BEFORE THE
GUAM CIVIL SERVICE COMMISSION

BOARD OF COMMISSIONERS

GU#34-17-823

IN THE MATTER OF:

PEARL ANGEL C. WUSSTIG,

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

ADVERSE ACTION APPEAL
CASE NO. 13-AA26S

DECISION AND JUDGMENT

Office of the People
Senator Régine Biscoe Lee
Legislative Secretary
Date/Time: 8/3/17 @ 10am
Initials:

2017 AUG -3 AM 10:16

The Civil Service Commission met at its regularly scheduled time, Thursday, July 13, 2017, at 5:45 p.m. Notwithstanding objections by Employee, by a vote of 5-0, the Commissioners affirmed the recommendations of the Administrative Law Judge Findings, Conclusions and Recommendations after Merit Hearings, attached hereto.

Speaker Benjamin J.F. Cruz

SO ADJUDGED THIS 01st day of August 2017.

AUG 03 2017
Time: 10:09 (1AM) PM File No: 34-17
Received By:

EDITH PANGELINAN
Chairperson

LOURDES HONGYEE
Vice-Chairperson

Not Present
PRISCILLA T. TUNCAP
Commissioner

JOHN SMITH
Commissioner

CATHERINE GAYLE
Commissioner

MICHAEL G. TOPASNA
Commissioner

ORIGINAL

BEFORE THE
GUAM CIVIL SERVICE COMMISSION
ADMINISTRATIVE LAW JUDGE

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IN THE MATTER OF: **PEARL ANGEL WUSSTIG,** **Employee,** **VS.** **PORT AUTHORITY OF GUAM,** **Management.**	**ADVERSE ACTION APPEAL** **CASE NO.: 13-AA26S** **FINDINGS, CONCLUSIONS AND RECOMMENDATIONS ON JURISDICTIONAL ISSUE**

This matter comes before the undersigned, sitting as a duly-appointed Administrative Law Judge, pursuant to 4 G.C.A. § 4405(c), on the initial, jurisdictional phase of the merits hearing for the above-captioned matter.

BACKGROUND: JURISDCTIONAL ISSUE

1. This matter involves an adverse action taken against Employee Pearl Angel Wusstig Cruz ("Employee") who was suspended for thirty (30) days, effective July 4, 2013, by her employer, the Port Authority of Guam ("PAG" or "Management") based on findings that Employee had failed or refused to perform prescribed duties and responsibilities, insubordination and unsatisfactory performance in connection with her job duties as Buyer II at PAG.

2. The corresponding Proposed Notice of Adverse Action ("PNAA") was served on the Employee on June 20, 2013. The Employee responded in writing on June 28, 2013. A Final

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Notice of Adverse Action (FNAA") was executed by PAG's General Manager on July 3, 2013. Employee was not at work on that date and thus PAG employee Shawn Cepeda was tasked with personally serving the FNAA on Employee at her residence. However, Employee was not at her residence at that time, and PAG made the decision to effectuate registered mail service of the FNAA pursuant to PAG Personnel Rules & Regulations ("PRR") 11.313, on that same date, July 3, 2013. Employee filed a Notice of Appeal of Final Adverse Action on July 25, 2013.

3. On October 24, 2013, Management filed a motion to dismiss the above-captioned appeal, pursuant to 4 G.C.A. § 4406, maintaining that Employee failed to take an appeal from her adverse action within the requisite 20 days.[1] Nearly three years later, the undersigned ALJ was assigned to the above-captioned matter. During the September 29, 2016 Status Call hearing, it came to the ALJ's attention that the Civil Service Commission had already heard and denied the motion to dismiss without issuance of a written disposition. The ALJ reviewed the audio recording of the record for that hearing and confirmed that, in fact, the Commission denied Management's motion on November 23, 2013, on a 6-1 vote, finding that Management had failed to meet its burden on that motion of showing that the Employee's appeal was untimely.

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[1] Title 4 G.C.A. § 4406 provides in relevant part:

> An employee in the classified service who is dismissed, demoted or suspended shall be given immediate notice of the action, together with a specific statement of the charges upon which such action is based in the manner required by Article 2 of this Chapter . . . The employee within twenty (20) days of effective date of the action, may appeal to the Commission or appropriate entity by filing that person's written answer to the charges against the employee, regardless whether the employee has tendered any resignations, which shall have no effect upon the employee's appeal rights. 4 G.C.A. § 4406 (2005).

