BEFORE THE GUAM CIVIL SERVICE COMMISSION

BOARD OF COMMISSIONERS

GL#34-17-126

IN THE MATTER OF:

PEARL ANGEL C. WUSSTIG,

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

ADVERSE ACTION APPEAL
CASE NO. 13-AA22S

DECISION AND JUDGMENT

Speaker Benjamin J.F. Cruz
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The Civil Service Commission met at its regular scheduled time, Tuesday, January 10, 2017 at 5:45 pm. By a vote of 6-0 the Commissioners affirmed the recommendations of the Administrative Law Judge Findings, Conclusions and Recommendations after Merits Hearing, attached hereto.

SO ADJUDGED THIS 26th DAY OF January 2017.

EDITH PANGELINAN
Chairperson

LOURDES HONGYEE
Vice Chairperson

PRISCILLA T. TUNCAP
Commissioner

JOHN SMITH
Commissioner

not present
CATHERINE GAYLE
Commissioner

MICHAEL G. TOPASNA
Commissioner

Office of the People
Senator Régine Biscoe Lee
Legislative Secretary
Date/Time: 1-27-17 @ 1040
Initials:

ORIGINAL

BEFORE THE
GUAM CIVIL SERVICE COMMISSION
ADMINISTRATIVE LAW JUDGE

IN THE MATTER OF: **PEARL ANGEL WUSSTIG,** **Employee,** **vs.** **PORT AUTHORITY OF GUAM,** **Management.**	**ADVERSE ACTION APPEAL** **CASE NO.: 13-AA22S** **FINDINGS, CONCLUSIONS AND RECOMMENDATIONS AFTER MERITS HEARING**

This matter comes before the undersigned, sitting as a duly-appointed Administrative Law Judge, pursuant to 4 G.C.A. §4405(c), upon a merits hearing of the above-referenced adverse action appeal held November 28-29, 2016. Management was represented by Michael F. Phillips, Esq., with General Manager Joann Brown present on behalf of the Port Authority of Guam ("PAG" or the "Port"). Employee was present and represented by lay representative Naomi Eve Lujan Charfauros.

Pursuant to 4 G.C.A. §4405(c) and Section 2214 of the Commission's Administrative Law Judge Rules, the ALJ renders the following findings and conclusion.

1. The Civil Service Commission has jurisdiction over this matter pursuant to the Organic Act of Guam, 4 GCA Sections 4401, *et seq.*, and the Personnel Rules and Regulations of the Port Authority of Guam.

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Doc. No. 34GL-17-0126.

2. Employee, Ms. Pearl Angel Wusstig Cruz (hereinafter "Employee") was at all relevant times employed by the Port Authority of Guam as a Buyer III, in PAG's Procurement Division.

3. On May 17, 2013, Employee received a Notice of Proposed Adverse Action in accordance with PAG's Personnel Rules and Regulations alleging a violation of three particular provisions of Section 11.303 the Rules, as follows: (b) refusal or failure to perform prescribed duties and responsibilities; (e) insubordination, including but not limited to, resisting Management's directives through actions and or verbal exchange, or failure or refusal to follow supervisor's instructions to perform assigned work, or otherwise failure to comply with applicable established written policies; and (j) discourteous treatment of the public, customers or other employees.

4. According to the Notice of Proposed Adverse Action, the alleged violations were predicated upon an incident occurring on May 3, 2013, at around 8:30 a.m., when Employee's supervisor, Ms. Alma Javier, made a general statement to the staff in Employee's work area to the effect of, "can you guys at least pretend that you are working." Later, Javier noticed that Employee had not yet turned on her computer and appeared to be applying makeup at her desk. Ms. Javier then approached Employee and asked whether Management was paying employee to put on makeup. According to the proposed notice, Employee then "snapped back" at Ms. Javier and asked her if the Port was paying her (Ms. Javier) to take smoking breaks. Allegedly, Employee "started mouthing off" and did not immediately proceed to Ms. Javier's office to discuss the matter, as instructed by Ms. Javier.

5. The Notice of Proposed Adverse Action was further predicated, as a matter of progressive discipline, upon a December 3, 2012 letter of reprimand, by which

Employee had been reprimanded for refusing or failing to perform prescribed duties and responsibilities and insubordination, in connection with the alleged failure to timely process certain bid documents and for disrespectful conduct towards her superior during investigation of the incident.

