



BEFORE THE
 GUAM CIVIL SERVICE COMMISSION
 BOARD OF COMMISSIONERS



ADVERSE ACTION APPEAL
 CASE NO.: 19-AA03T

IN THE MATTER OF:
 KAREN MADLUTK,
 Employee,
 vs.
 DEPARTMENT OF PUBLIC WORKS,
 Management.

**DECISION AND ORDER
 ASSIGNING ADMINISTRATIVE
 LAW JUDGE TO HEAR THE
 MERITS OF THIS ACTION AND
 ORDER VACATING ALL
 CURRENTLY ASSIGNED
 MERIT HEARING DATES**

This matter came before the Civil Service Commission (Commission) on January 21, 2020, June 18, 2020, July 7, 2020, and July 8, 2020, regarding the Administrative Law Judge’s recommendations dated December 31, 2019, and February 6, 2020.

Present at the hearings for Management was Assistant Attorney General Donna Lawrence and Director Vincent Arriola of the Department of Public Works (DPW). Employee was present and was represented by Guam Federation of Teachers (GFT) representative, Daniel Del Priore.

1 Commissioners present at the hearings were Chairman Juan K. Calvo, Vice
2 Chairman John Smith, Commissioner Priscilla T. Tuncap, Commissioner Emilia F. Rice
3 and Commissioner Anthony Benavente.

4 *Jurisdiction*

5 CSC has jurisdiction to hear adverse action appeals filed by classified employees
6 under 4 GCA § 4403(b) involving suspensions, demotions and terminations of classified
7 employees.

8 *Background/History*

9 On January 21, 2020, Administrative Law Judge (ALJ) Eric D. Miller read his
10 December 31, 2019 recommendation into the record, and was available to answer
11 questions by the Commissioners. This report consisted of fourteen (14) recommendations.

12 After concerns expressed at the hearing, ALJ Miller was ordered to submit an
13 additional report based on the parties' motions that were not addressed in his report.

14 On June 18, 2020, ALJ Miller read his supplemental report dated February 6,
15 2020, into the record and was available to answer questions from the Commissioners. This
16 report consisted of five (5) recommendations.

17 On June 18, 2020, the Commissioners adopted all five (5) recommendations in the
18 ALJ supplemental report dated February 6, 2020, and continued the hearing to July 7,
19 2020, at 5:45 pm.

20 At the hearing on July 7, 2020, Management orally raised the issue of vacating the
21 scheduled merit hearing dates of July 9, 2020 and July 14, 2020, due to stated health and
22

1 safety concerns regarding potential witnesses. On July 7, 2020, the Commission
2 continued the motion hearing to July 8, 2020.

3 Management filed and served its motions on July 8, 2020, with the Commission
4 and GFT regarding its request to vacate the merit hearings for health and safety reasons in
5 addition to its renewed motion request to have all of its exhibits admitted at a further
6 motion or merit hearing and prior to the taking of any witness testimony.

7 *Ruling by Commissioners*

8 On July 8, 2020, by a vote of 5 to 0, the Commission accepted each of the ALJ's
9 nineteen (19) recommendations in his two reports dated December 31, 2019 (14
10 recommendations), and supplemental report dated February 6, 2020 (5 recommendations).
11 These reports are attached hereto and incorporated by reference as if set forth in full
12 herein.

13 By this Order, Civil Service Commission staff is ordered to remove the
14 confidential Lynda Aguon complaint from all motion filings by GFT in this case including
15 but not limited to, Employee's exhibit list.

16 GFT is also hereby admonished for filing a confidential document as stated in the
17 attached recommendation on which this Order is based.

18 Management's request for a protective order is issued preventing any direct contact
19 by GFT with DPW's Director as set forth more fully in the attached report.

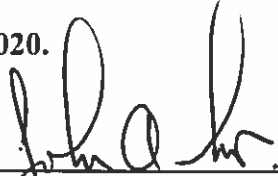
20 By a vote of 5 to 0, the Commission voted to have its Administrative Counsel, Eric
21 D. Miller, be the Administrative Law Judge to hear all further motions in this case and to
22

1 hear the merits of this case pursuant to CSC Adverse Action Rules 14 et. seq. (March 1,
2 2020) and 4 GCA, § 4405(c)(1)(A)-(C).