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4. The ALJ determined, however, that while the Commission duly denied Management's motion, the denial of the motion did not foreclose Management from arguing the matter with evidence at the merits hearing. This is particularly so since the 20-day issue involves the jurisdiction of the Commission to entertain the appeal. *See* In re Department of Agriculture v. Civil Service Commission (Rojas), 2007 Guam 21, ¶15.

5. Because the 20-day appeal issue is jurisdictional in nature, it may be raised at any point in the proceedings, even by the Commission or ALJ, *sua sponte*, if it had not been raised by any of the parties. *See* City of Philadelphia v. City of Philadelphia Civil Serv. Comm'n (Robinson), 2012 WL 8683297, at *4 (Pa. Commw. Ct. June 11, 2012) (Failure to file appeal to the Philadelphia Civil Service Commission within statutory 30-day time limit was a jurisdictional defect which barred the Commission from granting relief, and the issue could not be waived and may be raised for the first time on appeal).

6. Accordingly, the ALJ issued an October 27, 2016 Order indicating that he would take evidence and argument concerning this jurisdictional matter at the beginning of the merits hearing for this matter. The ALJ also determined and notified the parties in that Order that this jurisdictional issue is subject to a different burden of proof than the one that applies to motions or when assessing the allegations supporting an adverse action.

7. In a prehearing motion, the moving party generally bears the burden of proof by the preponderance of the evidence. Rules of Procedure for Adverse Action Appeals ("AA Rules") Rule 9. In denying Management's Motion, the Commission found merely that Management had failed to meet its burden at that stage of the proceedings, but the Commission did not preclude Management from raising the issue again at the merits hearing, with the aid of live testimony and evidence.

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8. Administrative agencies are granted only limited and special subject matter jurisdiction. In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250, 27 A.3d 726, 731 (2011). There is no presumption of jurisdiction for the CSC as a tribunal of limited jurisdiction. "Rather, the party seeking to invoke the jurisdiction of such a tribunal must allege and prove the necessary jurisdictional facts." Figueroa v. C & S Ball Bearing, 675 A.2d 845, 850 (Conn. 1996).

9. Accordingly, while it is true that AA Rule 11 generally saddles Management with the burden to "prove its allegations by clear and convincing evidence," case authorities make clear that when *jurisdictional* matters are involved, it is the party seeking to invoke the tribunal's jurisdiction that bears the burden of proof. *See* Crutcher v. Williams, 12 So. 3d 631, 637 (Ala. 2008) ("The party invoking the Court's subject-matter jurisdiction bears the burden of establishing a basis for that jurisdiction.").

10. Thus, while Management bears the burden to "prove its allegations by clear and convincing evidence," proving jurisdiction is not part of Management's "allegations" within the contemplation of AA Rule 11. To the contrary, in the instant case Management maintains that the Commission *lacks* jurisdiction. Thus, it is the Employee who bears the burden to show that she complied with the jurisdictional 20-day appeal deadline so as to invoke the Commission's jurisdiction in the first place.

11. Having determined that this threshold jurisdictional issue must be resolved—based on a review of the evidence and application of the appropriate burden of proof—before proceeding to address the merits of the adverse action, the ALJ issued an order instructing the parties that the sole issues to be resolved concerning jurisdiction are: (1) whether Management made "reasonable efforts" to personally serve Employee, as contemplated by PAG PRR 11.313,

prior to sending the notice to Employee via registered mail; and (2) whether the Employee timely appealed after registered mail service was accomplished. The parties were notified that these issues, and these issues alone, would be heard and determined on the first date of the merits hearing, which ultimately took place on May 15, 2017.

FINDINGS AND CONCLUSIONS

12. PAG PRR Rule 11.313, entitled "Service of Proposed and Final Notices of Adverse Action," is the key provision governing this matter. Rule 11.313 allows service by registered mail under certain circumstances, as follows:

> Proposed and final notices of adverse action shall be personally served upon employee. In the event, the general manager cannot locate the employee, after reasonable efforts have been made to locate the employee, service of the proposed or final notices may be made by leaving the notice at the employee's dwelling or usual place of abode with some person of suitable age and discretion residing therein, or by registered mailing the notice to the employee at the last known address. Service by registered mail is complete upon mailing.

