GFT, AFT Local 1581
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**Sanjay Sharma**, President
**Corazon Mucho**, Secretary
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**James Lujan**, Treasurer

November 9, 2018

Vice Speaker Therese M. Terlaje
34GL-18-2554
NOV 13 2018
Time: 15:20
Received by:

Honorable Therese M. Terlaje, Speaker and
All Senators of the 34th Guam Legislature
Guam Congress Building
163 Chalan Santo Papa
Hagatna, Guam 96910

**Re: Request for Legislation clarifying that ALL decisions of the Civil Service Commission shall be subject to Judicial Review.**

Dear Senators,

As you know, the Guam Federation of Teachers represents public employees in the grievances and disciplinary matters before the Guam Civil Service Commission. From time to time a decision of the Commission needs to be reviewed by the courts for conformance with law.

Appealing CSC decisions to the courts has been met with mixed results. For example, in 2009 Pro-Tem Judge Robert Klitzkie's issued his decision asserting that the courts lack jurisdiction over CSC decisions for grievances. Since then, many grievances have indeed been appealed and heard by the courts while others have been denied for lack of jurisdiction. Unfortunately, again today we are faced with an action by the Attorney General of Guam acting on behalf of the Department of Corrections specifically designed to deny Public employees and the Government of Guam any access to the courts on the grounds that it lacks jurisdiction to hear grievance appeals.

The Attorney General, acting on behalf of DOC clearly states at item C. in the motion attached herewith:

> *"NO Judicial Review of Grievance Matters is Permitted Under 4 GCA 4403 and CSC's grievance Rules. DOC contends that there is no basis for judicial review of CSC's Decision and Judgements regarding Petitioner's Step 5 grievance complaints."*

Interestingly, classified employees in the Judicial Branch have an expressed right of appeal to the courts. PL27-031:16 that provides JOG employees have a *right to appeal* a grievance matter from the Judicial Council to the Superior Court. Consistent with 7 GCA 5102(f), in Dec. 2003 the JOG adopted rules for the hearing of appeals of adverse actions, EEO matters, **and grievances** within the JOG. (The JOG's rules are attached.)

> *"Judicial Review. The decision of the Judicial Council Hearing Officer shall be final but subject to judicial review. In order to seek judicial review of a Judicial Council Hearing Officer decision, the Appellant shall file a petition for judicial review in the Superior Court within thirty (30) calendar days of the decision."*

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Affected public employees and their representatives are frustrated with this inconsistency and the lack of equity/fairness for some government of Guam classified employees to have greater rights than other classified employees -- such as a right to appeal a grievance matter to the court. The DOC's motion argues for exactly that, as JOG employees have a right to seek judicial review after losing a grievance at the Judicial Council but (according to DOC's argument) Executive Branch employees cannot seek judicial review after losing a grievance at the CSC. This cannot be and yet it occurs from time to time in a very disparate manner and fashion. We now seek a resolution with finality.

This is to request that the Senators of the 34th Guam Legislature introduce and support legislation into law that will ensure that every decision of the Guam Civil Service Commission shall be subject to judicial review.

Thank you for your time and attention to this very important matter. I am available to meet upon request at rkoss@gftunion.com or call 735-4390. Thank you.

ROBERT E. KOSS

4:15pm
OCT 30 2018

FILED
SUPERIOR COURT
OF GUAM
2018 OCT 30 PM 3:37
CLERK OF COURT
By:

**Office of the Attorney General**
**Elizabeth Barrett-Anderson**
Attorney General of Guam
**Civil Division**
590 S. Marine Corps Drive
Suite 706, ITC Building
Tamuning, Guam 96913 • USA
(671) 475-3324 • (671) 472-2493 (Fax)
www.guamag.org

**Attorneys for the Government of Guam**

**IN THE SUPERIOR COURT OF GUAM**
**HAGÅTÑA, GUAM**

| | |
|---|---|
| JUANITA AGUON,<br><br>Petitioner,<br><br>vs.<br><br>CIVIL SERVICE COMMISSION,<br><br>Respondent.<br><br>And<br><br>DEPARTMENT OF CORRECTIONS,<br><br>Real Party in Interest. | Special Proceeding Case No: SP0132-18<br><br>Related CSC Case No: 17-GRE25<br><br>**MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES** |

COMES NOW, Real Party in Interest Department of Corrections ("DOC"), by and through counsel, the Office of the Attorney General, who respectfully moves this court for an order dismissing this special proceeding in its entirety for lack of subject matter jurisdiction.



