



BEFORE THE
GUAM CIVIL SERVICE COMMISSION



IN THE MATTER OF:

JOHN POTTER,

Employee,

vs.

GUAM HOUSING CORPORATION,

Management.

ADVERSE ACTION APPEAL
CASE NO. 13-AA10T

DECISION AND JUDGMENT

This matter came before the Civil Service Commission (the "Commission") on Employee's Motion to Revoke for Procedural Defect at its regularly scheduled meeting on May 28, 2013. Present for Guam Housing Corporation Management ("Management") were Cesar Villanueva and Management's counsel, Minakshi Hemlani, Esq. of Fisher & Associates. Also present were Employee John E Potter ("Employee") and his counsel, Daniel S. Somerfleck, Esq. of Somerfleck & Associates, PLLC.

I. FACTUAL BACKGROUND

Employee John E. Potter began working at the Guam Housing Corporation in April of 1994 as a Senior Tenant Relations Advisor. On January 24, 2013, Employee received Notice of Proposed Adverse Action for violation of the Guam Housing Corporation Personnel Rules and Regulations. Specifically, the Notice of Proposed Adverse Action alleged Employee had engaged in "[d]iscourteous treatment to the public or other employees" and "[a]cts of prohibited discrimination to include sexual harassment." Additionally, the Notice of Proposed Adverse

ORIGINAL

1 Action cited a violation of “[o]ther misconduct not specifically listed.” (See Notice of Proposed
2 Adverse Action (“NPAA”) dated January 24, 2013.) On February 1, 2013, Employee met with
3 Management to respond to the allegations contained in the NPAA.

4 On February 18, 2013, Employee received the Notice of Final Adverse Action, dated
5 February 5, which dismissed Employee from his classified position as a Senior Tenant Relations
6 Advisor with the Guam Housing Corporation effective February 6, 2013. The Notice of Final
7 Adverse Action set forth that Employee’s termination was for the same reasons articulated in the
8 Notice of Proposed Adverse Action.

9 **II. DISCUSSION**

10 Four G.C.A. §4406 imposes a clear and unequivocal duty upon management not only to
11 provide notice of the charges levied against an employee but also to provide, “a specific
12 statement of the charges upon which the action is based in the manner required by Article 2 of
13 this Chapter.”¹ At the hearing and in moving papers, Employee asserted that neither the NPAA
14 nor the Notice of Final Adverse Action provide with sufficient specificity the factual allegations
15 that served as the basis for the issuance of an adverse action.² Management countered that it had
16 satisfied the specificity requirements when it included this single line: “This tenant has reported
17 to me that, on or about September 2010, while meeting at our office to discuss rental issues, you
18 hugged her and touched her inappropriately.” (See NPAA dated January 24, 2013.)

19 Guam Housing Corporation’s Personnel Rules and Regulations (“PR&R”) further
20 provide in Section 11.306 that an employee is entitled to written notice “stating any and all
21 reasons specifically and in detail for the proposed notice of adverse action.” The PR&R also
22 provide, pursuant to Section 11.311, with regard to final adverse action “that the notice shall be
23 in writing; be dated; state the specific facts found upon which such action is based.”

24 ¹ “No person in the classified service shall be removed except for such cause as will promote the efficiency of the
25 service and for the reasons given in writing. The person whose removal is sought shall have notice of the same and
of any charges preferred against him, and be furnished a copy thereof...and also be allowed a reasonable time for
personally answering the same in writing with affidavits in support thereof...” 4 G.C.A. §4201.

² Employee additionally argued that he had not received due process as required under the United States
Constitution.

1 Management was fully aware of its obligations under the PR&R; indeed, the two notices
2 provided by Management to Employee specifically reference sections 11.306 and 11.311.

3 Provision of a the generic explanation of the nature of charges against an employee who
4 is faced with an adverse employment action is not sufficient to provide him or her with the
5 ability to defend against the same, thus denying due process rights. *See Mackin v. Civil Service*
6 *Commission*, 155 W.Va. 139, 181 S.E.2d 684; *Rapaport v. Civil Service Commission of State of*
7 *California et al.*, 134 Cal.App. 319, 25 P.2d 265; and *People Ex Rel. Miller v. Elmendorf*, 42
8 A.D. 306, 59 N.Y.S. 115.

9 Even if this Commission were to accept Management's contention that the NPAA
10 contained sufficient specificity to allow Employee to meaningfully respond to the charges, the
11 Final Notice of Adverse Action issued to Employee similarly lacked the requisite specificity.
12 Guam Housing Corporation's PR&R Section 11.311 provides:

13 An employee is entitled to written notice of the department's
14 decision within 10 days after receipt of the employee's answer to
15 the charge(s). The decision shall be made by the
16 department/agency head and shall be delivered to the employee at,
17 or before the time of action will be made effective. The notice
18 shall be in writing, be dated, state the specific facts found upon
19 which such action is based.

20 Since the Final Notice of Adverse Action contained essentially the same statement of with regard
21 to the factual assertions underlying the basis for the adverse action, there can be no finding that
22 the Final Notice of Adverse Action satisfied the specificity requirements where the NPAA did
23 not. They were essentially the same.

24 Because the Notice of Final Adverse Action fails to provide the Employee notice of the
25 factual basis for the Final Adverse Action the Commission is without jurisdiction and the adverse
action must be voided.

JUDGMENT

WHEREFORE based upon a unanimous decision of 5-0 in favor of Employee's Motion, the Commission enters the following Judgment:

a) That the Employee shall be immediately reinstated to his position as a Senior Tenant Relations Advisor with the Guam Housing Corporation;

b) Employee shall receive back pay for all wages withheld from Employee during the period from termination on February 06, 2013 until he is reinstated;

c) Employee shall be credited with all sick leave and annual leave that he would have accrued during the period from termination on February 06, 2013 until he is reinstated.

d) Management shall deduct Employee's retirement contribution from his back pay and then pay both Employee's and Management's contributions to the Government of Guam Retirement Fund during the period from termination on February 06, 2013 until he is reinstated.

e) Employee shall recover his reasonable attorney's fees and costs pursuant to 4 G.C.A. § 4406.1.


So ordered this 30th day of July, 2013 as determined by votes taken on May 28, 2013.



LUIS R. BAZA
Chairman



MANUEL R. PINAUN
Vice-Chairman



PRISCILLA T. TUNCAP
Commissioner




JOHN SMITH
Commissioner



LOURDES HONGYEE
Commissioner



DANIEL D. LEON GUERRERO
Commissioner



EDITH C. PANGELINAN
Commissioner