3 The Commission hereby vacates the merit hearings scheduled on July 9, 2020, and
4 July 14, 2020. A status conference will be set before the ALJ to hear and schedule any
5 further motions and for the ALJ to hear the merits of this case pending final review and
6 decision by the Commissioners as to the ALJ's findings and conclusions.

7 **SO ORDERED THIS 30th day of July, 2020.**

8 
9 **JUAN K. CALVO**
Chairman


10 **JOHN SMITH**
Vice-Chairman

11 
12 **PRISCILLA T. TUNCAP**
Commissioner


13 **EMILIA F. RICE**
Commissioner

14 
15 **ANTHONY P. BENAVENTE**
Commissioner



LOURDES A. LEON GUERRERO
Governor
JOSHUA F. TENORIO
Lieutenant Governor

CIVIL SERVICE COMMISSION
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DANIEL D. LEON GUERRERO
Executive Director

C.S.C. No.: 2019-056

December 31, 2019

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Re: Karen Madlutk vs. Department of Public Works
Civil Service Commission Case No.: 19-AA03T

Please find attached the Recommendations After Hearing on the Motions from Administrative Law Judge, Eric D. Miller, regarding the above matter. Upon service of the findings, the parties shall have ten (10) days to file a written objection with the Civil Service Commission. The Continued Hearing on the Merits is scheduled before the Civil Service Commission Board on Tuesday, January 14, 2020 at 5:45 p.m., at which time you will have the opportunity to be heard on the Recommendation. An official notice from the Commission will be issued for the Continued Hearing on the Merits.

Senseramente,


Eric D. Miller
Administrative Law Judge
Civil Service Commission

Attachment
Daniel D. Leon Guerrero, Executive Director
Civil Service Commission



**BEFORE THE
GUAM CIVIL SERVICE COMMISSION
ADMINISTRATIVE LAW JUDGE**



IN THE MATTER OF:

KAREN MADLUTK,

Employee,

vs.

DEPARTMENT OF PUBLIC WORKS,

Management.

**ADVERSE ACTION APPEAL
CASE NO.: 19-AA03T**

**RECOMMENDATIONS AFTER
HEARING ON THE MOTIONS**

This matter comes before the undersigned sitting as a duly-appointed Administrative Law Judge (ALJ) pursuant to 4 GCA §4405(c), and Rule 14 Civil Service Commission (hereinafter "Commission") Rules of Procedure for Adverse Action Appeals.

BACKGROUND

Employee, Karen Madlutk (hereinafter "Employee") was at all relevant times employed by Department of Public Works (hereinafter "DPW"). Employee was a school bus driver. August 2, 2019, Employee was served with a Final Notice of Adverse Action (FNAA) alleging that on May 21, 2019, Employee knowingly dropped two elementary students at the wrong bus stop. On December 17, 2019, the undersigned heard numerous motions of the parties. Present for the hearing were Employee, appearing with lay representative, Daniel Del Priore. Also present were Department of Public Works Director, Vincent Arriola, appearing with his counsel, Donna Lawrence, Assistant Attorney General.

1 **RECOMMENDATIONS**

2 1. Employee moves to disqualify Assistant Attorney General Donna Lawrence
3 (hereinafter "Lawrence") from representing DPW because Lawrence conducted the investigation
4 and is now a witness so she cannot also be the attorney for DPW. Employee sites Guam Rules
5 of Professional Conduct 3.7. which provides, "A lawyer shall not act as advocate at a trial in
6 which the lawyer is likely to be a necessary witness."

7 In this case Lawrence is not a witness to the conduct which is the basis for the FNAA, but
8 did question the Employee. All of the investigation interviews were recorded. Lawrence is not
9 likely to be a necessary witness. If the Commission allows Employee to call Lawrence as a
10 witness, the Commission should disqualify her from representing DPW. At this point it appears
11 unlikely that Lawrence has any relevant testimony as to the merits of the case.

12 **MOTION DENIED UNTIL SUCH TIME AS THE COMMISSION ALLOWS**
13 **ATTORNEY LAWRENCE TO BE CALLED AS A WITNESS**

14 2. Employee moves to dismiss because she was not given the right to have a Guam
15 Federation Teacher (hereinafter "GFT") representative present during her
16 interview/investigation.