6. On May 22, 2013, Employee submitted a seven-page, single-spaced typewritten response to the Notice of Proposed Adverse Action entitled "Reconsideration of the Proposed Adverse Actions." Employee's May 22, 2013 letter was, in turn, read aloud when Employee met with the Port's General Manager, Ms. Joann Brown. The letter gave detailed accounts of the relevant events from Employee's perspective. Employee maintains that she was not applying makeup but rather medication for an eye inflammation and was dismayed with "abrasive, loud comments thrown at me." In the same statement, Employee admitted, "I proceed into her office, but before I could sit down she went off yelling at me . . ." The letter continues at some length, again taking issue with the allegation that she was applying makeup and asserting that Ms. Javier had used an abrasive tone of voice and "became belligerent." Employee maintains that Ms. Javier was "yelling at me, trying to belittle me in front of the staff."

7. Significantly, Employee admitted both in her May 22, 2013 letter and in her live testimony that she stated the following to Ms. Javier when confronted about the alleged "putting on makeup" episode: "Then it is safe to say that the Port is paying you to be smoking all different times of the day?"

8. On May 31, 2013, Employee was served a final notice of adverse action issuing a five-day suspension without pay to be carried out June 3-7, 2013.

9. Employee timely appealed the Notice of Final Adverse Action on June 18, 2013. The notice of appeal did not deny that Employee had talked back to her supervisor, Ms.

Javier, but alleged the following bases for the appeal: (1) the notice of proposed adverse action was already decided at the time it was issued; (2) Employee was denied a full and fair ten-day opportunity allowed by the Personnel Rules and Regulations to respond to the charge; (3) the final notice of adverse action violated 4 G.C.A. §4406—the "60-day" rule—because much of the conduct alleged in the adverse action had occurred in December, 2012, which was more than six months prior to issuance of the final notice; and (4) Employee's suspension was inappropriate because the adverse action was punitive as against Employee and that action should have instead been taken against Ms. Javier, her supervisor for being abusive and belligerent.

10. There was some testimony from witnesses regarding previous alleged conduct by Employee similar to or in conformity with conduct which forms the basis of the subject adverse action appeal. The ALJ gave limited weight to such testimony as it seemingly has little probative value as to what happened during the incident on the date in question. Likewise, little weight was accorded to testimony, such as that of former PAG employee Vivian Leon, for the same reasons, regarding Ms. Javier's perceived shortcomings as a supervisor during her tenure at the Port.

11. Employee's testimony and written statements criticized Ms. Javier's management style and cataloged her alleged inadequacies as a supervisor, and in particular a tendency to shout or to take long smoking breaks. Of course, Ms. Javier's adequacy or inadequacy as supervisor is not the subject of this proceeding. Rather, it is the Employee's response to her Supervisor, Ms. Javier, that is relevant.

12. Employee's case focused on the issue of whether Employee was applying makeup or eye medication at the time of incident. The testimony was in conflict. However, this matter is really beside the point. For even assuming that Ms. Javier was mistaken in her

assumptions about Employee's conduct on the morning in question, or had otherwise mishandled the situation in one way or another, it was Employee's admitted response to Ms. Javier, rather than the underlying conduct, that was the focus of the adverse action.

13. In fact, PAG General Manager Joann Brown confirmed in her testimony that her main concern in issuing the Notice of Final Adverse Action and for meting out the five-day suspension was Employee's reaction to being called out by her Supervisor, rather than the underlying conduct of allegedly applying makeup or being unprepared for work in the morning.

14. Ms. Javier's concern about Employee attending to personal matters while ostensibly working at her desk is also implicated if Employee had, in fact, been applying eye medication instead of makeup. Employee grooming, hygienic, cosmetic or medicinal concerns are all generally inappropriate to be addressed at an employee's work station and should all optimally be addressed elsewhere, such as in a restroom or during a break, so as to avoid the appearance of spending work time on personal pursuits.

15. In this instance, Employee admits talking back to Ms. Javier. And Employee's statements to Ms. Javier went beyond merely a denial about applying make up but also included what amounted to a tit-for-tat criticism of Ms. Javier's alleged taking of smoking breaks.

16. Management met its burden, by clear and convincing evidence, of showing that Employee made inappropriate comments and responses when confronted by her Supervisor, Ms. Javier. In fact, there was no material fact dispute concerning either the substance or tone of Employee's response to Ms. Javier.

17. Supervisors, of course, are not infallible. Sometimes they make mistakes. Even if we assume that Ms. Javier was mistaken about whether Employee was applying makeup

at her workstation and even if Javier's tone of voice and demeanor were to be deemed inappropriate to the occasion, such mistakes do not excuse Employee's coarse reaction. Employees must generally respect their supervisors, even if they are wrong.

