Gmail

Benjamin J.F. Cruz <senator@senatorbjcruz.com>

Civil Service Commission Decision

4 messages

Joaquin Taitague <taitaguej.rbl@gmail.com>
To: BJ Cruz <senator@senatorbjcruz.com>
Mon, Aug 28, 2017 at 8:14 AM

Hafa Adai,

Please see attached Civil Service Commission Decisions from The Office of Senator Régine Biscoe Lee which were received on August 24, 2017 at 8am for Messages and Communications.

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Si Yu'os Ma'åse
Joaquin Taitague
Legislative Assistant
Office of Senator Régine Biscoe Lee

Tel: 472-3455

Speaker Benjamin J.F. Cruz
AUG 28 2017
Time: 9:41 ✓
Received By

PEARL ANGEL CRUZ vs PORT AUTHORITY OF GUAM_ CASE NO. 14-AA05T.pdf
310K

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GL# 34-17-925
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Benjamin J.F. Cruz <senator@senatorbjcruz.com>
To: Guam Legislature Clerks <clerks@guamlegislature.org>
Cc: "<rennae@guamlegislature.org>" <rennae@guamlegislature.org>, BENJAMIN CRUZ <speaker@senatorbjcruz.com>
Mon, Aug 28, 2017 at 9:47 AM

8/28/2017	8/4/2017	Civil Service Commission *Office of the Legislative Secretary Senator Régine Biscoe Lee	Civil Service Commission; Judgement of Dismissal; Adverse Action Appeal Case No. 14-AA05T. *Emailed	34-17-925
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BEFORE THE
GUAM CIVIL SERVICE COMMISSION

BOARD OF COMMISSIONERS

IN THE MATTER OF: **MARK C. CHARFAUROS,** **Employee,** **vs.** **GUAM POLICE DEPARTMENT,** **Management.**	**ADVERSE ACTION APPEAL** **CASE NO. 17-AA02D** **DECISION AND JUDGMENT**

I.

INTRODUCTION

This matter came before the Civil Service Commission of Guam (hereinafter "CSC" or "Commission") for a Hearing on the Merits on June 22, 2017. Present at the hearing were Employee MARK CHARFAUROS (hereafter "Charfauros" or "Employee"), with his counsel, F. Randall Cunliffe, Esq., and Management GUAM POLICE DEPARTMENT (hereinafter "GPD" or "Management") represented by Samuel Taylor, Assistant Attorney General, and Guam Police Department Chief Joseph Cruz.

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II.

JURISDICTION

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

III.

FACTS

1) On June 1, 2017, Management filed with the CSC a packet of twenty (20) documents that were to be submitted into evidence during the presentation of their case-in-chief. No declaration certifying their authenticity accompanied them or was ever presented.

2) Of the twenty (20) documents, one included a photo of a CD that purported to contain body camera footage, although no disc or other media containing video was actually filed with the CSC.

3) On June 13, 2017, at the Pre-Hearing Conference ("PHC"), Management was informed that the CSC would "follow the practice that the Employee is the last witness management calls." This was done so management could adequately prepare their case being forewarned of the practice. Management then stated they would object to the practice, but was cautioned that the Commission would likely still follow their standing procedure. Management gave no indication that they would refuse to proceed with the case unless they could call the Employee first.

4) During the time between the PHC and the Hearing on the Merits ("HoM"), Management did not file a notice to the CSC indicating their unwillingness to proceed with the case unless they could call the Employee first.

5) During the time between the PHC and the HoM, Management did not file a legal brief referencing statutes, caselaw, or other authority to support their argument that they should be entitled to call the Employee first.

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6) At no time prior to the HoM did Management attempt to take a deposition of the Employee under 5 G.C.A. § 9218, which could have allowed them to secure his testimony prior to hearing Management's witnesses testify at the HoM.

7) At no time prior to the HoM did Management follow the procedure provided in 5 G.C.A. § 9227 to have any written statements be given the same effect as direct, oral testimony, instead of the effect of hearsay evidence.

8) At no time prior to the HoM did Management request that the Commission take judicial notice of any matter pursuant to 5 G.C.A. § 9228.

9) At the HoM, Management made opening statements, followed by Employee's opening statements.

10) Management then attempted to call Employee as their first witness. The Commission informed Management they would follow their normal procedure and not allow the Employee to be called first. Management would have to call their other witnesses first, then the Employee could be called. Management insisted that the CSC vote on the matter, which it did, and the Commission voted not to waive its normal procedure.