17 Employee sites *NLRB vs. J. Weingarten*, 420 U.S. 251 (1975). In that case the
18 Supreme Court found that refusing an employee the right to have a representative present during
19 an investigation was an unfair labor practice in violation of the National Labor Relations Act
20 (hereinafter "NLRA"). The problem is that the NLRA does not cover state and local government
21 employees. Moreover, even if NLRA covered this employee, its violation would not necessarily
22 void the adverse action.

23 //

24 //

1 Employee sites *Garrity vs. New Jersey*, 385 US 493 (1967). In that case the Supreme
2 Court ruled that statements made by a government employee during an interrogation where the
3 employee could be terminated for refusal to testify was an involuntary statement and not
4 admissible in a subsequent criminal trial. Nothing in *Garrity* suggests that the employee could
5 not be terminated for his statements. Employee's statements here may not be admissible in a
6 subsequent criminal trial, but that is not the issue here.

7 Employee sites no statute, rule, or case law that the denial of representation to an
8 employee at an internal investigation is grounds for voiding the adverse action. **MOTION**
9 **DENIED.**

10 3. Employee moves to dismiss on the grounds that Employee was not advised of the
11 charges against her citing Department of Administration Rules 11.306 and 11.307, which deal
12 with the Notice of Proposed Adverse Action and Employee's answer respectively. Employee
13 also complains she did not receive videos as requested before the interview. The investigation
14 is what takes place before the NPPA and therefore Department of Administration Rules 11.306
15 and 11.307 have no applicability as to how the investigation is conducted. Employee cites no
16 authority for the right to be advised of charges during the investigation, nor to receive discovery
17 before being investigated. **MOTION DENIED.**

18 4. Management seeks Protective Order against GFT contact with DPW Management.
19 Once Employee's Representative is advised that Management's counsel is represented by
20 counsel, Employee Representative should only be contacting the Director through counsel. The
21 Assistant Attorney General in this case only represents the Agency in this matter not the
22 individual employees of the Agency. The Agency Director serves as the head of the agency and
23 therefore should not be contacted directly by Employee representatives. However, all the other
24

1 employees of the Agency are not represented by counsel, and therefore may be contacted directly
2 by the Employee Representative. **MOTION GRANTED AS TO AGENCY DIRECTOR.**

3 5. Management moves for a declaratory ruling under 5 GCA §9308 as to the validity of
4 CSC rules not promulgated by Article 3 of the Administrative Adjudication Act. The issue of a
5 declaratory ruling under §9308 is not mandatory and in this case not necessary to decide the
6 issues of this case. The undersigned declines to issue a ruling. **MOTION DENIED.**

7 6. Management moves to have the right to call Employee as its first witness. The CSC
8 has taken the position that the Employee shall be the last witness. This issue is pending in the
9 Supreme Court of Guam. Pending the ruling of the Courts the CSC will continue to require that
10 Employee be called last. **MOTION DENIED.**

11 7. Management moves to have no time limitations on testimony. The CSC reserves the
12 right to control its docket, and prevent repetitive, and irrelevant testimony. **MOTION**
13 **DENIED.**

14 8. Management requests that Case Management Statement, Paragraph 10, be
15 invalidated. Although the Case Management Statement is not required by the Administrative
16 Adjudication Law promulgated rule, it is an allowable procedure within the CSC's powers to
17 conduct an efficient process for handling appeals. **MOTION DENIED.**

18 9. Management moves to request a ruling that Articles 1 and 2 of the Administrative
19 Adjudication Law do not apply to CSC hearings. This ruling is not required to resolve this appeal
20 and the undersigned will not make a ruling. **MOTION DENIED.**

21 10. Management moves that GFT be admonished, warned, or sanctioned for his improper
22 conduct. Having ruled in favor of Management as to Motion #4 regarding contact with the
23 Agency Director, the undersigned finds no further action is necessary. **MOTION DENIED.**

1 11. Management moves to strike, deny, and admonish GFT for filing of Second
2 Discovery Request. In the absence of a motion by Employee to compel discovery, the
3 undersigned will conclude that discovery is complete. **MOTION DENIED.**

4 12. Management moves for clarification as to filing of Discovery Requests with CSC.
5 The undersigned finds clarification is unnecessary. **MOTION DENIED.**

6 13. Management moves for an inquiry or order to Employee as to when and how
7 the May 16, 2019 complaint by Lynda Aguon was obtained etc. The requested inquiry or order
8 will not help resolve the merits of this appeal, and the undersigned will therefore not respond.
9 **MOTION DENIED.**

10 14. Management moves to strike exhibits which are letters of complaint against Attorney
11 Lawrence. The complaint from Lynda Aguon to the Attorney General is a confidential personnel
12 record and should be stricken. The complaint by Employee to the Attorney General is
13 confidential once filed with the Attorney General's office, and not to be revealed to the general
14 public. It does not need to be withheld, however, from its author who can publish it if she wishes
15 and has done so herein. **MOTION GRANTED IN PART AND DENIED IN PART.**

16 **CONCLUSION**

17 The undersigned recommends that the Commission grant or deny these motions as
18 indicated above. Respectfully submitted.

