BEFORE THE GUAM CIVIL SERVICE COMMISSION

BOARD OF COMMISSIONERS

IN THE MATTER OF: **ROBERT E. KOSS,** **Employee,** **vs.** **DEPARTMENT OF EDUCATION,** **Management.**	**ADVERSE ACTION APPEAL** **CASE NO. 16-AA25T** **DECISION AND ORDER**

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I. INTRODUCTION

This matter came before the Board of Commissioners on November 3, 2016, for the hearing of several motions, including Employee's Motion to Void for Procedural Defect and Management's Motion to Dismiss. Present at the hearing were Employee and his counsel, Daniel Somerfleck, Esq., of Somerfleck & Associates, PLLC, and Mrs. Taling Taitano, Deputy Superintendent of Finance, and Legal Counsel Jesse N. Nassis, Esq., for GDOE.

The Commission gave careful consideration of the written motions and oppositions filed on the motions. Pursuant to Rules for Adverse Action Appeals Rule 9.1, the Commission deliberated without hearing oral arguments on the motions. The Commission voted 5-1 to deny Employee's Motion to Void for Procedural Defect and 6-0 to deny Management's Motion to Dismiss.

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II.
JURISDICTION

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

III.
ANALYSIS

Recently, the Commission has been receiving more motions such as motions to dismiss, motions to void the adverse action, and the like, that are akin to motions for summary judgment ("MSJ") in the courts.

When motions to dismiss or a motion to void involves simple, undisputed facts that are easily resolved by motion, the Commission is amenable. Motions such as those involving the "60 day rule," the "10 day rule," or the "20 day rule," are often readily ascertainable from documents. In such instances, the Commission sees the benefit of efficiently resolving the case by a motion without the time and expense of a full hearing on the merits. Yet, it should be noted that sometimes the circumstances of a given case make even the "60 day rule" a complicated issue that requires the testimony of witnesses. In cases of such complexity, we generally deny the motion, but defer ruling on the matter raised by the motion until after the hearing on the merits, to give the parties a chance to present witnesses and make their arguments in full.

We see little value in conducting a "hearing on the merits" before the hearing on the merits. Where the subject matter of a motion to dismiss of motion to void involves conflicting stories, intricate timelines, and detailed arguments, those are best reserved for the hearing on the merits. While the Commission is willing to entertain dispositive motions prior to a hearing on the merits where the issue is straightforward, we are not prepared to spend an entire evening on a dispositive motion that may not be successful

when the same argument could better be presented at the hearing on the merits. This also reduces the chances of procedural errors or due process violations on our part.

There are some advocates who will present such motions as part of a strategic concern. They seek to "preview" their case, "educate" the tribunal on their arguments, and perhaps "poison the well" against their opponent. While we cannot prevent such motions from being filed, we can deny them without oral argument when the issues raised seem better suited for presenting at the hearing on the merits.

Employee's Motion to Void for Procedural Defect involves a resignation letter and questions of disputed fact as to whether it was successfully withdrawn. Employee appears to contend that the resignation letter did not go into effect or was withdrawn, while Management contends that the resignation was accepted and not withdrawn. Multiple documents and dates are involved in the timing, as well the substance of oral conversations between Employee and Management. The Commission would like the benefit of seeing the witnesses testify, subject to cross-examination, before determining this issue.

Management's Motion to Dismiss is similarly focused on the issue of the resignation and the timing involved. Again, the issue of whether the Employee voluntarily resigned, was constructively discharged, or summarily dismissed are questions of fact that would benefit from a full hearing to resolve. Management and Employee are free to argue these points at the hearing on the merits.

One matter does stand out from Management's Motion to Dismiss, and that is the issue as to whether the Commission will consider constructive discharge claims. Since the issuance of the July 29, 2016, opinion in *Bischoff v. Civil Service Commission, Attorney General's Office*, SP 80-15 (J. Sukola), the Commission has accepted the Court's ruling that it should consider claims of constructive discharge. Resignations

must be voluntary, and constructive discharge is a doctrine that recognizes an employee may be effectively forced to tender an involuntary resignation, which is functionally equivalent to a termination. Yet, it is a high bar for an employee to meet to demonstrate that they were constructively discharged – a resignation cannot *post hoc* be converted to a constructive discharge.

GDOE argues that the CSC had previously declined to recognize constructive discharge, and that this was the proper course. GDOE contends that the *Bischoff* decision was wrongly decided by the Superior Court, and that the CSC should maintain its prior refusal to consider constructive discharge claims. We disagree.

We hold that, until the Supreme Court of Guam or the Legislature determines otherwise, that the Civil Service Commission of Guam will consider claims of constructive discharge. Management is free to make their arguments regarding whether constructive discharge should be adopted by the CSC on an appeal, if necessary, but should refrain from such arguments during the hearing on the merits. Note, we have not ruled that Employee *was* constructively discharged, that must be established at the hearing on the merits, but we will consider such arguments.

IV.
CONCLUSION

For the foregoing reasons, by a vote of 6-0, Management's Motion to Dismiss is DENIED. For the foregoing reasons, by a vote of 5-1, Employee's Motion to Void for Procedural Defect is DENIED. The underlying merits of each motion are not decided herein, and no findings of fact are decided herein. The parties may raise their arguments at the hearing on the merits with the exception of whether the CSC should consider constructive discharge claims, as we herein adopt the decision of *Bischoff v. Civil Service Commission, Attorney General's Office*, SP 80-15 (J. Sukola) for all cases.

IT IS SO ORDERED THIS 17th DAY OF January 2017.

EDITH PANGELINAN
Chairperson

LOURDES HONGYESS
Vice-Chairperson

PRISCILLA T. TUNCAP
Commissioner

Not present
JOHN SMITH
Commissioner

CATHERINE GAYLE
Commissioner

MICHAEL G. TOPASNA
Commissioner