11) An exchange followed the vote:

> Mr. Taylor: [T]hen we appeal. Okay, so be it.
>
> Chair. Pangelinan: If that's how you want to proceed.
>
> Mr. Taylor: That's exactly how I want to proceed.
>
> Chair. Pangelinan: So you don't want to call any of the witnesses?
>
> Mr. Taylor: Since you will not let me call Mr. Charfauros [first], no, I will not call any other witnesses because you are impairing my case. . . literally this case comes down to his word versus the officers' word. . . . So yes, we are going to take this to court.

12) After Management rested, Employee also rested.

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13) Management was given an opportunity to make closing arguments: "My closing arguments are I was denied due process. My client was denied due process. That's my closing argument."

IV.

THE MERIT SYSTEM

A. THE SPOILS SYSTEM

Guam and the United States did not always have a merit system. When Andrew Jackson became the seventh President of the United States in 1829, he fired almost every federal civil servant and replaced them with one of his own. This was called the "spoils system" where the victor of an election can replace all civil service servants at will. In time the spoils system caused growing dissatisfaction; debate over whether to adopt a merit system was prevalent in the 1800s. The discussion became more serious when President Garfield was assassinated in 1881 by a disgruntled supporter who claimed Garfield owed him a civil service position. Soon thereafter, Congress passed the Pendleton Civil Service Reform Act in 1883 implementing a merit system for the first time.

It is worth noting that the alternative to the merit system (the spoils system) has many disadvantages. One goal of the merit system is to ensure that qualified, experienced government employees are not fired purely due to political affiliation. Another goal of the merit system is to ensure that the most qualified people are hired and promoted for taxpayer-funded government jobs, regardless of political patronage. Thus, under the spoils system, competent and experienced civil servants could be replaced by incompetent, inexperienced civil servants for no reason other than politics.

If a house caught on fire two weeks after a new administration took office, imagine an entire team of rookie firefighters showing up to the scene. Since the new administration replaced

every experienced firefighter from the Fire Chief down to Firefighter I with political supporters, no one from the previous administration's appointees remains. Every firefighter showing up to the house-fire lacks training and experience because their only qualifying characteristic was their political affiliation. Further, imagine it is not just the Fire Department, but schoolteachers, medical personnel, employees at utility companies, and other essential services, all replaced by rookies at the same time. Such a thing cannot happen under a merit system, but can under the spoils system.

B. THE MERIT SYSTEM ON GUAM

The Organic Act provides that "[t]he legislature [of Guam] shall establish a merit system and, *as far as practicable*, appointments and promotions shall be made in accordance with such merit system." 48 U.S.C. § 1422c(a) (emphasis added). This statute also provides for Guam to "establish a Civil Service Commission to administer the merit system." *Ibid.* Further, 4 GCA § 4101 provides that "[e]mployment in the service of the government of Guam *shall* be based upon merit," and that "[c]ontinuity of employment *shall* be dependent upon good behavior, satisfactory performance and availability of funds," (emphasis in original), while 4 GCA § 4102 lists the exceptions to classified service. The Civil Service Commission of Guam is established by 4 GCA § 4401.

C. PROTECTIONS OF THE MERIT SYSTEM

Continuing into the latter part of the 20th century, the Supreme Court of the United States expanded the protections afforded to civil servants outside of the federal merit system through a series of cases affecting state and local public employees. In *Elrod v. Burns*, 427 U.S. 347, 356 (1976) the court found that the merit system does not just exist to promote the comfort and security of government employees, but allows them to exercise fundamental constitutional rights and encourages an open election process:

///

> It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. Conditioning public employment on partisan support prevents support of competing political interests.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court found that public employees have a property interest in their continued employment; thus, the *employee* is entitled to constitutional due process protections when the government seeks to terminate them.

This procedural due process as applied to Guam protects the employee at three different stages. First, the appointing authority must follow specific requirements in issuing the adverse action, such as the 60-day rule. Second, the representative of the appointing authority in contesting the appeal must meet specific requirements in presenting the case to the CSC. Finally, after those steps, the case is voted on by the CSC. If there is a procedural deficiency in the processing of the first two stages, it is the duty of the CSC to find for the employee.