19 Dated this 30th day of December, 2019.

20 
21 ERIC D. MILLER
22 Administrative Law Judge
23 Civil Service Commission



LOURDES A. LEON GUERRERO
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Lieutenant Governor

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C.S.C. No.: 2020-012

February 6, 2020

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Re: [Karen Madlutk vs. Department of Public Works](#)
Civil Service Commission Case No.: 19-AA03T

Please find attached the Supplemental Recommendations After Hearing on the Motions from Administrative Law Judge, Eric D. Miller, regarding the above matter. Upon service of the findings, the parties shall have ten (10) days to file a written objection with the Civil Service Commission. The Continued Hearing on the Merits will be scheduled before the Commission, at which time you will have the opportunity to be heard on the Recommendation. An official notice from the Commission will be issued for the Continued Hearing on the Merits.

Senseramente,

Eric D. Miller
Administrative Law Judge
Civil Service Commission

Cc: Daniel D. Leon Guerrero, Executive Director
Civil Service Commission



**BEFORE THE
GUAM CIVIL SERVICE COMMISSION
ADMINISTRATIVE LAW JUDGE**



IN THE MATTER OF:

KAREN MADLUTK,

Employee,

vs.

DEPARTMENT OF PUBLIC WORKS,

Management.

**ADVERSE ACTION APPEAL
CASE NO.: 19-AA03T**

**SUPPLEMENTAL
RECOMMENDATIONS AFTER
HEARING ON THE MOTIONS**

Both parties in this matter pointed out that the undersigned neglected to address some of the motions made in the first Recommendations filed December 30, 2019. The undersigned addresses the balance of the motions below.

1. Employee moved to dismiss the Adverse Action because the Final Notice of Adverse Action was lacking the specificity required of 4 GCA §4406(a) which requires that an Employee who is dismissed, " shall be given immediate notice of the action together with a specific statement of the charges upon which such action is based..."(emphasis added)

The Notice of Adverse Action shall state the specific facts found upon which such action is based. Department of Administration Personnel Rules and Regulations 11.311. *Guam Housing Corporation v. John E. Potter*, 2015 Guam 22.

1 Due process requires that an employee have fair and reasonable notice of what conduct may
2 subject him or her to an adverse action. *Perez v. Guam Department of Education*, 2018 Guam 25.

3 Page 6 of the FNNA states:

4 “Before you told the two female students to get off the bus at the Bamba bus stop on
5 May 21, 2019, you were aware that the children were either on the wrong bus or had missed their
6 bus stop. After speaking with the two students briefly, you asked the two females why they rode
7 the wrong bus. You then informed the two female students to just get down and walk...”

8 This quote from the FNAA identifies with clear specificity the conduct for which Employee
9 was being terminated. **MOTION DENIED.**

10 2. Management moved to have all of its exhibits admitted into evidence.

11 Employee had filed an objection to Management’s exhibits. CSC AAR#10.3 OBJECTION
12 TO INCLUSION OF DOCUMENTS states:

13 “The opposing party may object to the inclusion of a document for a hearing on the
14 merits...” “The objected document will be excluded from the packet and its submission will be
15 decided during the hearing on the merits...”

16 This rule is clear and controlling; therefore, the documents in question will be excluded
17 from the packet and its submission will be decided at the hearing on the merits. **MOTION**
18 **DENIED.**

19 3. Management moved to deny the issuance of a subpoena to Assistant Attorney General
20 (AAG) Lawrence, and to strike AAG Lawrence from the witness list. In this case, AAG Lawrence
21 is not a witness to the conduct which is the basis for the FNAA, but did question the Employee. All
22 of the investigation interviews were recorded. AAG Lawrence is not a necessary witness.
23 **MOTION GRANTED.**

