BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS

IN THE MATTER OF:
WILLIAM BISCHOFF,
Employee,

VS.
ATTORNEY GENERAL'S OFFICE,
Management.

ADVERSE ACTION APPEAL
CASE NO. 14-AA03T

DECISION AND JUDGMENT

This case came before the Civil Service Commission at its regularly scheduled meeting on April 29, 2014, at 5:45 p.m., at its office located at Suite 6A, Phase II, Sinajana Complex, 777 Route 4, Sinajana, GU 96910.

William Bischoff ("Employee") was present and represented himself at the motion hearing. Present for Management was Deputy Attorney General Philip Tydingco. Donna E. Lawrence, Esq., from the Attorney General’s Office, was present and represented Management.

I. ISSUE

a) Did Management meet its burden of proof under CSC AAR 9 regarding its Motion to Dismiss Employee’s Adverse Action Appeal for Lack of Subject Matter Jurisdiction filed on March 4, 2014?

b) Did Management meet its burden of proof under CSC AAR Rule 9 regarding its Request its Motion to Remove Confidential Attachments from the CSC’s file Without CSC Review filed on March 4, 2014?
c) Did Employee meet his burden of proof under CSC AAR Rule 9 regarding his Motion for Ruling on the Admissibility of the Sealed Exhibits filed on March 4, 2014?

II. HOLDING

After considering the pleadings and the arguments of counsel, the CSC finds that Management met its burden of proof regarding the above two (2) issues by a vote of 6-0, and denies Employee’s motion for a ruling on the admissibility of the sealed exhibits by a vote of 6-0.

CSC finds that Management met its burden of proof regarding its Motion to Dismiss Employee’s Adverse Action Appeal for Lack of Subject Matter Jurisdiction.

CSC grants Management’s Request to have documents filed by Employee under seal removed from the CSC’s file without CSC review. Employee’s attachments to his Notice of Appeal that were filed under seal are ordered to be returned to Employee forthwith. CSC has not reviewed these documents prior to this order at the request of the parties.

CSC was also informed that Employee previously represented at a status conference that he was willing to stipulate to the return of the sealed documents. Finally, CSC notes that Employee filed a request with CSC to seal the documents after receiving a Notice of Confidentiality filed by the Office of the Attorney General (MTD at M-32 through M-34).

CSC is not aware of any process or rule or authority for it to seal documents, but as of the motion hearing, the documents Employee filed under seal were not reviewed by CSC staff or the Commissioners.

III. FINDINGS

1) Employee resigned from his employment with an effective date of January 3, 2014 (MTD at M-2);

2) Employee notified Management of his intent to resign on November 9, 2013 (MTD at...
M-6 at M-25);

3) Management did not authorize Employee to extend his employment beyond January 3, 2014, the effective date of his resignation.

4) Employee appealed his resignation to the Civil Service Commission on January 21, 2014 (MTD at M-25 through M-26);

5) Employee resigned before he filed the adverse action appeal alleging constructive discharge. Employee resigned pursuant to Chapter 13, and the resignation was made effective on the date Employee chose to voluntarily resign, January 3, 2014 (MTD at M-8 through M-11). Management could have made the effective date of resignation earlier under Guam law but chose instead to apply Employee’s stated resignation date of January 3, 2014.

6) After Employee appealed his resignation effective January 3, 2014, Employee then retired from government service (MTD at M-20 through M-23) with an effective date of January 24, 2014. Employee noted on his retirement eligibility request to Management that he wanted his retirement effective January 3, 2014. Employee’s amended appeal documents attached to Management’s Motion to Dismiss even indicate his retirement should be treated as if he had retired January 3, 2014 (MTD at M-28 through M-31);

7) CSC finds that Employee resigned. CSC further finds that Employee was not served with an adverse action by Management. CSC further finds that Employee did not have a right to appeal to CSC on January 21, 2014. Employee was not employed by Management as of January 21, 2014, because he resigned effective January 3, 2014.