The protection of due process generally belongs to the one who is in danger of being deprived of their property interest by the government (the employee), and the due process extended is generally notice and opportunity to be heard. "Ordinarily, due process of law requires [notice and] an opportunity for some kind of hearing prior to the deprivation of a significant property interest." *Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1260 (9th Cir. 1994). Thus, it is not clear what, if any, constitutional due process protections are afforded to the government seeking to do the deprivation.

V.

ADOPTION OF A RULE

In early 2015, the CSC's calendar had a backlog of approximately 2.5 years. This was an untenable situation for employees and agencies to have to wait so long for a hearing to occur. The CSC was considering options to reduce the wait time. Noting "a serious need to provide a solution

to the extensive backlog of cases before the Civil Service Commission [where] cases are backed up for many years," *I Liheslaturan Guahan* passed Public Law No. 33-55. Becoming law in June of 2015, it recommended time standards of a few months for all cases filed with the CSC after December 31, 2015.

Also in June of 2015, the case of *Eddie N. Castro v. Port Authority of Guam* began to be heard. The case took twelve (12) nights to resolve with final deliberation in August. Since the Commission only meets two (2) nights per week, there are only so many nights available for the hearing. At that rate, the CSC could only hear around nine (9) cases per year considering holidays such as Thanksgiving. Such a slow pace could create a backlog that violates P.L. No. 33-55.

A contributing factor to the length of the *Castro* case was the fact that witnesses such as Mr. Castro testified multiple nights. Castro was the first witness called by the Port. Then, after the Port put on multiple adverse witnesses, Castro was recalled during the Employee's case-in-chief, taking another full night of hearing to respond to the adverse witnesses.

It had been the practice of the CSC at that time to mimic what the courts do: Management calls witnesses in whatever order they choose, the cross-examination of the witness by Employee is limited to matters covered on direct examination, and then during the Employee's case they can call the same witnesses again. Thus, every witness could be called twice. This meant that all subpoenaed witnesses needed to spend their evenings in the waiting area for the duration of the hearing, unsure if they would be recalled even after they had testified once.

Yet, this indulgence of allowing parties to call witnesses in whatever order they choose is not required by the Rules of Procedure or statutes. Rule 11.2.4 of the Rules of Procedure for Adverse Action Appeals ("RPAAA") provides only that: "[e]ach party shall have the right to call, examine, or cross-examine witnesses. . . ." Nothing is mentioned about the parties having the right

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to call witnesses in whatever order they please. Similarly, 5 G.C.A. § 9225 defines the "Rights of the Parties" in an administrative trial:

> Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him to testify; and to rebut evidence against him. If respondent does not testify on his own behalf, he may be called and examined as if under cross-examination.

Similar to Rule 11.2.4, there is no mention of being able to call a witness in whatever order the party chooses, only that they have a right to call witnesses. Further, that a party may cross-examine opposing witnesses on any matter indicates a legislative intent that a witness need be called only once. Also, the last sentence of § 9225, "[i]f the respondent does not testify on his own behalf, he may be called and examined as if under cross-examination," suggests that perhaps the Employee should not be permitted to be called during Management's case-in-chief at all. Finally, Rule 11.2.5 and 5 G.C.A. § 9226 permits the CSC to exclude evidence that is "unduly repetitious" from the proceedings; having a witness testify twice invites repetition.

Constitutional due process only requires notice and an opportunity to be heard while local law only requires that the parties be permitted to call witnesses. No due process principle or rule requires a party to be permitted to call witnesses in whichever order they please. Further, it is not the case that an administrative body is permitted to only do that which is expressly permitted by statute; rather, within the bounds of reason an administrative body can do that which is not expressly forbidden. There appears no due process concern in adopting this procedure unless, at a minimum, there is a state-created statute with mandatory language *requiring* that the parties be allowed to call witnesses in whatever order they please. *See Shanks v. Dressel*, 540 F.3d 1082 (9th Cir. 2008). Yet, no such requirement exists in the Rules of Procedure or Administrative Adjudication Act.

Therefore, the decision was made in the interests of expediency to thereon have a witness testify only once during the hearing, including the employee. The question remaining was when to have the employee testify. Management usually wanted to call the employee as their first witness during management's case-in-chief; the employee usually wanted to be last during the employee's case-in-chief. Unfortunately, if management calls employee as their first witness, then subsequently calls adverse witnesses, the employee would not have a chance to respond to the adverse testimony. If there is any due process concern, it is the problem that would be created by not affording the employee an opportunity to respond to adverse witnesses after they had testified. Thus, the decision was made to have the employee testify as the last witness of management's case-in-chief, after all of the adverse witnesses had testified. This appeared a suitable compromise.