COPY

Doc. No. 34GL-18-2554.

## BACKGROUND

In her Verified Petition for Judicial Review ("Verified Petition"), Petitioner admits she initiated a grievance with DOC pertaining to her re-employment salary on September 10, 2017. Verified Pet., at ¶ 14. Petitioner pursued a Step 5 grievance complaint appeal on November 16, 2017, before the Civil Service Commission ("CSC"), which was assigned CSC Case Number 17-GRE25. Verified Pet., at ¶ 15.

CSC issued a Decision and Judgment regarding Petitioner's Step 5 grievance appeal on July 3, 2018. CSC granted DOC's motion to dismiss, with prejudice, for lack of jurisdiction. Verified Pet., at ¶ 20, Exh. A. On July 31, 2018, CSC denied Petitioner's motion for reconsideration. Verified Pet., at ¶¶ 23-24.

At the status hearing before this court on October 4, 2018, DOC requested to file a motion to dismiss this special proceeding for lack of subject matter jurisdiction. This Court set the filing deadline for the motion for November 1, 2018.

Judicial notice is requested of the complete record to be filed by CSC as discussed at the status hearing on October 4, 2018. Judicial notice is also requested of all legal citations and authority referenced herein, including, but not limited to, 4 GCA §§ 4106 (a)(2)(M), DOA Personnel Rules and Regulations (DOA PR&R) Chapter 12 Grievance Rules, 4 GCA § 4403 (b)-(c), § 4406, § 4406.1, 7 GCA § 3105, 7 GCA § 4101, CSC's Adverse Action Rules of Procedure, CSC's Grievance Rules and Civil Rule 10.1.

## FACTS

In her Verified Petition, Petitioner claims she is owed monies from DOC relating to her employment with DOC on or about March 28, 2017, as a Detention Facility Guard. Petitioner was hired at pay grade and step HL04-01, for which DOA issued a Notice of Personnel Action



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on April 3, 2017. Petitioner claims she should be paid at the rate of HL04-13, despite signing a waiver and despite her acceptance of an offer of employment at HL04-01 on or about January 18, 2017. Verified Pet., at ¶ 9-11.

On or about July 12, 2017, Petitioner alleges she communicated in writing requesting to rescind the prior waiver she signed on January 18, 2017. Verified Pet., at ¶¶ 13-14. Petitioner does not refer to this writing as a grievance in her Verified Petition.

Petitioner did not initiate a grievance with DOC pertaining to her re-employment salary until September 10, 2017. Verified Pet., at ¶ 14. The Verified Petition does not mention any written complaint Petitioner directed to DOA or CSC as to her pay grade and step indicated in her Notice of Personnel Action dated April 3, 2017, between April 3, 2017, and the date she filed her Verified Petition on August 1, 2018. Petitioner references only a Step 5 grievance complaint appeal she filed with CSC under Chapter 12 of the Department of Administration Personnel Rules and Regulations after she alleges she completed steps 1-4. Verified Pet., at ¶ 15.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR THIS MATTER

#### A. SUBJECT MATTER JURISDICTION CAN BE RAISED AT ANY TIME

A "court's lack of subject matter jurisdiction over an action may . . . be raised at any time, including after trial has concluded and for the first time on appeal, and may not be waived or excused by the parties." *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5 ¶ 19 (citing *Taitano v. Lujan*, 2005 Guam 26 ¶ 21). Guam courts have a duty to police their jurisdiction and power. *See People v. Gomia*, 2017 Guam 13 ¶ 8.

Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel. *Duenas v. George and Matilda Kallingal, P.C.*, 2013 Guam 28 ¶ 19 (citing *In Re*



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*Marriage of Ben-Yehoshua*, 154 Cal. Rpt. 80, 83 (Cal. Ct. App. 1979)). Subject matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt. *Ashcroft v. Iqbal*, 556 U.S. 662, 671; *see also Gonzales v. Thaler*, 565 U.S. 134, 141 (2012); *see also* 6 C.J.S. Appearance § 45 (subject matter jurisdiction cannot be waived).

DOC contends this court lacks subject matter jurisdiction to hear this matter for many reasons set forth herein, most of which are being raised now for the first time as DOC did not have the benefit of counsel in the proceedings before CSC. DOC respectfully requests the court dismiss this matter with prejudice.

