BEFORE THE
GUAM CIVIL SERVICE COMMISSION

IN THE MATTER OF:

FIDEL Q. MASGA,

Employee,

vs.

GUAM INTERNATIONAL
AIRPORT AUTHORITY,

Management.

ADVERSE ACTION APPEAL
CASE NO. 11-AA11D

DECISION AND JUDGMENT

THIS MATTER CAME before the Civil Service Commission ("Commission") on April 3, April 4 and May 10, 2012 on hearing of an appeal of adverse action (the "Hearing"). Present on behalf of the A.B. Won Pat International Airport Authority, Guam ("GIAA" or "Management") was GIAA legal counsel Janalynn Cruz Damian of Calvo Fisher & Jacob LLP. Present on behalf of employee Fidel Q. Masga ("Masga" or "Employee") was Attorney Daniel Somerfleck. The Commission renders the following Decision and Judgment in this matter.

I.

JURISDICTION AND STANDARD OF REVIEW

The Commission has jurisdiction over this matter pursuant to the Organic Act of Guam, 4 G.C.A. §§ 4403(b) and 4406, GIAA’s Personnel Rules and Regulations ("PRR") § 11.312 and Civil Service Commission Rules of Procedure for Adverse Action Appeals Rule ("CSC AAAR") 5.
II.

FACTUAL BACKGROUND

A. December 29, 2010 Notice of Proposed Adverse Action

i. Violation of Division Directive AP-015-FY09

On December 29, 2010, GIAA issued a Notice of Proposed Adverse Action (“First NPAA”) to Masga. The First NPAA found that on November 13, 2010, a commingling event (the “Commingling Event”) occurred at the airport concourse during Shift I when Masga was the Officer-In-Charge (“OIC”). According to the First NPAA, this Commingling Event occurred when Airport Police Officer Beem, an officer under Masga’s supervision, “allowed [an arriving, non-TSA screened passenger] to crossover” the barrier which divides and separates arriving and departing passengers within the concourse. (See M1-2.) In doing so, Officer Beem allowed a non-sterile passenger to commingle with departing, TSA screened (and, thus, sterile) passengers. See id.

Because the Commingling Event occurred during a shift in which Masga was the OIC and thus was responsible for the performance of subordinate personnel, the First NPAA found that it appeared that Masga had violated Division Directive AP-015-FY09 (setting forth the “security measures...to ensure the...separation of sterile (departing TSA screened) as opposed to non-sterile (arriving non-TSA screened) passengers, inclusive of transit passengers arriving from foreign airports destined to connecting flights.”).

ii. Violation of Operations Directive No. AP-001-FY10

In addition to his failure to provide proper supervision of Officer Beem, the First NPAA found that Masga was not even present at his assigned post within the concourse when the Commingling Event occurred. According to the First NPAA, an administrative investigation “revealed that on the date and time of the [commingling] incident” Masga was not in the concourse but was “assisting other personnel with traffic and criminal cases.” (See M1-2.) According to the First NPAA, a “systems journal audit” for “the day of the [commingling] incident” corroborated the administrative investigation as it “revealed that your security badge access showed that the only time you entered the concourse was on the morning of the commingling incident which was about 8:22 a.m. and only after you were informed of the [commingling] incident.” See id.
As such, it appeared that Masga had violated Operations Directive No. AP-00-FY10. (See M1-2 (“[o]n the morning of the [commingling] incident, you were not at your assigned post as required by Operations Directive No. AP-001-FY10.”).)

The First NPAA stated further that “[a]nother systems journal audit was conducted for the period of November 7-27, 2010, one week prior and one week after the [commingling] incident, revealed that your presence in the concourse area during break peak times as stipulated in GIAA’s Division Operations Directive No. AP-001-FY10 and Interim Concourse Security Procedures, were very minimal.” (See id.) Thus, both the administrative investigation arising from the Commingling Event and the systems journal audits conducted by GIAA appeared to indicate that Masga violated AP-001-FY10 on at least several occasions.

iii. Dishonest Claim

In addition, the First NPAA also found that a statement (the "Dishonest Claim") which Masga made to GIAA management in order to excuse his absence from the concourse on the day of the Commingling Event was, in fact, untrue. In particular, the First NPAA states that Masga told GIAA management that he “had” obtained approval from Operations Shift Supervisor, Carl Cruz, to monitor [his] shift via radio from [his] office” (rather that appear on the concourse in person) on the day in which the Commingling Event occurred. (See M1-2.) The First NPAA notes, however, that an administrative investigation revealed that the Shift Operations Supervisor, Carl Cruz, did not approve any such request for the day of Commingling Event. (Id.)