Unlike a standard civil or criminal action, an adverse action has its own unique process that occurs before the hearing on the merits. To take an adverse action, 4 GCA § 4406 requires that management provide a notice of proposed adverse action that contains a complete list of the charges and basis for them. The employee is then permitted a ten (10) day answering period. Management then has the option of issuing the final adverse action, but it must mirror the notice of proposed adverse action.

In other words, the employee is *already* supposed to know what the evidence against them is before the hearing on the merits begins. A CSC hearing on the merits does not have a Perry Mason surprise witness. There is no Law and Order twist. There is no Matlock moment. The charges and evidence are supposed to be provided for in the notice of proposed adverse action given months before the hearing. It should be provided in discovery prior to the hearing.

Thus, the "danger" that an employee will change their testimony based upon the testimony of preceding management witnesses is illusory. It is meaningless. Management should have all the evidence it needs in the form of documents, physical evidence, witness statements, and so on

before they sign the final notice of adverse action. If management's case is contingent upon their representative's ability to coax self-incriminating statements from the employee at the hearing on the merits, then management did not have enough evidence to issue an adverse action in the first place. Compare to a criminal case where the government bears the highest standard of proof, beyond a reasonable doubt, and cannot rely on receiving any testimony from the defendant at all.

The restriction is true even in civil cases. In *Elgabri v. Lekas*, 964 F.2d 1255, 1259-60 (1st Cir. App. 1992) the First Circuit Court of Appeals upheld a trial court's decision to disallow the plaintiff from calling defense witnesses during their case-in-chief. "Plaintiff did not have an 'unfettered right' to call defendants during his case-in-chief." *Ibid.* The trial court could manage the order of witnesses "to avoid needless consumption of time." *Ibid.*

VI.

IMPLEMENTATION OF THE ONE TESTIMONY RULE

"[N]o principle of administrative law is more firmly established than that of agency control of its own calendar." 73A C.J.S. Public Administrative Law and Procedure § 277 (June 2017 Update). "[T]he agency has broad discretion in its docket management." 32 Fed. Prac. & Proc. Judicial Review § 8233 (1st ed.) (April 2017 Update) citing *Florida Cellular Mobil Communications Corp. v. FCC*, 28 F.2d 191, 198 (1994) certiorari denied 115 S.Ct. 1357, 514 U.S. 1016 (agencies may impose strict procedural rules to cope with an excessive workload). Furthermore, "it has long been settled that an agency may announce new principles that will guide future action in an adjudicative proceeding," without being "subject to the notice and comment procedures" required for non-adjudicatory rules. *R/T 182, LLC v. F.A.A.*, 519 F.3d 307 (2008) citing *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 294, 94 S.Ct. 1757 (1974).

We began using the principle of the employee testifying only once as management's final witness at our hearings in 2015. The time-saving result was immediately apparent. By way of

example, the case of *Eric Santos v. DOC*, 13-AA30T, heard in November/December of 2015, had a similar number of witnesses to the *Castro* case. Yet, instead of twelve (12) nights to resolve the case, the *Santos* case took only five (5).

There did not appear to be any impediment to management successfully bringing a case by implementation of the rule. Examples of cases heard after implementation of the rule in 2015 where the Commission ruled in favor of management following a full hearing on the merits include: *Beth Perez v. DOE*, 14-AA04D (January 7, 2016); *Winnifred Carter v. DOE*, 14-AA07S (March 29, 2016); *Daryl Movida v. PAG*, 16-AA02S (August 4, 2016); *Gabriel T.Q. Cruz v. DOC*, 12-AA14S (July 14, 2016); *Eric S.N. Santos v. DOC*, 12-AA02S (July 14, 2016); *Gerard L. Cabana v. Rev. & Tax*, 09-AA42T (April 28, 2016); *Frank B. Cruz v. GFD*, 16-AA17S (June 22, 2017), and *Joaquin G. Tayama v. PAG*, 16-AA27S (August 10, 2017). Furthermore, since its implementation in 2015, the process had never been challenged by any management until now.

Indeed, the *Cabana*, *supra*, case demonstrated the need for the CSC to be able to control the order of witnesses. In *Cabana*, one of management's witnesses needed a Korean interpreter. The CSC could only secure a translator for one night during a specific window of time. Thus, the CSC directed management to call their witness on that night at that time. It seems absurd to suggest that the CSC does not have the authority to control its docket.