**B. PETITIONER FAILED TO COMPLY WITH CIVIL RULE 10.1**

Civil Rule ("CVR") 10.1 states, "Each complaint, petition, counter-claim and cross-claim shall state in a separate paragraph entitled 'jurisdiction' *the statutory or other basis for jurisdiction and the facts supporting jurisdiction.*" CVR 10.1 (emphasis added).

Petitioner incorrectly asserts this court has jurisdiction under 7 GCA §§ 3105 and 4101. Verified Pet., at ¶ 1. Section § 3105 states, "The Superior Court shall have original jurisdiction over all causes of action, and, except for those causes exclusively vested in the Supreme Court, *may have appellate jurisdiction as may be provided by the Legislature.*" 7 GCA § 3105 (emphasis added). Petitioner fails to cite to a statute that allows for this matter to be heard by this court under its discretionary appellate jurisdiction.

Petitioner fails to set forth the required facts supporting jurisdiction in her Verified Petition as required by CVR 10.1. Petitioner further fails to comply with CVR 10.1 by providing a valid statutory basis for this Court's discretionary exercise of its appellate jurisdiction over this matter. Neither 7 GCA § 3105 nor 7 GCA § 4101 provides a basis for this court's discretionary appellate jurisdiction. Instead, these statutes reference this court's original jurisdiction, which



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does not apply to this special proceeding where Petitioner has requested that this court review CSC's Decision and Judgment dismissing employee's grievance appeal on jurisdictional grounds, determine that CSC's decision was incorrect and remand the matter back to CSC, and award attorney's fees under 4 GCA § 4406.1.

### C. NO JUDICIAL REVIEW OF GRIEVANCE MATTERS IS PERMITTED UNDER 4 GCA § 4403 (c) AND CSC'S GRIEVANCE RULES

DOC contends that there is no basis for judicial review of CSC's Decision and Judgments regarding Petitioner's Step 5 grievance complaint appeal before the CSC, because there is no statute or rule authorizing judicial review by the Superior Court after a matter has proceeded to Step 5 before CSC under Chapter 12 of the DOA PR&R.

Unlike 4 GCA § 4406 (d) and CSC Rule of Adverse Action Procedure 11.7.8, which authorize judicial review of decisions and judgments issued by the CSC pertaining to adverse action appeals, there is no similar statute or rule pertaining to grievance complaint appeals before CSC. Neither 4 GCA § 4403 (c) (as repealed and reenacted by P.L. 30-112:2 (March 12, 2010)) nor CSC's Grievance Rules refer to a right of judicial review.

### D. THIS COURT LACKS JURISDICTION BECAUSE CSC HAD NO JURISDICTION TO HEAR THE MATTER

The subject matter jurisdiction of an administrative agency may not be created through consent or waiver. *See Brunsvold v. State*, 864 P.2d 34, 36 (Wyo. 1993); *Gov't of the Virgin Islands v. Trafton*, 14 V.I. 192, 206 (1977). As will be set forth more fully below, CSC did not have jurisdiction over Petitioner's claims, and she failed to meet her burden to show CSC had jurisdiction. This Court lacks subject matter jurisdiction to review an administrative decision where CSC determined it had no subject matter jurisdiction.



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Moreover, Petitioner has not met her burden in establishing this Court has appellate jurisdiction to review CSC's Decision and Judgment in her grievance appeal.

### E. SOVEREIGN IMMUNITY ACTS AS BAR TO SUPERIOR COURT'S SUBJECT MATTER JURISDICTION

In order for someone to sue the Government of Guam or any governmental agency, sovereign immunity must be waived. Unless a sovereign specifically waives immunity to suit by duly enacted law, it may not be sued. *See generally Guam Econ. Dev. Auth. and Guam Visitors Bureau v. Island Equip. Co.*, 1998 Guam 7 ¶ 6 ("There is no doubt that the doctrine of sovereign immunity applies to Guam.") (citing *Marx v. Gov't of Guam*, 866 F.2d 294, 298, 301 (9th Cir. 1989). Without such a waiver, the courts lack jurisdiction over the claim. *See Pacific Drilling, Inc. v. Marianas Drilling, Inc.*, DCA Civ. No. 85-0016A, 1985 WL 56585 (D. Guam App. Div. Sep. 27, 1985). The Government of Guam's sovereign immunity may only be waived by statute enacted by the Legislature. *See* 1 GCA § 405 (1995); *Guam Econ. Dev. Auth. v. Island Equip.*, 1998 Guam 7 ¶ 6 (citing *Marx*, 866 F.2d at 298).