iv. Authorized Causes for Adverse Action

The First NPAA found that Masga’s violation of Division Directive AP-015-FY09 and Operations Directive No. AP-001-FY10 each constituted a “[r]efusal or failure to perform prescribed duties and responsibilities” and thus established an apparent basis for adverse action against Masga pursuant to Airport Personnel Rules and Regulations (“APRR”) Section 11.3030. (Id.)

B. January 6, 2011 Meeting

On January 6, 2011, Executive Manager Mary C. Torres and Personnel Specialist IV Virginia Molo met with Masga regarding the allegations contained in the First NPAA. At the meeting, Ms. Torres explained the allegations to Masga, including the allegation that he had
failed to supervise the concourse area on November 13, 2010 when the Commingling Event occurred. In response, Masga asserted that he had indeed been present at the concourse area during the Commingling Event. *(See M6-7.)*

Ms. Torres, in turn, revealed to Masga that an audit of the security system which tracks the movement of GIAA personnel through badge swipes indicated that Masga was not in the concourse area at the time of the Commingling Event. *(See id.)* Ms. Torres revealed further that the additional systems audits indicated that during the period of November 7 through November 27, 2010, Masga had spent minimal time within the concourse area and thus appeared to be in violation of Division Directive AP-015-FY09 and Operations Directive No. AP-001-FY10. *(Id.)* In response to the evidence presented by the system audits, Masga explained that he frequently bypassed security checkpoints that would otherwise read his security badge and instead entered the concourse through an area designated for Customs and Quarantine personnel. *(See M6-7.)*

**C. January 25, 2011 Written Reprimand**

On January 25, 2011, GIAA issued a written reprimand (the “Reprimand”) to Masga in response to his violation of Division Directive AP-015-FY09 and Operations Directive No. AP-001-FY10 and the Dishonest Claim. *(See M3-5.)* In spite of his claims that he bypassed the security check points and thus entered the concourse undetected on the day of the Commingling Event, the Reprimand noted that Masga nevertheless admitted in an additional statement that he was “not on the concourse at the time of the [commingling] incident.” *(See id.)* As such, the Reprimand found that Masga had “failed to adhere to the directives noted on the NPAA [i.e., Division Directive AP-015-FY09 and Operations Directive No. AP-001-FY10]” and “[a]s a result of your failure to perform your duties as the Supervisor in Charge, GIAA is now under investigation and may be liable for a civil penalty of up to $10,000.00 per incident.” The Reprimand further found that the Dishonest Claim which Masga made in order to excuse his absence from the course on the day of the Commingling Event was indeed untrue and that “as an Officer and Supervisor of over 20 years, your conduct is dishonest and unprofessional.” *(Id.)*

**D. February 21, 2011 Notice of Proposed Adverse Action**

On February 21, 2011, GIAA issued a second Notice of Proposed Adverse Action (“Second NPAA”) to Masga. The Second NPAA stated that on “January 6, 2011, in your meeting with [Mary Torres] and Ms. Virginia Molo, Personnel Specialist IV, to respond to a
Notice of Proposed Adverse Action (NPAA) [i.e., The First NPAA] issued to you, it appears that you provided information to management of your failure to follow security policies and procedures relating to the use of your issued SIDA badge and accessing restricted areas.” (See M8-13 (emphasis added).)

In particular, the Second NPAA stated that on January 6, 2011 meeting, Masga revealed to management that he, as a matter of general practice, “access[ed] the concourse through ‘alternative routes’ which enable [him] to bypass the security check to include entering through Customs and Quarantine area.” (See id.) According to the Second NPAA, Masga further revealed that the “majority of times [Masga’s] access point [to the concourse] is through the double doors located at the Customs and Quarantine area where arriving passengers exit.”