VII.

BURDEN OF PROOF

In "any adverse action appeal, the burden of proof shall be upon the government to show clearly and convincingly that the action of the Branch, department, agency, or instrumentality was correct." 4 G.C.A. § 4407(a). Clear and convincing evidence "must be of extraordinary persuasiveness." *Guam Greyhound, Inc. v. Brizill*, 2008 Guam ¶ 41. Indeed, "clear and convincing evidence means testimony that is so clear, direct, weighty, and convincing as to enable

the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue." *Ibid.* Thus, § 4407(a) sets a very high hurdle for the government in its burden of proof.

"There are two distinct elements of the burden of proof – the burden of production and the burden of persuasion." *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 287 (3d Cir. 2006) citing *Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986) ("The 'burden' in a civil case involves not one but two elements: the burden of going forward with proof (the burden of 'production') and the burden of persuading the trier of fact (the burden of 'proof').") The burden of production is "sometimes referred to as the 'burden of going forward.'" John P. McCahey, "The Burdens of Persuasion and Production" (The Journal of the Trial Evidence Committee Section of Litigation, American Bar Association Vol.16 No.3) at p. 8. *See also, Guam Greyhound v. Brizzil*, 2008 Guam ¶ 41 ("the burden of proof, of going forward with the evidence"). "The two burdens are intertwined; for one thing, the burden of persuasion generally determines who has the burden of production." Richard A. Posner, "An Economic Approach to the Law of Evidence" (John M. Olin Program in Law and Economics Working Paper No. 66, 1999) at p. 32. Thus, the government had the burden not only of persuading the Commissioners, but actually 'going forward' with their case.

"Of course, actual testimony is a major source of evidence. Generally, counsel's opportunity to question a witness and the decisionmaker's opportunity to view the demeanor of a witness are considered crucial to a fair hearing." 32 Fed. Prac. & Proc. Judicial Review of Administrative Action § 8236 (1st ed. April 2017 Update). "[O]ral argument is of much aid to any judicial or quasi-judicial body in reaching a proper conclusion." *McCoy v. Easley Cotton Mills*, 218 S.C. 350, 357 (1950). "Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

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Management refused to put forth any witnesses, even though they were given the opportunity. The opening statements made by counsel are not evidence. *Sinlao v. Sinlao*, 2005 Guam 24. Thus, we cannot find by clear and convincing evidence that the action of management was correct. Management stated: "literally this case comes down to his word versus the officers' word," but in a case where credibility and veracity are at issue, gave no direct testimony. Even if the documents were considered, in light of the absence of testimony and the opportunity to view the demeanor of management witnesses, clear and convincing evidence was not presented.

The documents could not be considered, since all proffered documents are hearsay. "Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding. . . ." 5 G.C.A. § 9226. Written statements, even affidavits under penalty of perjury, not in compliance with the notice requirement of 5 G.C.A. § 9227 are "given only the same effect as other hearsay evidence." Even if *arguendo* it was ceded that the documents were entered into evidence in spite of the lack of reference to them during any presentation by counsel in the case-in-chief or closing arguments, they are all hearsay evidence.

Yet, the fact there was no presentation of evidence and no testimony attempting to introduce or authenticate the documents means they cannot be considered at all. "[A]lthough a hearing may be conducted with a degree of informality, the essential due process elements of a trial must be observed." *Matter of Biondolillo v. Lang*, 57 A.D.2d 762 (N.Y. App. Div. 1977). "Ordinarily documentary evidence enters a formal adjudicative record in much the same way as a trial." 32 Fed. Prac. & Proc. Presentation § 8236 n. 19 (1st ed.) (April 2017 Update) (citing *People of the State of Illinois v. U.S.*, C.A.7th, 1981, 666 F.2d 1066, 1082-1083). While an administrative hearing may have a "somewhat lower" standard for authenticating documents, it "does not completely obviate the necessity of proving by competent evidence that the real evidence is what it purports to be. . . absent any such proof, the evidence to be admitted would be irrelevant or

immaterial and hence should be excluded from the proceeding." *Woolsey v. National Transportation Safety Board*, 993 F.2d 516, 519 (5th Cir. 1993); *see also Gallagher v. National Transportation Safety Bd.*, 953 F.2d 1214, 1218.

