



BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS



IN THE MATTER OF:

GABRIEL LAU,

Employees,

vs.

DEPARTMENT OF EDUCATION,

Management.

POST AUDIT APPEAL
15-PA05

JUDGMENT OF DISMISSAL

This matter came before the Commission on October 8, 2015, for the presentation of an initial assessment report. Based upon the facts presented, the Commission voted 6-0 not to authorize the staff to conduct further investigation.

I.

JURISDICTION

The Civil Service Commission ("CSC") has jurisdiction over matters pursuant to the Organic Act, 4 G.C.A. § 4401, *et. seq.*, and the Department of Education ("DOE")'s Personnel Rules & Regulations ("DOE PRR"). Specifically, Personnel Action Reviews a.k.a. "Post-Audits" are governed by 4 GCA § 4403(d).

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II.

RELEVANT FACTS

On September 11, 2015, Gabriel HT Lau (“Lau”) filed a Post-Audit complaint with the Commission. Lau complains that he applied for the position of math teacher at J.P. Torres Alternative School on August 5, 2015, but was unfairly denied hiring. Lau alleges that he previously worked for DOE, but employment had ceased. Lau later had brought a suit against DOE; it is unclear where this suit was brought, other than our records show it was not a CSC case. Lau alleges that the suit resulted in an August 30, 2013, settlement agreement between himself and Superintendent Jon Fernandez that Lau would be re-hired as a teacher by DOE. Lau further claims retaliation for the suit is preventing his re-hiring.

III.

ANALYSIS

A. Limits on the Commission’s Jurisdiction.

As we have noted in prior decisions, the CSC currently has much more limited jurisdiction than it did prior to 2006. *See, e.g., 44 Signatories, et. al., vs DOE*, 14-GRE-04, (Feb. 24, 2015). Prior to the passage of Public Law No. 28-68, the CSC had plenary jurisdiction over matters such as classification and compensation. Passed on September 30, 2005, P.L. No. 28-68 stripped the CSC of this jurisdiction and transferred overwhelmingly such power to the Department of Administration. Public Law No. 30-112, passed March 12, 2010, returned some critical aspects of authority to the CSC, but our jurisdiction today remains far less than it was prior to P.L. No. 28-68. “Thus, the present-day jurisdictional authority of the Commission to act on government employment matters is greater than it was between 2005- 2010, but still lesser than it was prior to P.L. 28-68.” *44 Singnatories, supra*, 14-GRE-02 at 2.

Had Mr. Lau brought his action before us prior to Public Law No. 28-68, perhaps we

1 would have had authority to investigate this matter. Yet, under the current statutory regime, we
2 doubt such authority exists. This is particularly true where, as here, we lack express authority to
3 do so.

4 B. The Commission's Powers Under 4 GCA § 4403(d).

5 The power afforded us by § 4403(d) is extremely narrow. One threshold requirement is
6 that there is a personnel action of an employee in the classified service. Examples of a personnel
7 action are actions such as recruitment or promotion. Then, upon investigation and determination
8 that a violation occurred in the granting of the personnel action, we have the option of declaring
9 that personnel action null and void:

10 (d) The Commission may investigate and set aside and declare null
11 and void any personnel action of an employee in the classified
12 service if the Commission finds after conducting the necessary
investigation that the personnel action was taken in violation of
personnel laws or rules....

13 We have in earlier decisions highlighted that our ability only to either null and void or do
14 nothing appears problematic. *See, e.g., 7 Port Employees v. Port Auth.*, 14-PA-02 (September
15 10, 2015). (“The Commission has a binary choice to completely null and void or do nothing
16 with no apparent authority to do anything in between. While case after case in post-audit presents
17 us with circumstances where it seems an alternate remedy would be more just and equitable, the
18 Legislature has limited us to an “all or nothing” decision.”) Yet, that is currently where our
19 authority lies in relation to 4 GCA § 4403(d).

20 In the present case, Lau is not asking us to null and void a particular personnel action. He
21 is certainly not asking us to null and void his personnel action, since he has not received one. If
22 Lau was in competition applying for a position or promotion and believed there were
23 irregularities, he could request that we null and void the personnel action that gave the position
24 to another individual or individuals. *See, e.g., Aguon v. Dept. of Corrections*, 15-PA-01 (July

1 30, 2015). For § 4403(d) to apply there must be an actual personnel action to null and void,
2 otherwise, there is nothing to investigate. By Lau's own account, he was not competing for an
3 open position, but was applying for employment based upon a settlement agreement and
4 recommendation letter. Even if he could point to another math teacher at J.P. Torres whose
5 position he would like, unless there was an irregularity in the hiring or promotion of that
6 individual, then § 4403(d) is not appropriate. Regardless, no such individual was identified in
7 Lau's complaint. Therefore, § 4403(d) does not appear to apply to Lau's case.

8 C. Enforcement of the Alleged August 30, 2013 Settlement.

9 We do not know whether an August 30, 2013, settlement agreement ("Settlement")
10 between Lau and Superintendent Fernandez exists. Regardless of whether it does or does not,
11 our decision would likely be the same.

12 4 GCA § 4408 states:

13 The Civil Service Commission may seek enforcement of its
14 decisions and orders in all decisions and orders in all matters
15 permitted by this Title by application to the Superior Court for the
16 appropriate remedy. In seeking enforcement of its decisions and
17 orders, the application for enforcement shall be entitled, "The Civil
18 Service Commission v. (department, agency, instrumentality or
19 officer)." No enforcement shall be commenced against any
20 department head or other employee or officer of the Government in
21 his personal capacity.

18 As is apparent from the clear language of § 4408, the CSC does not possess the power even to
19 enforce our own decisions and orders. For enforcement, we ourselves need to turn to the
20 Superior Court.

21 Assuming the Settlement exists and is valid, we do not know which jurisdiction (Guam,
22 federal, or other) the suit was filed in that resulted in this Settlement. Many jurisdictions have a
23 vehicle such as a Motion to Enforce Settlement that could be brought in the original court.
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1 Alternatively, courts often treat settlement agreements as contracts, and perhaps a civil
2 action would lie for breach of contract elsewhere. This is speculation on our part. What is
3 certain, however, is that we are not the appropriate venue and post-audits are not the appropriate
4 vehicle for Lau's attempt to enforce the alleged Settlement.

5 **IV.**

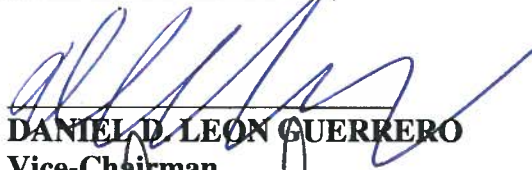
6 **CONCLUSION**

7 For the foregoing reasons, the Commission votes 6-0 to not authorize the staff to conduct
8 further investigation.

9 It is so ordered this 10th day of December, 2015.

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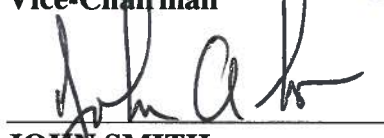
12 **LUIS R. BAZA**
Chairman

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12 **DANIEL D. LEON GUERRERO**
Vice-Chairman

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15 **PRISCILLA T. TUNCAP**
Commissioner

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15 **JOHN SMITH**
Commissioner

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18 **LOURDES HONGYEE**
Commissioner

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18 **EDITH C. PANGELINAN**
Commissioner

19 Not present

20 **CATHERINE GAYLE**
Commissioner