



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?

1 c) Did Employee meet his burden of proof under CSC AAR Rule 9 regarding his Motion for
2 Ruling on the Admissibility of the Sealed Exhibits filed on March 4, 2014?

3 **II.**
4 **HOLDING**

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

8 0.
9 CSC finds that Management met its burden of proof regarding its Motion to Dismiss
10 Employee's Adverse Action Appeal for Lack of Subject Matter Jurisdiction.

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

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

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

22 **III.**
23 **FINDINGS**

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

2) Employee notified Management of his intent to resign on November 9, 2013 (MTD at

1 M-6 at M-25);

- 2 3) Management did not authorize Employee to extend his employment beyond January
3 3, 2014, the effective date of his resignation.
- 4 4) Employee appealed his resignation to the Civil Service Commission on January 21,
5 2014 (MTD at M-25 through M-26);
- 6 5) Employee resigned before he filed the adverse action appeal alleging constructive
7 discharge. Employee resigned pursuant to Chapter 13, and the resignation was made
8 effective on the date Employee chose to voluntarily resign, January 3, 2014 (MTD at
9 M-8 through M-11). Management could have made the effective date of resignation
10 earlier under Guam law but chose instead to apply Employee's stated resignation date
11 of January 3, 2014.
- 12 6) After Employee appealed his resignation effective January 3, 2014, Employee then
13 retired from government service (MTD at M-20 through M-23) with an effective date
14 of January 24, 2014. Employee noted on his retirement eligibility request to
15 Management that he wanted his retirement effective January 3, 2014. Employee's
16 amended appeal documents attached to Management's Motion to Dismiss even
17 indicate his retirement should be treated as if he had retired January 3, 2014 (MTD at
18 M-28 through M-31);
- 19 7) CSC finds that Employee resigned. CSC further finds that Employee was not served
20 with an adverse action by Management. CSC further finds that Employee did not
21 have a right to appeal to CSC on January 21, 2014. Employee was not employed by
22 Management as of January 21, 2014, because he resigned effective January 3, 2014.
- 23 8) CSC finds that 4 GCA § 4406 and Chapter 11 of the Department of Administration's
24 Rules and Regulations ("DOA PR&R") do not provide a basis for Employee to
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1 appeal his resignation to the Civil Service Commission under 4 GCA § 4403.

2 9) CSC lacks subject matter jurisdiction to hear Employee's adverse action appeal as the
3 action is not an adverse action as defined under Chapter 11 of the DOA PR&R, and
4 Employee had no right to appeal his resignation to the CSC under 4 GCA § 4403 or
5 under Chapter 11 of the DOA PR&R. Employee was not suspended, demoted or
6 terminated as indicated under §§ 11.302 and 11.305 of the DOA PR&R (MTD at M-
7 12 through M-18).

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

11 **IV.**
JURISDICTION

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

16 **V.**
ANALYSIS

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

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


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

21 We do not herein decide that Bischoff was *not* constructively discharged. The
22 Commission did not proceed to a full hearing on the merits. Whether or not Bischoff would
23 meet the requirements of constructive discharge if it were recognized is an issue we did not
24 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. PINAUN
Vice-Chairman




PRISCILLA T. TUNCAP
Commissioner



JOHN SMITH
Commissioner



LOURDES HONGYEE
Commissioner



DANIEL D. LEON GUERRERO
Commissioner



EDITH C. PANGELINAN
Commissioner