Even if the documents were somehow to be considered, there was *no* copy of the video submitted into evidence, and no request for judicial notice made by Management. "The right to a fair hearing is destroyed if an agency bases its findings on matters not introduced into evidence." 73A C.J.S. Public Administration Law and Procedure § 313 n. 17 (citing *Board of Dental Examiners v. King*, 364 Do. 2d 319 (Ala. Civ. App. 1978)). Further, without a presentation by Management the burden of going forward is suddenly thrust upon the Commissioners to sort through the evidence and surmise what Management intended. Commissioners are not required to read documents outside of the presentation of evidence by a party. A party cannot submit the complete works of Marcel Proust and anticipate the CSC will read through them in their entirety without some presentation and direction by the party. Parties need to make their own case, not shovel random documents with an expectation that the CSC will do it for them. If they do, the CSC can "decline to sort through them," since they "are not like pigs hunting for truffles buried in briefs" and other documents. *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

VIII.

FAILURE TO PROSECUTE

"No rule of law *requires* a plaintiff to testify (or give a deposition) in his own suit, but failure to do so may justify termination on procedural grounds without reaching the merits. Just as a court may dismiss suits for failure to cooperate, so administrative bodies may dismiss [cases] for lack of cooperation." *Ford v. Johnson*, 362 F.3d 395, 397 (7th Cir. 2004) (citations omitted) (emphasis in original). Here, since the government bears the burden of proof, it is upon them to

cooperate with the CSC in following the procedures. The Guam Rules of Civil Procedure Rule 41(b) provides for dismissal of a case "[f]or failure of the plaintiff to prosecute or comply with these rules or any order of court." The Supreme Court of Guam adopted a five factor test from the Ninth Circuit to consider when deciding whether dismissal is appropriate: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *United Pac. Islanders' Corp. v. Cyfred, Ltd.*, 2017 Guam 6 ¶ 20.

Since Management refused to cooperate with the CSC's procedures, the votes against the Management are somewhat akin to dismissal for failure to cooperate. In a suit where the court dismissed a case for failure of the plaintiff to file a witness list, the court used the following analysis:

> With respect to the first factor, the Ninth Circuit has recognized that "the public's interest in expeditious resolution of litigation always favor's dismissal." The present situation is no different, and the first factor strongly favors dismissal. The second factor also strongly favors dismissal: the court is faced with the prospect of devoting considerable judicial resourced to a trial in which the plaintiff has no witnesses. Dismissal would also eliminate the risk of prejudice to defendants because defendants would no longer be required to attend a trial in which plaintiff calls no witnesses. The third factor therefore strongly favors dismissal. It is unclear how the fourth factor could ever weigh in favor of dismissal, however, here, the weight of the public policy in favor of resolving disputes on their merits is severely undermined by plaintiff's failure to file a witness list. Finally, while less drastic alternatives are available, the court concludes that they would be futile. *Conner v. Griego*, 453 Fed. Appx. 733, 2011 U.S. App. LEXIS 20858 (9th Cir. Ariz., Oct. 13, 2011).

See also Lam v. Valenzuela, 2015 U.S. Dist. LEXIS 82862 (C.D. Cal., June 23, 2015). Here, there is no less drastic sanction available. Management, who bears the burden of proof, refused to put on any witnesses, authenticated no documents, showed no video, and made no closing argument

apart from "I was denied due process." GPD put all their eggs in one basket and made this case solely about the issue of whether Employee can be called first or not. At the June 22, 2017, HoM, Management insisted: "you can just go ahead and vote and do whatever you're going to do. We are going to proceed to court." We see little else that can be done here.

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IX.

CONCLUSION

By a vote of 3 to 1, CSC ruled that Management did not meet its burden of proof to show clearly and convincingly that the action of the department was correct. Indeed, Management did not put forth any evidence to prove its case. In light of this decision, the February 7, 2017, adverse action is void and shall be expunged from Employee's files. Management is further ordered to make Employee whole for all losses and damages stemming from the demotion, including all loss of wages, employment benefits, and costs associated with his appeal to the Civil Service Commission, including reasonable attorney fees.

SO ADJUDGED THIS 15th day of August 2017.

EDITH PANGELINAN
Chairperson

LOURDES HONGYEE
Vice-Chairperson

Not Present
PRISCILLA T. TUNCAP
Commissioner

JOHN SMITH
Commissioner

CATHERINE GAYLE
Commissioner

MICHAEL G. TOPASNA
Commissioner