IN THE MATTER OF:

LINDA PALACIOS,

Employee,

vs.

DEPARTMENT OF REVENUE & TAXATION,

Management.

ADVERSE ACTION APPEAL
CASE NO.: 15-AA21T

DECISION AND
JUDGMENT

Appeal on this matter came before the Civil Service Commission for a Hearing on the Merits on Employee's Adverse Action at its regularly scheduled meetings on March 14, 16, 21, 23, and April 4, 2017 at its office. Present was the Employee and her counsel of record, Daniel S. Somerfleck, Esq. of Somerfleck & Associates, PLLC. Present for Management was Director John P. Camacho, Deputy Director Marie Benito of the Department of Revenue & Taxation, and their legal counsel, Assistant Attorneys General Shannon Taitano, and Debra Lefing of the Office of the Attorney General.

I.

JURISDICTION

The jurisdiction of the Civil Service Commission is based upon the Organic Act of Guam, 4 G.C.A., §§ 4401 et seq., and the relevant Personnel Rules and Regulations.

DECISION AND JUDGMENT

Linda Palacios vs. Department of Revenue and Taxation
Adverse Action Appeal Case No.: 15-AA21T

Page 1 of 7
II.

**HOLDING**

By a vote 4-2 in favor of Employee, Management did not prove its burden of proof that the termination of the Employee was proper. Since Management must have four affirmative votes, the Adverse Action fails.

III.

**FACTS**

1) On the morning of September 8, 2015, Driver's License Supervisor Jesse Salas received what was initially alleged to be an anonymous telephone call regarding potential improprieties regarding the processing and issuing of the Guam Driver's License to Justin Robert W. Cruz.

2) Upon investigation, Management alleged that Employee's user-ID was the last transaction entered into the Guam Driver's License System on July 14, 2015. The data entered purportedly reflected Michigan as a previous licensing jurisdiction with a motorcycle endorsement. It was also determined that the original application and supporting documents including the Michigan Driver's License were missing in the batch processed on July 14, 2015. It was further determined from the Michigan Secretary of State that they have no matching data on file for Justin Robert W. Cruz, and the license presented at the time of application is more than likely fraudulent.

3) On Friday, October 9, 2015, Employee met with Driver's License Supervisor Jesse Salas, and Administrator Marie Flores. At that meeting even upon presentation of Mr. Justin Robert W. Cruz's photo, Employee could not recall helping him. During that same meeting, Employee was asked whether there may be other transactions that are questionable and
Employee allegedly admitted to processing out-of-state applicants, and not securing their out-of-state drivers’ licenses to the application. Employee reportedly explained that there are some customers that beg to keep their licenses.

4) On October 12, 2015, Management issued a Notice of Proposed Adverse Action and on October 23, 2015, Management issued its Notice of Final Adverse Action terminating the Employee from her position at the Department of Revenue & Taxation.

5) Prior to the commencement of the Merit Hearing, the parties filed Witness Lists and Exhibit Lists. Employee’s counsel filed written objection to the inclusion of what he opined to be irrelevant documentary evidence included in Management’s Exhibit List.

6) Witnesses called by Management included Maria Flores, Administrator of the Motor Vehicle Branch of the Department of Revenue & Taxation, Jesse Salas, Supervisor Driver’s License Branch Department of Revenue & Taxation, and Leonard Aguon formerly of the Guam Police Department, and currently a Deputy Marshal for the Superior Court of Guam.

7) Based upon the testimony of Ms. Flores and Mr. Salas the following additional facts were presented:

a. That the Employee began working for the Department of Revenue & Taxation over eight (8) years prior to this adverse action and had no prior disciplinary actions

b. That Management had not received an anonymous telephone call as alleged in the Notice of Proposed Adverse Action, and the Notice of Final Adverse Action, but instead had received a telephone call from within the Department of Revenue & Taxation from Jerome Aguon of the Criminal Investigation Branch of the Department of Revenue & Taxation.

c. That the Department of Revenue & Taxation does not have a process to review applications for out-of-state licenses because of staff shortages.
d. That Management's Exhibit M-2 which purported to be driver's license transactions processed by Employee's access number DRV 78 does not support Management's contention that the Employee processed Mr. Justin Cruz's driver's license, nor Management's contention that only the Employee had access, via access number DRV 78, as at least one (1) transaction occurred after Employee was terminated.

e. That Management had in place, contrary to Department of Administration Personnel Policies and Procedures requiring progressive discipline, a zero tolerance policy regarding Employee's infractions.

8) The Commission upon determining that Leonard Aguon had no relevant testimony, as he had not had contact with the Employee until after the Notice of Proposed Adverse Action had been issued, and his first contact with the Employee was on the day the Final Notice of Adverse Action was issued, did not receive his testimony.