DOC contends this court also lacks subject matter jurisdiction because Petitioner has not established a statutory waiver of the Government of Guam's sovereign immunity such that an appeal of her matter involving classification and compensation before CSC can now be heard by this court by way of a Petition for Judicial Review. Absent a specific statutory waiver applicable to this matter, the Superior Court lacks subject matter jurisdiction.

## II. CSC WAS CORRECT IN DISMISSING EMPLOYEE'S STEP 5 APPEAL ON THE BASIS THAT CSC LACKED SUBJECT MATTER JURISDICTION

Employee was represented by GFT at the underlying hearings before CSC. DOC, on the other hand, was not represented by counsel or a lay representative. On appeal to this Court,



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DOC's counsel asserts additional bases for this Court to dismiss the Verified Petition for Judicial Review with prejudice for lack of subject matter jurisdiction.

A review of the record before CSC and this court will establish that CSC lacked subject matter jurisdiction to hear Petitioner's complaint for compensation on several bases not raised by the parties before CSC.

**A. PETITIONER'S COMPLAINT WAS NOT A GRIEVANCE UNDER CHAPTER 12 OF THE DEPARTMENT OF ADMINISTRATION'S PERSONNEL RULES AND REGULATIONS (DOA PR&R)**

Title 4 GCA §§ 4105 and 4106 (a)(2)(M), both of which refer to personnel rules, provide the statutory basis for personnel rules to be issued which reflect a uniform system of handling all grievances, except where a different grievance system has been negotiated between a recognized employee organization and the appropriate management officials.

CSC has adopted its own grievance rules for grievance complaints pursuant to its authority under 4 GCA § 4403(c). CSC's Grievance Rule G6 states that a grievance is defined as outlined in the applicable Rules and Regulations.

DOA PR&R Rule 1.000 (A) states, "These rules shall apply to all employees occupying classified positions employed by the departments and agencies under the jurisdiction of the Department of Administration." DOA PR&R, Rule 1.000 (A). The DOA PR&R apply to Petitioner as an employee of the DOC, a line agency of the Government of Guam under the jurisdiction of DOA. Petitioner admits DOA issued her Notice of Personnel Action. Verified Pet., at ¶ 11.

Pursuant to DOA PR&R, Rule 12.100, a grievance is any question or complaint filed by a permanent employee alleging that there has been a misinterpretation, misapplication or violation of a personnel statute, rule, regulation, or written policy which *directly affects the employee in the*



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*performance of his official duties*; or that he has received prejudicial, unfair, arbitrary, capricious treatment in his working conditions, or work relationships. DOA PR&R, Rule 12.100.

Grievances may include, but are not limited to, such matters as employee-supervisor relationships, duty assignments *not related to job classification*, shift and job location assignments, hours worked, working facilities and conditions, policies for granting leave and other related matters. DOA PR&R Rule 12.200. However, appeals from classification determinations are *not covered by the grievance procedures set forth in DOA's personnel rules and regulations*. DOA PR&R Rule 12.301(E).

Petitioner has failed to allege or prove either condition outlined in DOA PR&R 12.100 such that her complaint was a "grievance" under DOA's PR&R. Petitioner's employment with DOC at an agreed rate and step did not affect employee in the performance of her official duties. She continues to perform her job duties without hindrance. Moreover, she does not allege that she received prejudicial, unfair, arbitrary, or capricious treatment in her working conditions or relationships as a result of her employment on the terms to which she agreed. She has admitted to signing a document which set forth the terms of her employment prior to commencing her employment with DOC. *See* Verified Pet., at ¶ 9.

Since there were no such assertions by Petitioner on either of the above prongs in her appeal to CSC to establish that her matter was a proper grievance complaint appeal before CSC under Chapter 12 of the DOA PR&R, and because Petitioner has not indicated in her Verified Petition a right to file an appeal to CSC under the DOA PR&R, the matter was not a proper grievance appeal before CSC.

Petitioner's claim is one of classification or compensation which is specifically excluded from the grievance procedures under DOA PR&R, Rule 12.301 (E). Petitioner had no Step 5



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right of appeal to the CSC under the personnel rules that are applicable to her, and thus CSC lacked subject matter jurisdiction over Petitioner's matter.