13. Another important provision is CSC Adverse Action Rule 5.2.1, which provides that "[t]he CSC may not excuse the filing of a notice of appeal beyond the twentieth (20) day if the employee provides a compelling reason for his failure to timely file." This language was clarified by the Superior Court of Guam in the case Guam Public School System v. the Narciso, Special Proceeding Case Number SP 0245-08 (September 2009), wherein the court held that under no circumstances may the Commission exercise jurisdiction over an untimely appeal. Another case on point is Department of Agriculture v. CSC (Rojas), 2009 Guam 19, in which the Guam Supreme Court held that "the lapse of the 20-day statutory deadline for appeal to the CSC barred the CSC's assertion of jurisdiction" of the employee's untimely appeal.

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14. Also relevant to our inquiry is 4 GCA Section 4406, which provides, *inter alia*, that, "[t]he employee within twenty (20) days of effective date of the action, may appeal to the Commission or appropriate entity by filing that person's written answer to the charges against the employee . . ."

15. Although the ALJ did not request additional briefing from the parties on this jurisdictional issue, the ALJ received and considered Employee's May 1, 2017 memorandum entitled "Appellant's Brief Re Jurisdiction" which is lodged as Exhibit E4. Since the Employee bears the burden on this issue, and, moreover, since Employee changed representatives subsequent to the time the issues were first addressed back in 2013, the ALJ granted Employee leeway in this regard.

16. In her May 1, 2017 Brief Re Jurisdiction, Employee does not dispute the language of 4 GCA Section 4406, or Port Authority of Guam PRR 11.313 or CSC AA rule 5.2. Lastly, Employee does not dispute the court decisions of Narciso and or Rojas. E4, page 1. Instead, Employee concedes that "the sole issue before the CSC is, based on the circumstances and facts, whether Employee effectively served with her FNAA on July 3, 2013 when it was sent to her via registered mail or when a copy of it was personally served on her five days later on July 8, 2013?"

17. Employee further concedes that "if the CSC finds from the facts that management exercised 'due diligence' in attempting to serve employee on July 3, 2013, then employee failed to timely file her adverse action appeal." Employee maintains PAG's process server failed to exercise sufficient "due diligence" to personally serve Employee on July 3, 2013. Specifically, Employee maintains that the server should have attempted to contact her by cellular telephone

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through voice or text. In the alternative, Employee maintains that PAG's server should have left the FNAA with her boyfriend's mother at her residence in a sealed envelope.

18. PAG Personnel Specialist II Sean Cepeda testified that he and a Port Authority police officer went to Employee's residence to serve the FNAA and encountered a pit bull dog in a garage, which he claims broke loose from its chain and charged towards Cepeda and the officer. Cepeda testified that the dog then ran away to the back of the house as he deployed a paper folder as a shield or weapon. Cepeda came across as a credible witness, uninterested in the outcome of the hearing.

19. Cepeda testified that thereafter Employee's boyfriend's mother, Mrs. Bertha Taimanglo, stated that she would not receive any documents unless contained in a sealed envelope. Cepeda testified that he did not carry an envelope with him. Cepeda also did not have Employee's telephone numbers with him. However, Cepeda telephoned Ms. Carmelita Nededog, PAG's Acting Personnel Services Administrator, for further instructions and was told by Nededog to return to the office for his own safety. Ms. Nededog testified that Cepeda sounded scared by the encounter with the dog and that she thought it best for Cepeda's safety and that of the PAG police officer that they not make further attempts to effectuate service at the Taimanglo residence.

20. Employee's boyfriend, Mr. Leecardo Taimanglo, owner of a pit bull kept on the premises, testified that events could not have transpired as Cepeda suggests because his pit bull dog is always housed in a kennel reinforced with wire. However, Taimanglo acknowledged that his neighbor also had a large pit bull dog and Taimanglo could not rule out the possibility that the neighbor's dog had been the one that Cepeda had encountered. According to Taimanglo, both dogs weighed in excess of 75 pounds, and were quite large and intimidating. Taimanglo

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said that his dog was trained to attack and that when it encounters strangers it would bark loudly. Taimanglo stated that if his dog got loose "something is going to happen."

21. Although the testimony regarding the neighborhood pit bulls was rather inconclusive and conflicting, the weight of the testimony supports the conclusion that Cepeda and the PAG police officer had reasonable grounds to be concerned about their safety in the neighborhood when attempting to serve the papers at the Taimanglo residence, such that it was reasonable for them to retreat after the encounter with the dog and Mrs. Taimanglo rather than to obtain an envelope and to return with another attempt to serve the documents.

