGULINAN
Chairperson

PRISCILLA T. TUNCAP
Commissioner

LOURDES HONGYEE
Commissioner

DANIEL D. LEON-GUERRERO
Vice-Chairperson

JOHN SMITH
Commissioner

CATHERINE GAYLE
Commissioner