### B. PETITIONER'S COMPLAINT WAS NOT AN ADVERSE ACTION ENTITLED TO JUDICIAL REVIEW

An adverse action is a dismissal, demotion or suspension involving a permanent classified employee. 4 GCA § 4406. The Verified Petition refers only to Petitioner's initiating a grievance with DOC on September 10, 2017, and her subsequent filing of a Step 5 grievance complaint appeal with CSC after she pursued her grievance complaint against DOC at Steps 1-4. Verified Pet., at ¶ 15. Petitioner does not indicate Management took adverse action against her or that she filed an adverse action appeal with CSC at any time regarding her employment with DOC.

Unlike appeals of grievance complaints before CSC, parties have the right to judicial review of CSC decisions and judgment involving adverse action appeals under 4 GCA § 4406. Since Petitioner's claim is not considered an adverse action appeal, there is no statutory right to judicial review.

### C. DISTINCTION BETWEEN ADVERSE ACTIONS AND GRIEVANCES

The distinction between adverse actions and grievances is important because classified employees who have suffered an adverse action are entitled to appeal an adverse action to the Commission, and the decision of the Commission shall be final, subject to judicial review. 4 GCA § 4406.

In the instant case, Petitioner's claim relates to matters of classification and issues of pay. They are not adverse actions and they are explicitly excluded from the grievance procedures set forth in Chapter 12 of DOA's personnel rules and regulations. Title 4 GCA § 4403 (b) and (c) provide:



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The Commission has the following duties, powers and responsibilities:

> (b) It *shall* hear appeals from the adverse actions taken to suspend, demote or dismiss an employee from the classified service *if* such right of appeal to the Commission is established in the personnel rules governing the employee . . . .
>
> (c) To hear appeals of furlough, lay-offs, *grievance complaints*, and Equal Employment Opportunity complaints of an employee from the classified service *if* such right of appeal to the Commission is established in the personnel rules governing the employee . . . .

4 GCA § 4403(b) and (c) (emphasis added).

From the above provisions, it is evident that the *personnel rules governing an employee determine whether the Commission has jurisdiction over an adverse action or grievance complaint* regarding that employee.

As stated above, Petitioner's claim is not an adverse action, and it is explicitly excluded from the grievance procedures set forth in Chapter 12 of DOA's personnel rules and regulations. Therefore, the Commission does not have jurisdiction over Petitioner's claims *because the right of appeal was not established in the personnel rules governing the employee.* For that reason, DOC requests this court dismiss Petitioner's Verified Petition for Judicial Review with prejudice.

### D. PETITIONER'S COMPLAINT WAS UNTIMELY UNDER CHAPTER 12 OF THE DOA PR&R SUCH THAT CSC LACKED SUBJECT MATTER JURISDICTION

Under DOA PR&R 12.505(B)(1), an employee may present a grievance to his supervisor concerning a continuing practice or condition at any time. Grievances concerning a *particular act or occurrence*, must be presented within 15 calendar days of that action or occurrence.

Petitioner admits she communicated in writing with DOC's Director on July 12, 2017, requesting to rescind her previous written waiver regarding her agreement to an employment salary at HL04-01. Verified Pet., at ¶ 13. Petitioner does not label this letter as a grievance. Instead, she indicates she initiated a grievance with DOC on September 10, 2017, months after



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she started employment on March 28, 2017, and months after the Notice of Personnel Action was issued on April 3, 2017.

There is no evidence that Petitioner requested review by DOA of the Notice of Personnel Action issued by DOA or that she requested review by CSC of her personnel action at any time prior to her filing a Step 5 grievance complaint appeal against DOC with CSC on November 16, 2017. Verified Pet., at ¶ 10-11, 14-15.

CSC Grievance Rule G15.4 authorizes motions to dismiss. Additionally, Grievance Rule 27(b) allows the CSC to dismiss an employee's grievance appeal under circumstances that warrant dismissal.

DOC filed a Motion to Dismiss the underlying CSC grievance appeal requesting the CSC dismiss the grievance on the grounds that CSC lacked subject matter jurisdiction. *See* Verified Pet., Exh. B. CSC properly dismissed the grievance appeal for lack of jurisdiction, although the basis asserted was the Employee's untimely grievance filing pursuant to DOA PR&R 12.505, Step 1, Part B, Time Limit, paragraph 1.