18. Employee testified that she was upset about being called out in public by her supervisor: but such conduct, even if inappropriate, does not justify Employee subjecting her supervisor to similar treatment. Supervisors must demand and enjoy due respect from those they supervise; and their authority is undermined to the extent that their subordinates are permitted to talk back to them in a workplace setting.

19. Although the reason is unclear, the evidence is also clear and convincing that Employee did not immediately follow Ms. Javier's repeated instruction that Employee speak with her about the incident in Javier's office.

20. Employee's testimony was not credible when discussing whether Ms. Javier had asked to speak to Employee in her office after the incident. In Employee's May 22, 2013 letter to Ms. Brown, she stated, "Ms. Alma demanded for me to get in her office and tell her what my problem is." M00033, p. 4. Yet during her testimony at the merits hearing, Employee stated that she did not recall whether Ms. Javier had asked to speak with her in her office. Later, when questioned by her own representative, she stated that she had proceeded to Ms. Javier's office but that Ms. Javier allegedly "exploded" in the main work area before she got there. Then Employee suggested that perhaps she did not hear Ms. Javier call her to her office because of a "hearing issue" she had suffered from since her childhood.

21. Witness Eda Nededog, one of Employee's coworkers, came across as a credible, objective witness. She confirmed hearing Ms Javier state, "where did Angel go? . . . I was calling her," which is consistent with Ms. Javier's testimony that she had repeatedly asked

Angel to come to her office and Angel did not respond. Similarly, witness-coworker Pia Castro seemed credible when she confirmed hearing Ms. Javier call Employee into her office.

22. At several points when called to testify by Management, Employee exhibited evasiveness or an inability or unwillingness to answer relatively straightforward questions put to her by Management's Counsel. Even simple questions, such as whether Employee recognized her signature on her May 22, 2013 letter were the subject of equivocations. Such incidences are consistent with and lend credibility to other testimony elicited during Management's case about Employee's uncooperative and evasive responses when confronted by Ms. Javier during the incident in question.

23. When answering questions posed by Management's Counsel, Employee often purported to excuse her interactions with Ms. Javier by saying that Ms. Javier spoke in a loud and inappropriate tone, and Ms. Javier was generally a poor supervisor. These observations, even if true, do not excuse disrespecting one's supervisor in front of other employees.

24. Employee's conduct clearly amounts to "insubordination," and "discourteous treatment of . . . . other employees," as defined by subsections (e) and (j), respectively, of Section 11.303 of PAG's Personnel Rules and Regulations. Having found that at least two of the three alleged violations have been established by clear and convincing evidence, the conclusion is inescapable that a five-day suspension was a measured and appropriate disposition, particularly in light of the fact that Employee had been issued a reprimand for similar conduct approximately 6 months earlier.

25. General Manager Brown testified that she would have been inclined to impose a lesser sanction had the employee taken responsibility for the incident or shown

contrition or remorse for talking back to her supervisor or for losing her temper. However, Ms. Brown testified that she instead found the Employee to be unrepentant, to the point of asking for her supervisor to be disciplined instead. Ms. Brown testified that other employees had received suspensions of similar length for similar misconduct. No contrary evidence was presented.

26. The stated grounds for Employee's appeal were not substantiated by the evidence, as noted in the following paragraphs.

27. The Notice of Proposed Adverse Action was not "already decided at the time it was issued." The Proposed Notice clearly stated that it was a *proposed* action; and Ms. Brown's testimony shows that the disposition might have been different had Employee shown contrition.

28. Employee was not denied a full and fair opportunity under the Personnel Rules and Regulations to respond to the charge. Employee prepared and read a lengthy seven-page, single-spaced statement in rebuttal to the proposed notice.

29. The final notice of adverse action did not violate 4 G.C.A. §4406—the "60-day" rule—because while a prior December, 2012 reprimand had been used as a basis for the imposition of progressive discipline, the violations alleged in the adverse action specifically related to the May 3, 2013 events, and resulted in the May 31, 2013 Final Notice of Adverse Action, well within the requisite 60 days.

30. Employee's suspension was not inappropriate on the ground that adverse action was "punitive as against employee" because Employee admitted the principal allegation of talking back to her supervisor; and Management produced clear and convincing evidence that Employee's responses to her supervisor were disrespectful and inappropriate under the circumstances.

CONCLUSION

WHEREFORE, based on the foregoing findings and conclusions, the ALJ respectfully recommends that the adverse action be AFFIRMED.

Delivered and determined this 13th day of December. 2016

R. TODD THOMPSON
Administrative Law Judge