BEFORE THE
GUAM CIVIL SERVICE COMMISSION

BOARD OF COMMISSIONERS

GL#34-17-554

IN THE MATTER OF:

JOAQUIN R. MENO,

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

ADVERSE ACTION APPEAL
CASE NO. 16-AA01S

DECISION AND JUDGMENT

Office of the People
Senator Régine Biscoe Lee
Legislative Secretary
Date/Time: 5/24/17 @ 2:44pm
Initials:

2017 MAY 24 PM 5:08

The Civil Service Commission met at its regularly scheduled time, Thursday, March 23, 2017, at 5:45 p.m. By a vote of 6-0, the Commissioners affirmed the recommendations of the Administrative Law Judge Findings, Conclusions and Recommendations after Merit Hearings, attached hereto.

SO ADJUDGED THIS 21st day of April 2017.

EDITH PANGELINAN
Chairperson

LOURDES HONGYEE
Vice-Chairperson

PRISCILLA T. TUNCAP
Commissioner

JOHN SMITH
Commissioner

CATHERINE GAYLE
Commissioner

MICHAEL C. TOPASNA
Commissioner

Speaker Benjamin J.F. Cruz
MAY 24 2017
Time: 3:16 (1) AM (1) PM File No. 34-473
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ADMINISTRATIVE LAW JUDGE

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FINDINGS, CONCLUSIONS AND RECOMMENDATIONS AFTER MERITS HEARING

This matter comes before the undersigned, sitting as a duly-appointed Administrative Law Judge, pursuant to 4 GCA §4405(c), upon a merits hearing of the above-referenced adverse action appeal held February 6 & 8, 2017. 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 Rachel M. Taimanao-Ayuyu, Esq.

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

1. The Civil 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.

ORIGINAL

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2. Employee, Joaquin R. Meno (hereinafter "Employee"), was at all relevant times employed by the Port Authority of Guam as an Equipment Operator Leader in the Transportation Division.

3. In the Final Notice of Adverse Action dated December 11, 2015, the Acting General Manager issued a five day suspension without pay to Employee. The Notice stated that the basis for the adverse action was an incident which occurred on October 17, 2015. On that day, Employee, an Equipment Operator Leader, was supervising two groups (referred to as "Gang No. 1" and "Gang No. 2") of employees in loading operations involving the ship Maren S.

4. According to the Notice, Employee asked his immediate Supervisor, Transportation Superintendent Raymond B. Santos, whether Employee could "release" the employee members of Gangs No. 1 and No. 2 from further work duties that day. "Release" meant that those employees would be excused from any further work duties for the day.

5. Mr. Santos instructed Employee to check whether the employees of Gang No. 1 and Gang No. 2 had already completed their regular 40 hour work week prior to releasing them early on October 17, 2015. Management indicated that Employee released both Gangs early without checking the two week work schedule to ensure that the employees had completed their 40 hour work week.

6. Employee released Gang No. 1 at 9:00 a.m., and Gang No. 2 at 11:00 a.m. The two week work schedule for the Gangs provided that both gangs were scheduled to work on the Maren Voyage until 6 p.m. that day in order to complete their regular 40 hour work week.

7. The Final Notice stated that Employee did not follow his Supervisor's instructions; he failed to check or refer to the two week schedule prior to releasing both

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Gangs. As a result, the employees on both Gangs did not complete their 40 hour work week as scheduled.

8. Employee allegedly violated Rule 11.303 of the Port Authority of Guam Personnel Rules and Regulations, which provides as follows: "(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."

9. The Notice of Final Adverse Action was also predicated, as a matter of progressive discipline, upon an October 20, 2015, Letter of Reprimand, by which Employee had been reprimanded for disrespectful conduct/ use of insulting, abusive or obscene language to, or about, other personnel.

10. On December 31, 2015, Employee timely appealed the Notice of Final Adverse Action. In his Appeal, Employee indicated that he did not hear the instruction by his Supervisor to perform the specific time verification. Instead, he understood that his Supervisor had approved his request for the early release of the members of Gangs 1 & 2.

11. Employee indicated that it was not his duty to determine employee work hours, and he would not have allowed his teams to leave work early had he known their regular work hours had not been met. He denied that he engaged in any act of insubordination or resisting management, but asked permission to release the employees early. He completed the assigned work that day, which was operating the gantry for loading and offloading cargo on vessels and to supervise gantry workers performing the same.

12. There was some testimony from witnesses regarding the prior Reprimand which Employee received. The ALJ found that the facts and circumstances regarding the

conduct alleged in the Reprimand are entirely different from the charge upon which the adverse action is based and have little probative value. Other than to show compliance by Management with progressive discipline herein, the Reprimand is given no weight in the decision of this matter.