CSC based its decision dismissing employee's grievance appeal for lack of jurisdiction on the documents filed with CSC and testimony of Management and Employee's lay representative and held by a vote of 4-0 that Management met its burden of proof relating to its Motion to Dismiss for Lack of Jurisdiction. Verified Pet., Exh. A. Although DOC now contends this matter was not a grievance as defined under Chapter 12 of the DOA PR&R, because it involves matters of classification or pay which are excluded under DOA's Chapter 12 grievance rules, DOC requests that this court dismiss this appeal because DOC contends this court lacks jurisdiction to hear this matter for the reasons set forth herein. CSC correctly determined it lacked jurisdiction.

The record shows there was more than one ground on which CSC could have determined it lacked jurisdiction.

Assuming arguendo, however, that this matter was considered a proper grievance complaint under the DOA PR&R, Petitioner's late filing at Steps 1-4 terminated her grievance under DOA PR&R 12.406 and 12.505(B)(1) before she filed her Step 5 grievance complaint appeal with CSC on November 16, 2017, such that she had no right under the personnel rules to appeal her complaint to the CSC. On this basis, CSC lacked subject matter jurisdiction to hear her complaint.

## III. PETITIONER HAS NO RIGHT TO JUDICIAL REVIEW OF CSC'S DECISION AND JUDGMENT

DOC contends that in addition to the fact that CSC lacked subject matter jurisdiction to hear Petitioner's complaints, this Court further lacks subject matter jurisdiction to hear this matter because there is no statutory right to judicial review. Petitioner fails to meet her required burden in establishing this court's jurisdiction to review the underlying CSC decision.

Even if Petitioner's request for compensation or pay was a proper grievance under the DOA PR&R, *there is no right of judicial review of CSC's grievance decisions.* Neither 4 GCA § 4403 (c) nor CSC's Grievance Rules establish a right to judicial review of CSC's grievance decision. On the other hand, 4 GCA § 4406 (d) and CSC's Rules of Adverse Action Procedures Rule 11.7.8 authorize judicial review over CSC decisions involving adverse action appeals.

## IV. ATTORNEY'S FEES ARE NOT AUTHORIZED IN GRIEVANCE APPEALS BEFORE CSC

Because grievances were not intended to involve complex issues or issues involving compensation or classification, there is no statutory right to attorney's fees in grievance appeals before CSC. This is another reason to support DOC's position that issues relating to



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compensation are not authorized to be heard by CSC as a Step 5 grievance appeal under 4 GCA § 4403 (c) pursuant to Chapter 12 of the DOA PR&R.

Since a grievance would typically involve simple matters such shift locations, assignments, or employee-supervisor relationships, which would not typically require the services of an attorney, there is no right to attorney's fees in grievance matters before the CSC. On the contrary, for adverse action appeals involving an employee's suspension, demotion or termination, there is a statutory provision authorizing attorney's fees under 4 GCA § 4406.1, if the statutory conditions are met.

In this special proceeding, Petitioner seeks attorney's fees under 4 GCA § 4406.1, yet this statute applies only to adverse actions appeals before the CSC. It does not apply to grievance appeals before CSC, so no attorney's fees can be awarded under this provision.

## V. CONCLUSION

In light of the foregoing, this matter should be dismissed for lack of subject matter Jurisdiction.

Dated: 10/29/18

OFFICE OF THE ATTORNEY GENERAL
Elizabeth Barrett-Anderson, Attorney General

By: _____
Donna E. Lawrence, Esq.
Assistant Attorney General



Doc. No. 34GL-18-2554.

4:15 pm
OCT 30 2018

FILED
SUPERIOR COURT
OF GUAM
2018 OCT 30 PM 3:37
CLERK OF COURT
By:

**Office of the Attorney General**
**Elizabeth Barrett-Anderson**
Attorney General of Guam
**Civil Litigation Division**
590 S. Marine Corps Drive
Tamuning, Guam 96913 • USA
(671) 475-3324 • (671) 472-2493 (Fax)
www.guamag.org

**Attorneys for the Government of Guam**

# IN THE SUPERIOR COURT OF GUAM
# HAGÅTÑA, GUAM

Juanita Aguon,

Petitioner(s)

Case No. **SP0132-18**

Civil Service Commission,

Respondent(s)

and

Department of Corrections,

Real Party in Interest

**CVR 7.1 FORM 1**

And any related claims and parties.