22. Ms. Nededog testified that PAG policy is to serve notices concerning adverse actions as soon as possible, normally on the same day or the following day after being signed by the General Manager. She further testified that PAG's procedure is that if the employee cannot be served at work or at the employee's residence within one day, then the notice is sent out via registered mail. Nededog testified that in this instance she directed that the notice be sent to the Employee at the address of record that Employee herself had provided PAG. Nededog testified further that employees are told to register address changes with PAG Human Resources.

23. Employee testified that the postal box address to which the FNAA was sent was, at one time, her address but she stated that the box had been closed to her for nonpayment of the rental fee. She did not deny that this was the address that she had originally provided PAG and that she never updated her address after the box was closed. Accordingly, Employee has no ground for complaint that she did not actually receive the FNAA via registered mail, which was ultimately stamped "Return to Sender."

24. Employee testified that at the time that the subject FNAA was prepared she had already been subject to several previous adverse action proceedings. Accordingly, she confirmed

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in her testimony that she was familiar with the process for adverse actions. Accordingly, Employee had to reasonably anticipate on July 3, 2013 that an FNAA would be forthcoming soon. Moreover, Employee testified that she spoke to Mrs. Taimanglo on July 3, who informed her that someone from PAG, including a police officer, had attempted to deliver documents earlier that day. Accordingly, Employee then either knew or should have suspected that PAG was attempting to serve an FNAA document on her on the afternoon of July 3, 2013, even though she did not actually receive the document on that date.

25. Employee's brief states, "it is inconceivable why the PAG allows adverse action documents to be served without being placed in a sealed envelope." E4, page 2. However, Employee has pointed to no requirement either in PAG's personnel rules or analogous provisions of Guam's civil procedure rules that requires documents be served in sealed envelopes. In fact, the ALJ takes judicial notice of the fact that civil complaints under Guam's Rules of Civil Procedure are routinely served without being enshrouded in a sealed envelope—even complaints alleging highly personal matters, including personnel matters—unless the court has ordered or the parties have agreed that the papers must be filed under seal or a protective order.

26. PAG's Assistant General Manager Alfred Duenas testified that subsequent to the July 3, 2013 service, it has become PAG's practice to serve notices in sealed envelopes. However, this practice, without more, does not establish that the failure to use an envelope on July 3, 2013 was a transgression, in the absence of any administrative rule or statute on point.

27. Employee testified and produced a leave form she had filed with PAG indicating that she would be at a medical appointment on July 3, 2013, and she contends that Management thus knew or should have known of her whereabouts at the time service was attempted on that date and should have tried to serve her at her medical appointment. However, "reasonable

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efforts" to serve cannot mean a requirement that employees assigned to serve documents must ascertain an employee's whereabouts at all times or undertake to track and chase employees as they move around the island.

28. Employee points to provisions of the California Code of Civil Procedure suggesting that at least three attempts at personal service are required before courts will consider that the process server has exercised "due diligence." Employee states that this provision should be persuasive because "Guam has adopted its original criminal and civil codes" from California. E4. Employee likewise pointed to Guam Public Law 24-115, now codified as Rule 4 of the Guam Rules of Civil Procedure, indicating that a server must exercise due diligence before resorting to service by publication.

29. Employee's arguments are unpersuasive for several reasons. First, although Guam formerly followed California's Civil Procedure Code, Guam abrogated those Code provisions and adopted provisions analogous to the Federal Rules of Civil Procedure many years ago. Notably, there is no provision of the Guam Rules of Civil Procedure which requires at least three attempts to effectuate personal service.

30. Second, nothing in PAG's Personnel Rules and Regulations on point suggests any "three attempts" or "due diligence" standards apply. Instead, PRR 11.313 uses the term "reasonable efforts."

31. Third, while it may be generally helpful to look to rules governing service of process for guidance on the matter of service of adverse action documents, such provisions cannot be deemed controlling. Service of summons or other process initiating a civil complaint is distinguishable from service of notices of final adverse actions. The latter documents relate to proceedings with which the recipient is already intimately familiar by virtue of having already

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been served with a proposed notice of adverse action. On the other hand, it is often the case that defendants in civil court proceedings are entirely unaware of the allegations set forth in a civil complaint until they are actually served with it.