Based upon Masga’s revelation that he routinely bypassed security checkpoints and entered restricted Custom and Quarantines areas, GIAA found that “it appears that [Masga was] in violation of the Authority’s Personnel Rules and Regulations. “In particular, the Second NPAA found that it appeared that Masga had violated:

a. Airport Security Program Part IV (relative to access to controlled areas) and Airport Security Program Part II (relative to adherence to federal rules and regulations by GIAA security badge holders)

b. 49 USC § 1540.105 (relative to circumvention of security systems, illegal accessing of controlled areas and proper use of identification media)

c. APRR, Article XIII (relative to strict adherence to rules and regulations promulgated by the FAA, GIAA and the Department of Public Safety).

On account of these apparent violations revealed to GIAA for the first time at the January 6, 2011 meeting, the Second NPAA found that Masga was likely subject to adverse action pursuant to APRR Section 11.303O.

E. March 3, 2011 Meeting

On March 3, 2011, Ms. Torres and Personnel Specialist Vivian Aflague met with Masga regarding the Second NPAA. At the meeting, Ms. Aflague reiterated to Masga that the Second NPAA was issued not in response to the Commingling Event but on account of the information that Masga revealed “in his response” to the First NPAA. (See M16.) Thereafter, Masga refused to respond to Ms. Torres’ assertion that “[b]y your own admittance, it appears you violated the
security program.” That same day, Masga sent a response to the Second NPAA wherein he stated that during “our meeting regards to my response to the [First NPAA] against me, I might have mis-spoken during your inquiry of my whereabouts on the dates surrounding Nov. 7 and 26, 2010.” (M14-15.)

F. March 4, 2011 Final Notice of Adverse Action

On March 4, 2011, GIAA issued a Final Notice of Adverse Action (“FNAA”) to Masga. The FNAA noted that the Second NPAA had been issued “based upon your admission during a meeting held on January 6, 2011 attended by you, Ms. Virginia Molo, Personnel Specialist, IV, and me, that you access the concourse through ‘alternative routes’ which enable you to bypass the security check to include entering through Customs and Quarantine.” (See M17-22.) The FNAA went on to note that “[y]our admission to repeatedly entering secured areas of the Airport in an unauthorized manner is sufficient grounds to determine that you are indeed in breach of the Authority’s security mandates.” (Id.)

As such, and because the evidence adduced in the course of investigating the claims underlying the Second NPAA did not establish a basis for invalidating the findings in the Second NPAA, the FNAA found Masga to be in violation of the security rules and regulations as identically set forth in the Second NPAA. As a result of Masga’s violations, Management informed of Masga that, effective March 5, 2011, Employee would be demoted to an Airport Police Officer I position.

G. Employee’s Appeal

On March 23, 2011, Masga timely appealed his adverse action asserting that FNAA was timely and thus any action brought by management in violation was barred and any decision upon such actions void. (M23-24.) On May 19, 2011, Masga brought a motion to revoke in which he argued that “GIAA failed to provide specific facts found in which this action is based” and that the FNAA was untimely. (Employee Mot. Revoke for Procedural Defect filed May 19, 2011.) Management filed an opposition to the motion and the matter was heard on June 21, 2011. (See Masga v. A.B. Won Pat Int'l Airport Auth., Adverse Action Appeal Case No. 11-AA11D, (Decision and Order Jan. 17, 2012, nunc pro tunc, June 21, 2011.)) The Commission found that the Second NPAA and FNAA was sufficiently detailed and timely. (Id.) After denying Masga’s motion, the Commission set the matter to be heard on its merits.
H. April 3, 4 and May 10, 2012 Hearing on the Merits.

The merits hearing was held on April 3, 4 and May 10, 2012. The Commission heard oral testimony from Mary Torres, former Executive Manager, Robert Camacho, Chief of Airport Police, Vivian Aflague, GIAA Personnel Specialist, Virginia Molo, GIAA Personnel Specialist IV, and Masga.

III.

ISSUE

Did Management meet its burden of proof by clear and convincing evidence that its actions taken in demoting Employee from Airport Police Supervisor to Airport Police Officer I was correct and proper?

IV.

DISCUSSION

On March 4, 2011, GIAA issued a Final Notice of Adverse Action ("FNAA") to Masga. The FNAA noted that the Second NPAA had been issued "based upon [Masga's] admission during a meeting held on January 6, 2011 attended by [Masga], Ms. Virginia Molo, Personnel Specialist, IV, and [the Executive Manager], that [Masga] accessexes the concourse through 'alternate routes' which enable [Masga] to bypass the security check to include entering through Customs and Quarantine." (See M17-22.) The FNAA went on to note that Masga’s “admission of repeatedly entering secured areas of the Airport in an unauthorized manner is sufficient grounds to determine that you are indeed in breach of the Authority’s security mandates.” (Id.) As such, and because the evidence adduced in the course of investigating the claims underlying the Second NPAA did not establish a basis for invalidating the findings in the Second NPAA, the FNAA found Masga to be in violation of the security rules and regulations as identically set forth in the Second NPAA.