IV.

DISCUSSION

There are two components to the adverse action. The first is that Employee issued a license to Justin Cruz improperly on July 14, 2015. Specifically, that Mr. Cruz did not possess a valid out-of-state license, but purportedly secured a Guam license from Employee regardless on the basis of possessing one. The second allegation is that Employee had, on occasion, permitted out-of-state applicants to retain their licenses while they waited to receive their Guam license. The dates which Employee is supposed to have done this are unknown.

This case raises potential issues with the "60 day rule" from 4 GCA § 4406:

In no event may an employee in the classified service be given notice and statement of the charges required by this Section after the sixtieth (60th) day after management knew or should have known the facts or events which form the alleged basis for such
action. Any action brought by management in violation of this
Section is barred and any decision based upon such action is void.

(emphasis added). It should be noted that it appears that Management has virtually no
mechanism in place to check on the work of those who issue drivers licenses. While
Management is entitled to place some trust in their Employees, it would seem that there should
be some system in place when dealing with a matter as important as state-issued IDs. If there is
no way to automate the process of oversight, something like quarterly random spot-checks would
seem at least a minimal step.

This is applicable to the allegation that Employee, at some points during her eight (8)
year career, may have allowed out-of-state applicants to retain their licenses. There’s no
evidence of when that may have occurred. If they happened five (5) years ago, for example, it
would be a violation of the sixty (60) day rule to discipline Employee for them now, as
Management should have known of them sooner. There’s no evidence Employee took active
steps at concealment which would prolong the sixty (60) days; in fact, Management alleges that
when asked about it she freely admitted it. Even if it were established that Employee had
allowed an out-of-state applicant to retain her license in the sixty (60) days prior, it is
questionable whether immediate termination was the appropriate discipline.

As to the matter of the license for Mr. Cruz, there is a question as to when Management
became aware of the Employee’s alleged actions. The subterfuge of reporting an anonymous
call that was actually from someone known within the Department raises that question.
Management did not establish the date that they actually knew of the allegation.

A more important problem with Management’s case revolves around Exhibit M-2,
introduced by Management as evidence showing transactions using the Employee’s user-ID in

DECISION AND JUDGMENT

Linda Palacios vs. Department of Revenue and Taxation
Adverse Action Appeal Case No.: 15-AA21T
the system. First, Exhibit M-2 does not actually show a Michigan license transaction occurring on July 14, 2015. This omission raises extreme doubt about the Employee’s culpability, since Management introduced into evidence a document that shows that the transaction alleged did not occur. Second, Exhibit M-2 shows at least one (1) transaction occurring after the date that Employee was terminated. If the user-ID in question was exclusively used by Employee and not reused, this would be impossible. At the very least, someone else in the Department must have used Employee’s user-ID on at least one (1) occasion. Since the alleged use of the user-ID by Employee was the basis of Management’s case against Employee, these two facts cast overwhelming doubt on the Employee’s culpability for the issuance of the license to Mr. Cruz.

Therefore, Management failed to meet its burden of proof. The adverse action appeal of the Employee is granted.

V.

JUDGMENT

It is the judgment of the Civil Service Commission as follows:

1) That adverse action against Employee is hereby void, and she shall be returned to the position she held prior to the termination.

2) All documents related to, or reflecting the adverse action shall be expunged from Employee’s personnel file.

3) Employee shall receive back pay for all wages withheld from Employee during the period of termination.

4) Employee shall be credited with all sick leave, and annual leave that she would have accrued during the period of termination.

5) Management shall deduct Employee’s retirement contribution from her back pay,

DECISION AND JUDGMENT

Linda Palacios vs. Department of Revenue and Taxation
Adverse Action Appeal Case No.: 15-AA21T
and then pay both Employee’s and Management’s contributions to the Government of Guam Retirement Fund.

6) That Management shall contribute Management’s contribution to the Government of Guam Retirement Fund equal to that which would have been paid since Employee’s termination.

7) Attorney Daniel S. Somerfleck shall be paid reasonable attorney’s fees and costs by Management directly to the office of Somerfleck & Associates, PLLC.

SO ADJUDGED THIS 45th day of MAY 2017.

EDITH PANGELINAN
Chairperson

LOURDES HONGYEE
Vice-Chairperson

PRISCILLA T. TUNCA P
Commissioner

JOHN SMITH
Commissioner

CATHERINE GAYLE
Commissioner

MICHAEL G. TOPASNA
Commissioner

DECISION AND JUDGMENT
Linda Palacios vs. Department of Revenue and Taxation
Adverse Action Appeal Case No.: 15-AA21T

Page 7 of 7