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## NOTICE OF MOTION and MOTION

Please take notice that The Government of Guam, Department of Corrections (Movant(s)) hereby move(s) the court for an Order granting the following relief:

Dismissal for Lack of Subject Matter Jurisdiction

Relief Sought



COPY

| | |
|---|---|
| Oral Argument is requested: | Yes **XX** No Unknown at this time |

## BRIEFING SCHEDULE

Pursuant to CVR 7.1(b) and (d)(1)-(3), or order of this court, or stipulation filed with the court, the respective briefs of the parties on the motion must be filed and served as follows:

| | | |
|---|---|---|
| Opening brief due: | October 30, 2018 | Normally the date of filing of this Notice |
| Opposition brief due: | November 27, 2018 | Normally 28 days after above date |
| Reply brief (if any) due: | December 11, 2018 | Normally 42 days from the filing of the motion |

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he or she has caused, or within one business day of filing, shall cause this notice, together with any and all accompanying documents and supporting memoranda relative to the subject motion, to be served upon all parties who have appeared herein, through counsel of record, pursuant to Guam Rule Civil Procedure Rule 5.

**RESPECTFULLY SUBMITTED** this 30th day of October, 2018.

| | | |
|---|---|---|
| Government of Guam | Movant(s) | |
| Donna Lawrence | Attorney | |



Doc. No. 34GL-18-2554.

# JUDICIAL COUNCIL OF GUAM

# HEARING OFFICER PROCEDURES

# FOR THE HEARING OF APPEALS OF

# ADVERSE ACTIONS, GRIEVANCES AND EEO MATTERS

(Adopted December 18, 2003; revised November 21, 2016)



Doc. No. 34GL-18-2554.

## JUDICIAL COUNCIL OF GUAM

## HEARING OFFICER PROCEDURES FOR THE HEARING OF APPEALS OF ADVERSE ACTIONS, GRIEVANCES AND EEO MATTERS

I. Adverse Action Appeals and EEO Appeals

A. Right to Appeal

1. Classified Employees. Any person in the classified service holding a permanent appointment and who is subject to an adverse action by management, except one who is exempted by law from the jurisdiction of the Judicial Council, is entitled to appeal an adverse action to the Judicial Council. A person who has been appointed to a permanent position and who has satisfactorily completed his or her probationary period holds a permanent appointment.
2. Contract Employees. A contract employee occupying a permanent position in the classified service is entitled to appeal an adverse action to the Judicial Council during the term of his or her contract. Non-renewal of the contract is not appealable.
3. Any employee who believes he or she is aggrieved by a decision of an Equal Employment Opportunity ("EEO") investigation is entitled to an appeal to the Judicial Council using these procedures.

B. Contents of an Appeal

An appeal shall be in writing and shall set forth the answer to the charges and the grounds for appeal. An appeal may be amended within fifteen (15) calendar days after filing. A person who is the subject of an adverse action, or who is a Charging Party in an EEO matter who files an appeal on his own behalf or through a representative is the "Appellant."

C. Time Limit for Filing an Appeal

1. An adverse action appeal must be filed with the Judicial Council within twenty (20) calendar days from the effective date of the adverse action.
2. An appeal of an EEO matter must be filed within five (5) days in accordance with the EEO Discrimination Charge Procedure section IV(2).

D. Judicial Council Hearing Officer



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The adverse action or EEO appeal shall be heard, considered, and decided by a Hearing Officer appointed by the Judicial Council.

E. Rights in Pursuit of an Appeal

An Appellant shall:

1. Be assured freedom from restraint, interference, coercion, discrimination, or reprisal.
2. Have the right to be accompanied, represented and advised by a representative and/or legal counsel of their choice.
3. Be assured a reasonable amount of official time to prepare his or her case if he or she is on duty status.

F. Entitlement

An Appellant who files an appeal in accordance with these rules is entitled to a hearing on his or her appeal before the Judicial Council Hearing Officer. Except in the case of an emergency, or death, incapacitation, or absence from the island of the Appellant, the Appellant shall be personally present at the hearing of his or her appeal. The term "emergency" means an occurrence of a serious nature demanding immediate attention. The term "absence from the island" covers off-island emergencies, relocation, situations in which the Appellant was not notified of the hearing date before leaving the island, and situations in which the Appellant was excused by the Judicial Council Hearing Officer for off-island purposes.