A. MANAGEMENT MET ITS BURDEN OF PROOF SUPPORTING ITS ACTION AGAINST EMPLOYEE.

Pursuant to 4 Guam Code Annotated §4407(a):
(a) Upon the hearing of any adverse action appeal, the burden of proof shall be upon the government to show clearly and convincingly that the action of the Branch, department, agency or instrumentality was correct.

4 G.C.A. §4407(a).

Both Employee and GIAA have had an adequate opportunity to present their evidence and to allow the Commission sufficient testimony upon which to weigh and render its decision.

The Commission finds that Employee’s own admission to Ms. Torres on January 6, 2011 that he routinely bypassed security checkpoints, provides clear and convincing evidence that he in fact did so. While it may be true that GIAA was unable to provide video footage or eyewitness testimony of such breaches, Employee’s admission is also corroborated by the swipe system journal audits for the month of November 2011, lack of a timely retraction of his earlier admission, and Airport Police Chief Robert Camacho’s testimony that the manner by which Employee described his breach of security is possible.

During Employee’s January 6, 2011 meeting with Mary Torres and Ms. Molo present, he admitted to accessing the airport concourse in willful breach of several GIAA regulations. Employee does not dispute that the security breaches he admitted to and described in detail during the January 6, 2011 meeting are serious violations of airport security protocols. Nor does Employee contest that they are adequate grounds for demotion under GIAA’s policies and procedures.

However, in his testimony before the Commission on April 4, 2012, Employee indicated that he “misspoke” when he told Ms. Torres on January 6, 2011 that he breached security protocols, that in fact, he was able to access the concourse without swiping his badge but also without breaching security protocols. Therefore, by Employee’s own account, either he did in fact repeatedly and willfully breach security at the airport, or, he provided false statements to Ms. Torres, then GIAA’s Executive Manager, that he did so.

His explanation for the inconsistency was that he felt pressured to give some kind of response to Ms. Torres’ repeated questioning regarding his whereabouts during the Commingling Event. The Commission, as trier of fact, does not accept Employee’s explanation truthful. It is simply not credible that a twenty year veteran of the airport police, with extensive police training
including but not limited to conducting interrogations, would be coerced by Ms. Torres into confessing to a security breach that he in fact did not commit.

While the swipe systems journal audit from November of 2011 does not in and of itself conclusively prove that Employee in fact committed the security violations he admitted to in his January 6, 2011 meeting with Ms. Torres, the audit showed that he was either repeatedly failing in duty to man the concourse at the required times, or that he was willfully evading the required swipe system checkpoints. This information corroborates his January 6, 2011 admission to Ms. Torres.

Additionally, Chief Camacho's testimony that Employee's means of evading the airport security systems is possible lends further credibility to the accuracy of Employee's original admission. The Commission simply does not accept Employee's feeble attempt, almost a year after the fact, to retract his January 6, 2011 admission to Ms. Torres that he willfully breached GIAA's security protocols. Thus, we find that GIAA's decision to demote Employee was proper.

V.

HOLDING

By a vote of 5-0, the Commission has determined that GIAA met its burden of proof supporting its adverse action against Employee. Thus, GIAA's action in demoting Employee was proper.

VI.

CONCLUSION

Based on the foregoing, GIAA has proven its allegations by clear and convincing evidence. The Commission hereby sustains GIAA's adverse action against Employee.
SO ORDERED THIS 13th DAY OF Jane 2013 as determined by a vote of
5-0 on May 10, 2012.

LUIS R. BAZA
Chairman

PRISCILLA T. TUNCAP
Commissioner

LOURDES HONGYEE
Commissioner

EDITH C. PANGELINAN
Commissioner

MANUEL R. PINAUIN
Vice-Chairman

NOT PRESENT

JOHN SMITH-
Commissioner

NOT PRESENT

DANIEL D. LEON GUERRERO
Commissioner

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