13. The central issues during the hearing were: (a) whether Employee's immediate Supervisor, Transportation Superintendent Raymond B. Santos, instructed Employee to check the work schedule prior to releasing the employees; (b) whether Employee knew or understood that the instruction had been given; and (c) whether the Employee followed the instruction.

14. The Assistant Operations Manager Kenneth Calvo conducted an investigation of the incident at the request of the Operations Manager. Mr. Calvo met with Employee shortly after the incident. Employee indicated to Mr. Calvo that Employee was responsible for timing out the Transportation Personnel on the day in question. Employee admitted that he did not check the two week schedule before releasing ("securing") the employees.

15. Mr. Calvo stated that Employee admitted to him that Employee's failure to check the two week schedule prior to releasing the employees was an "oversight on his part." Employee confirmed to Mr. Calvo that his Supervisor Mr. Santos did ask him to check whether the employees had completed their 40 hour work week.

16. Employee's Supervisor, Mr. Raymond Santos, Transportation Superintendent testified that, during a phone conversation, he told Employee to check the two week schedule before releasing the Gangs: "I referred him back to the two week schedule". When Mr. Santos met with Employee on the Monday after the incident, Employee stated to Mr. Santos that Employee "forgot to review the work schedule" and had "messed up".

17. Mr. Santos was present when Employee gave his response to the Acting Port Manager concerning the Notice of Proposed Adverse Action. According to Mr. Santos, Employee told the Manager that Mr. Santos "never told him to check the 40 hour work schedule."

18. The testimony of Employee's Supervisor, Transportation Superintendent Santos, is credible. He maintained that he did instruct the Employee to review the work schedule for October 17, 2015 prior to releasing the employees of Gangs Nos. 1 and 2. Mr. Santos did not believe it was possible that Employee "just misunderstood" the instruction. Port employees, including Employee, had been trained concerning the requirement that employees were required to work a minimum of 40 hours per week.

19. Mr. Santos indicated that, in prior years, employees had sometimes been released from duty when a ship operation was completed. However, since the present General Manager had assumed the position, there was a requirement in effect that employees work a minimum of 40 hours in one week. Leaders such as Employee were aware of this requirement.

20. Mr. Santos had no apparent reason to claim that he gave an instruction to Employee if in fact he did not. Mr. Santos has demonstrated past fairness and objectivity with Employee, as evidenced by the high performance evaluations he has given Employee.

21. On the other hand, Employee has taken inconsistent positions with regard to the issue of whether his Supervisor gave him instructions concerning the release of employees. His testimony on this point is not credible. Employee initially admitted to Mr. Calvo and Mr. Santos that he had been instructed to review the 40 hour work schedule prior Management Exhibits "1" and "4"; testimonies of Kenneth Calvo and Raymond Santos.

22. In responding to the Notice of Proposed Adverse Action, Employee then told the Acting General Manager that he had not received any such instruction from Mr. Santos. During the hearing, Employee testified that he did not remember telling Mr. Santos or Mr. Calvo that he overlooked reviewing the employees' hours and work schedule, but that it was "possible" he did so. Employee agreed that "it was important for him to determine whether employees under him had met their 40 hours." He also confirmed that he should have known whether the employees under him had worked 40 hours.

23. Having stated that he should know the hours worked by the employees under his supervision, Employee then claimed that it was not a part of his job responsibilities to determine the hours worked by employees under him, but that of other Supervisors and Planners. He also said that he assumed that the employees had met the 40 hour work week requirement.

24. Management Exhibit M7 establishes a two week work schedule for various Gangs, including Gang No. 1 and No. 2. That schedule indicates that on Saturday, October 17, 2015, which was the last day of the pay period, the employees of Gangs No. 1 & No. 2 were scheduled to work between 0700 (7:00 a.m.) and 1800 (6:00 p.m.), and that such hours were included within the 40 hour work week of the employees.

25. Review of the work schedule would have indicated to Employee that the entire work day on October 17, 2015, was counted for the 40 hour work week. In accordance with his Supervisor's instruction, he should have checked the work schedule. Employee indicated that the two week work schedule (Management Exhibit M7) was posted in the employees' room. Employee did not feel that it was necessary for him to look back at the two week work schedule. He was aware of the instruction, but simply decided not to follow it.

26. By failing to check the work schedule or determine whether the employees of Gangs Nos. 1 & 2 had met the minimum 40 hour work requirement, Employee's early release resulted in the failure of numerous employees to meet the minimum of 40 work hours during the week, as required by the Port Personnel Rules and Regulations. The Personnel Rules and Regulations of the Port, Chapter 8, Section 8.001, Work Week, requires that, for Maritime positions at the Port, "the basic work week is forty (40) hours."

