



BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS



IN THE MATTER OF:

FRANCINE ROCIO,

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

ADVERSE ACTION APPEAL
CASE NO.: 12-AA29T SP

DECISION AND JUDGMENT

This matter came before the Commission October 10, 2019, for the Civil Service Commission (Commission) to hear the recommendations of the Administrative Law Judge (ALJ). Commissioners present were Chairman Luis R. Baza, Vice-Chairman Juan K. Calvo, Commissioner Priscilla T. Tuncap, Commissioner John Smith, and Commissioner Emilia F. Rice. Employee was present with her counsel, Terrence M. Brooks. Management was represented by Port General Manager, Rory Respicio, and Attorney Joseph McDonald.

Eric D. Miller, ALJ, read his recommendations to the Commission.

DECISION AND ORDER

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1 **PROCEDURAL BACKGROUND**

2 On March 24th, 2015, the Commission signed an Order that by a vote of 4 to 3
3 the Final Notice of Adverse Action (FNAA) in this case was procedurally defective for
4 failing to be specific as required by Department of Administration Personnel Rules and
5 Regulations (PPR) 11.311. The same Order found that Management failed to meet their
6 burden of proof which was by clear and convincing evidence. Management appealed to
7 the Superior Court of Guam on the issue of burden of proof only, ignoring the findings
8 regarding the defective FNAA.

9 The case lingered in Superior Court waiting for the Supreme Court to rule on the
10 related case of *Javelosa vs Port Authority*, 2018 Guam 9, which would address the same
11 issue of burden of proof. The Supreme Court finally decided on the *Javelosa* ruling that
12 pursuant to 4 GCA, § 4407(C), the Commission must make an initial determination as to
13 whether the allegations would constitute a crime. If the Employee acts were a crime, the
14 burden of proof is substantial evidence. If it is not a crime, the burden is Clear and
15 Convincing evidence. After the ruling in *Javelosa*, the Superior Court remanded this
16 case to the Commission to make the initial determination of Management's burden of
17 proof. The Superior Court made no rulings reversing either of the two findings of the
18 Commission. When the case came back before the Commission, Employee filed three
19 motions to dismiss.

20 1. First, Employee moved to dismiss on the grounds that although, Management
21 had appealed to the Superior Court on the issue of burden of proof, it did not appeal
22 findings of the Commission that the FNAA was defective. Employee reasoned that

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1 issues not raised on appeal are waived, and the decision of the Commission on this
2 issue is final. The ALJ recommended that the Commission grant Employee's motion to
3 dismiss.

4 2. Employee also moved to dismiss on the grounds that the FNAA violated the
5 60-day rule of 4 GCA, §4406. Finding that Management knew or should have known
6 on October 16, 2012, the alleged bad acts of the Employee because on that date
7 Management received a detailed report from their attorneys describing the bad acts of
8 Employee. Employee received her FNAA December 18, 2012, 63 days after
9 Management knew or should have known. The ALJ recommended that the Commission
10 grant Employee's motion to dismiss.

11 3. Employee moved to dismiss asking the Commission to *sua sponte* find the
12 FNAA as defective for lack of specificity required by Department of Administration
13 Personnel Rules and Regulations (PRR) 11.306. The ALJ noted the FNAA includes
14 vague accusations of conspiracy, disobedience, falsification, and conclusions as to
15 violations of the criminal code, but **does not allege a specific act** done by Employee.
16 The ALJ found the FNAA was not compliant with PRR 11.311, and recommended that
17 the Commission grant Employee's motion to dismiss.

18 After reading his recommendations to the Commission, the ALJ was dismissed
19 and the Commission began deliberations.

20 The Commission began the discussion by noting that the Superior Court of Guam
21 had remanded the case back to the Commission to determine the correct burden of proof
22 in accordance with *Javelosa vs Port Authority of Guam*, 2018 Guam 9. After discussion

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1 the Commission voted 5 to 0 that **no crime** was alleged, and Management's burden of
2 proof is therefore **clear and convincing**.

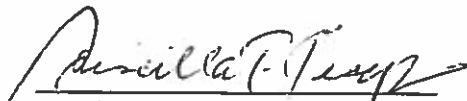
3 The Commission then discussed the recommendations of the ALJ and voted 5-0
4 to adopt the recommendations of the ALJ, a copy of which is attached hereto.