8) CSC finds that 4 GCA § 4406 and Chapter 11 of the Department of Administration’s Rules and Regulations (“DOA PR&R”) do not provide a basis for Employee to
appeal his resignation to the Civil Service Commission under 4 GCA § 4403.

9) CSC lacks subject matter jurisdiction to hear Employee’s adverse action appeal as the action is not an adverse action as defined under Chapter 11 of the DOA PR&R, and Employee had no right to appeal his resignation to the CSC under 4 GCA § 4403 or under Chapter 11 of the DOA PR&R. Employee was not suspended, demoted or terminated as indicated under §§ 11.302 and 11.305 of the DOA PR&R (MTD at M-12 through M-18).

10) The scope of the adverse action rules stated under 11.100 of the DOA PR&R does not include actions taken by the appointing authority or Director referenced in the Chapter on RESIGNATION AND TERMINATION (MTD at M-12).

IV. JURISDICTION

The jurisdiction of the Civil Service Commission is based upon the Organic Act of Guam, 4 G.C.A. Section § 4401 et. seq. and the personnel rules and regulations. As stated herein, CSC lacks subject matter jurisdiction regarding Employee’s resignation that was effective January 3, 2014 for the reasons set forth herein.

V. ANALYSIS

This case brings two novel issues before us to decide. First, can sealed or confidential documents be submitted to the Commission for review in deciding a case? Second, can the Commission recognize constructive dismissal or constructive discharge as a basis for bringing an adverse action?

We do not recall an earlier case where a party has attempted to submit documents for review under seal. It is possible that there may be a need for confidential or privileged documents to be reviewed in properly adjudicating a case, particularly one involving a legal or medical professional. Yet, we are concerned by the fact that there is no statutory basis for us to
accept such documents. Furthermore, the Commission is bound by the Open Government Law restrictions, and there is an apparent conflict between conforming to OGL requirements and consulting non-public documents in rendering a decision. Thus, until I Lihesluran Guahan or the courts recognize our authority to accept sealed documents we decline to do so.

Employee has argued that this is a case of constructive discharge, where he was effectively forced to resign, and thus should be permitted to invoke our adverse action process. (This case is similar to the case of Johnson v. DOE, 14-GRE-57, signed this same day; the salient difference being that Bischoff filed an adverse action after retiring, while Johnson filed a grievance while still employed and then retired). We note that constructive discharge is recognized in some other jurisdictions, including inter alia, states such as California, Maryland, and West Virginia; theMerit Systems Protection Board of the United States; federal Courts of Appeals circuits in relations to Title VII and Age Discrimination Act cases; and the Supreme Court of the United States in relation to National Labor Relations Act cases. Indeed, there is a reasonable argument that constructive discharge claims should be allowed under the adverse action procedures, as managers should not be allowed to circumvent the protections of a merit system by making a work environment so hostile that an employee is forced to resign. Yet, in the several decades this Commission has existed we have never recognized constructive discharge and a strict construction of 4 GCA § 4403(b) does not permit it. Again, until I Lihesluran Guahan or the courts recognize our authority to consider constructive discharge claims, we decline to do so.

We do not herein decide that Bischoff was not constructively discharged. The Commission did not proceed to a full hearing on the merits. Whether or not Bischoff would meet the requirements of constructive discharge if it were recognized is an issue we did not reach. Our ruling is simply that we do not recognize constructive discharge claims at this time.
VI. CONCLUSION

By a vote of 6-0, the Commission grants Management’s Motion to Dismiss Employee’s Adverse Action Appeal for Lack of Subject Matter Jurisdiction, grants Management’s Motion to Have Confidential Documents Returned Without CSC’s Review, and denies Employee’s Motion for a Ruling on the Admissibility of Sealed Exhibits.

SO ADJUDGED THIS 28th day of May 2015.

LUIS R. BAZA
Chairman

MANUEL R. PINAULIN
Vice-Chairman

PRISCILLA T. TUNCAP
Commissioner

JOHN SMITH
Commissioner

LOURDES HONGTEE
Commissioner

DANIEL D. LEON GUERRERO
Commissioner

EDITH C. PANGELINAN
Commissioner