32. Civil procedure provisions governing service of process serve a different purpose than provisions governing service of final notices of adverse actions. Service of process provides the recipient his or her first notice of a civil action and commands a response. On the other hand, an FNAA is the final step in effectuating an adverse action, of which the employee has already been given notice and had the opportunity to respond, at least preliminarily.

33. Likewise, the reported case law regarding service of civil process is not particularly helpful to our inquiry, as the cases generally address situations in which service by publication or other substitute service was made as a last resort. Registered mail service does not fit into that disfavored category. However, even the publication service cases recognize that the serving party need not exhaust all conceivable means of personal service before service by publication is authorized. *See* Carson v. Northstar Development Co., 62 Wash.App. 310, 814 P.2d 217. 221 (1991). Rather, "reasonable efforts under the circumstances are all that is required." McComb v. Aboelessad, 535 N.W.2d 744, 748 (N.D. 1995).

34. The circumstances here were admittedly unusual—with a pit bull and a mother-in-law each imposing their own particular challenges to effectuating service. However, Employee failed to show that "reasonable efforts" were not made by Management's process server under these circumstances.

35. Testimony from Ms. Nededog regarding an earlier attempt at service on Employee was also instructive. Ms. Nededog testified that Management's process server Shawn Cepeda was confronted and questioned by Employee "in an angry manner" after Cepeda's June

20, 2013 service of the proposed notice of adverse action on Employee. Employee refused to sign the PNAA that date. (*See* also Management exhibits M 10, M 11.) Cepeda's June 26, 2013 written statement, M12, and subsequent testimony corroborated that Employee spoke to him "in a loud tone" about being served with the PNAA and that Employee was "agitated" and refused to sign the PNAA. Cepeda thus had reasonable grounds to believe that Employee might have been attempting to evade service on the date in question and that attempts to telephone Employee might prove futile. Cepeda likewise had reason to believe that even if he called Employee—and even if Employee were to answer the call—she might not cooperate with Cepeda.

36. PRR Rule 11.313 states that "[s]ervice by registered mail is complete upon mailing." Pursuant to that provision, Employee was effectively served on the date registered mail notice was given of the FNAA on July 3, 2013. Accordingly, the appeal should have been filed on or before July 23, 2013. Yet, the appeal was not filed until two days later, on July 25.

37. In the instant case, Employee could have avoided the 20-day jurisdictional bar simply by filing her appeal on or before July 23, 2013. It is undisputed that Employee was personally served with the FNAA no later than July 8, 2013. Employee thus had 15 days (or more than 2 weeks) after receiving personal service of the FNAA in which to file her appeal.

38. If an employee has any doubt about the effective date of service of an FNAA the employee should consult the applicable rules, assume the earliest possible deadline under the circumstances, and act accordingly. Apparently, Employee did not do that in this instance. Employee instead assumed that service was accomplished on July 8, even though she knew that PAG employees attempted service and served the notice via registered mail 5 days earlier.

39. Moreover, it is notable that 4 G.C.A. § 4406 provides, "the employee within twenty (20) days of the *effective date of the action*, may appeal to the Commission." (Emphasis

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added.) In this instance, the FNAA itself indicated that the effective date of Employee's suspension was July 4, 2013. Exhibit M9. Yet Employee did not file her appeal until July 25— fully 21 days after July 4. Thus, even by this alternative "effective date" measure, Employee failed to timely file her appeal.

40. As the Supreme Court's ruling in Rojas case makes plain, the Commission lacks the power to overlook a late appeal, even where there is seemingly good reason to do so. By failing to timely file her appeal, Employee failed to invoke the jurisdiction of this Commission, which accordingly lacks the ability to entertain her appeal.

41. For the above reasons, the ALJ finds that Employee did not discharge her burden of showing by the preponderance of the evidence that Management failed to make reasonable efforts at personal service before resorting to registered mail service, which according to Rule 11.313, became effective on the date it was mailed, July 3, 2013. Since Employee did not file her appeal until July 25, 2013, the appeal was untimely and must be dismissed.

RECOMMENDATION

The ALJ recommends that the Commission DISMISS this appeal for lack of jurisdiction.

Delivered and determined this 25th date of May, 2017.

R. TODD THOMPSON
Administrative Law Judge