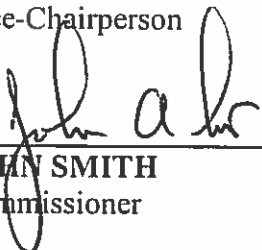
5 Pursuant to 4 GCA, §4406(e) the adverse action is revoked. Employee is awarded
6 her back pay and benefits. Pursuant to 4 GCA §4406. 1. Employee is awarded
7 reasonable attorney's fees and costs. Pursuant to 4 GCA, §4406(g), Employee is
8 reinstated **immediately** pending Judicial Review.

9 SO ORDERED THIS 7th DAY OF November, 2019.

10 
11 LUIS R. BAZA
Chairperson


12 JUAN K. CALVO
Vice-Chairperson

13 
14 PRISCILLA T. TUNCAP
Commissioner


15 JOHN SMITH
Commissioner

16 (absent)
17 CATHERINE GAYLE
Commissioner


18 EMILIA F. RICE
Commissioner

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**FINDINGS, CONCLUSIONS,
AND RECOMMENDATIONS
AFTER HEARING ON
MOTIONS**

This matter comes before the undersigned sitting as a duly-appointed Administrative Law Judge (ALJ) pursuant to 4 G.C. A. 4405(c), upon a hearing on Motions of the above referenced adverse action appeal held August 27, 2019 . Management was represented by Attorney Joseph McDonald. Employee was represented by Georgette Bello Concepcion. Also present were the employee, Francine Rocio, and General Manager of the Port Authority of Guam, Rory Respicio.

The ALJ renders the following findings and conclusions:

1. The Civil Service Commission (Commission) has jurisdiction over this matter pursuant to the Organic Act of Guam, and 4 GCA § 4401, *et seq.*

2. Employee argues that Management failed to timely appeal the Commission's Judgment finding the Notice of Proposed Adverse Action (NPAA), and the Final Notice of Adverse Action (FNAA) were procedurally defective.

**FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS
AFTER HEARING ON MOTIONS**

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1 On March 24th, 2015, the Commission signed an order following multiple nights of
2 hearings which held:

3 A. The Commission determined by a vote of 4 to 3 that the Notices of Proposed
4 and Final Adverse Action were procedurally defective, and;

5 B. The Commission by a vote of 5 to 2 held Management had failed to meet its
6 burden of proof.

7 4. Management appealed to the Superior Court on the issue of burden of proof but
8 not on the issue of defective Notices. Moreover, Management's opening brief with the
9 Superior Court of Guam is devoid of any argument regarding the findings that the FNAA
10 was defective. The Superior Court remanded the case to the Commission to determine the
11 burden of proof in accordance with the ruling of *Javelosa v. Port Authority of Guam 2018*
12 *Guam 9*.

13 5. Issues not raised on appeal are waived. The Commission's decision that the
14 Notice of Final Adverse Action was defective is now final. **Employee's Motion to**
15 **Dismiss is GRANTED.**

16 6. Employee also argues that the FNAA violates the 60-day Rule, 4 GCA §4406
17 failing to notify her of the adverse action within 60 days from when Management knew or
18 should have known of the basis for such action. A review of the record confirms that
19 Management knew or should have known on October 16, 2012, when it received a detailed
20 report from their attorneys indicating the bad acts and conspiracies of a number of
21 employees including the employee here. Employee Rocio was not served her FNAA until
22 December 18, 2012, 63 days after Management knew or should have known. The Final
23

1 Notice of Adverse Action was not timely filed and the Adverse Action is, therefore, void.


2 **Employee's Motion to Dismiss is GRANTED.**

3 7. Employee moves the Commission to *sua sponte* find that the FNNA was
4 defective for lack of specificity required by Department of Administration, Personnel Rules
5 and Regulations (PRR) 11.306. The FNAA must state specifically and in detail the reasons
6 for adverse action. Here the FNAA includes vague accusations of conspiracy,
7 disobedience, falsification and conclusions as to violations of the criminal code, but does
8 not allege a specific act done by Employee and therefore, the FNNA is not compliant with
9 PRR 11.306. **Employee's Motion to dismiss is GRANTED.**

10 **RECOMMENDATION**

11 The ALJ recommends that the Commission grant Employee's three Motions to
12 dismiss.

13 Submitted this 20th day of September 2019.

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15 
16 Eric D. Miller
17 Administrative Law Judge

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24 **FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS**
AFTER HEARING ON MOTIONS

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