27. Various Management witnesses testified that the Guam Civil Service Commission has determined that Port employees must work a minimum 40 hour work week; the employee may not be awarded overtime pay until this minimum 40 hour requirement is met. Management witnesses testified that their personnel, including Leaders such as Employee, are aware of this requirement.

28. On the Monday after their release, some of the Port employees complained to another Leader, Anthony Concepcion, that they had not worked their full 40 hours because of the early release. At least 10 employees from Gang Nos. 1 & 2 did not meet the 40 hour work week requirement as a result of the early release by Employee.

29. The Port decided to pay these employees for a full 40 hour work week, even though they did not work a full 40 hours. General Manager Brown believed that personnel and Leaders of the Port, such as Employee, who are in charge of employees, have the responsibility and obligation to ensure that the employees meet the weekly 40 hour work requirement.

30. Employee's failure to follow his Supervisor's instruction did not merely result in a technical violation of the minimum work week requirement; his early release of employees deprived the Port, as well as the Public, of the full services of such employees to which they

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were entitled during that work week. Furthermore, an employee who does not work a 40 hour work week is not entitled to overtime pay and can also be required to sign leave. Even where employees are not needed for vessel operations, there are other tasks that they can undertake such as cleanup and wash down of the yard, picking up metals, and fixing equipment.

31. In an adverse action hearing, Management has the burden of proof to present evidence that is "clear and convincing." "Clear and convincing evidence means that measure of degree of proof which will produce in the mind of trier of fact a firm belief or conviction as to the truth of the allegations sought to be established."

32. Here Management proved that Employee failed or refused to follow an instruction of his supervisor Mr. Santos to review the 40 hour work schedule, in order to determine whether the employees had met their 40 hour work requirement, prior to releasing the employees. Employee's statements to Mr. Calvo and Mr. Santos that he "overlooked the schedule" or "messed up" indicate that Employee was aware of the instruction that had been given to him; for whatever reason, Employee failed and/or refused to check the work schedule (Management Exhibit M7) before he released the employees.

33. Employee could also have asked the employees if they had completed the 40 hours. If he had insufficient information, he could further have contacted the Planners or his Supervisor in making this determination. Instead, he chose to take no action to determine whether the employees had met their 40 hour work week requirement.

34. Leaders at the Port, such as Employee, must undertake all necessary actions to ensure that employees meet the minimum 40 hour work week requirement. This requirement

is a significant and important policy of the Port and must be enforced. In this case, Employee's failure to follow the policy led to unfortunate consequences.

35. Management has proven the charge in Personnel Rule 11.303 (e) that relates to "or failure or refusal to follow supervisor's instructions to perform assigned work..."

36. Employee contends his action does not technically constitute "insubordination", as he did not refuse or fail to complete an assigned task. He suggests that "the assigned work task", securing the Maren S. vessel operations, was completed. However, the "assigned work" also included supervising the employees in Gang Nos. 1 & 2. As part of Employee's Job Description, the Equipment Operator Leader "leads the work of the Equipment Operators..." Employee Exhibit 51. Employee did not complete that task in accordance with his Supervisor's instruction, which was to make sure that the employees completed their 40 hour work schedule before he released them.

37. Employee claims that he did not evidence the required "intent" to sustain a charge of "insubordination." According to Employee, "insubordination" requires an element of "willfulness" or "disrespect". The portion of the Personnel Rule relied upon by Management refers to a "failure" or "refusal" to follow a supervisor's instructions as a ground for adverse action. Employee did not question his Supervisor about the instruction or indicate a lack of understanding. There was "intent" on the part of Employee; he was aware of the instruction yet knowingly decided that he would ignore it or fail to carry it out.

38. In any event, however, for a charge of failure to follow supervisory instructions, proof of intent is not required. Hamilton v. U.S. Postal Service, 71 M.S.P.R., 547 (1996).

39. A single refusal or failure to obey a direct order from a supervisor can establish a charge supporting adverse action. Tedtaotao vs. Department of Parks and Recreation,

Adverse Action Appeal Case No. CY97-AA30(A) (Guam Civil Service Commission, Decision and Order, filed December 22, 1998) (five day suspension upheld).

40. A five day suspension appears to be a measured and appropriate disposition of this matter. General Manager Brown stressed the importance of the 40 hour work week, and the obligation of all Leaders, including Employee, to ensure that employees fulfil the 40 hour work week.

CONCLUSION

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

Delivered and determined this 17th day of February, 2017.

Frederick J. Horecky

FREDERICK J. HORECKY
Administrative Law Judge

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