G. Place and Time of Hearing

The Judicial Council Hearing Officer shall set the place, date, and time of hearing as expeditiously as possible.

H. Conduct of Hearing

1. The hearing is open to the public.
2. The hearing will be conducted so as to bring out pertinent facts, including the production of certain records.
3. Decisions on the admissibility of testimony or other evidence are made by the Judicial Council Hearing Officer.
4. Testimony is under oath or affirmation.
5. Each party shall have the right to call, examine, or cross-examine witnesses, and introduce exhibits. Either party may be called and examined by the Judicial Council Hearing Officer after examination of the witness has been

completed by both parties; except that questions may be asked during examination to clarify a response by a witness.

6. Rules of evidence shall not be applied. The only grounds for excluding any proffered evidence are that the evidence is irrelevant or unduly repetitious. If any evidence is ruled inadmissible by the presiding officer, the grounds shall be stated for the record.

7. The order of presentation in the hearing shall be as follows:
   a. Opening statement of management (Adverse Action) or Charging Party (EEO).
   b. Opening statement of opposing party.
   c. Presentation by management or Charging Party of evidence in support of the charges.
   d. Presentation by the opposing party of such evidence in defense or rebuttal.
   e. Closing statement of management or Charging Party.
   f. Closing statement of opposing party.
   g. Preliminary motions and issues shall be disposed of prior to the hearing on the merits.

8. Burden of Proof

Management shall have the burden of proof by a preponderance of the evidence in both an Adverse Action appeal and in an EEO Appeal. In cases involving charges which could be a crime, if the person was charged in a criminal action, the Judicial Council Hearing Officer shall determine the matter based upon substantial evidence.

9. Witnesses

   a. Both parties are entitled to produce witnesses. The Administrator of the Courts, or his designee, shall be in attendance without subpoena. Except, as otherwise provided in Section I(F), the Appellant shall be in attendance without subpoena.
   b. The Judicial Council Hearing Officer may call additional witnesses as he or she may deem necessary and require the production of documents.
   c. The Judicial Council Hearing Officer, upon his or her own initiative, or upon the request of any party, may summon in writing any person to attend a hearing as a witness and, in a proper case, to bring with him or her any book, record or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before the Superior Court, except that if the witness

is a government employee, no witness fee shall be given. The subpoena shall issue in the name of the Judicial Council Hearing Officer, and shall be directed to the person and served in the same manner as subpoenas to appear and testify before the court. If any person summoned to testify shall refuse or neglect to obey said subpoena, upon petition, the court may compel the attendance of such person before the Judicial Council Hearing Officer, or punish said person for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the Superior Court.

d. An employee is considered to be on duty status during the time he is made available as a witness. Such employee is entitled to compensatory time-off if he serves during his normal non-working hours. The Judicial Council Hearing Officer shall furnish the witness, a certificate showing the time devoted to the hearing. "Employee" in this section does not include the parties to the appeal or their representatives.
e. The Judicial Council Hearing Officer shall ensure that all witnesses are treated with courtesy and respect while giving testimony at the hearing.
f. The Judicial Council Hearing Officer shall assure that witnesses be free from restraint, interference, coercion, discrimination, or reprisal in presenting testimony.

10. Record of Hearing

a. The hearing shall be audio recorded. The recordings, testimonies and exhibits admitted during the hearing, together with all pleadings and papers filed by the parties, shall constitute the official record.
b. Filming, video taping, or recording of the hearing or other proceedings by any of the parties shall be permitted only upon written request and prior approval by the Judicial Council Hearing Officer, with notice to the other parties in the case.
c. Transcripts of the hearing may be made available upon request and at a cost of one dollar ($1.00) per page. Additional copies may be provided for fifty cents ($0.50) per page. These charges do not apply to the court.

I. Termination of Appeal

The Judicial Council Hearing Officer may terminate an employee's or Charging Party's appeal:

1. At the Appellant's request.
2. When an Appellant fails to furnish required information necessary to proceed with the appeal.
3. When, without reasonable justification or excuse, an Appellant fails to personally appear for the hearing.

J. Death of Appellant

When an appeal has been filed properly before the death of the appellant, the Judicial Council Hearing Officer shall process it to completion and adjudicate it. The Judicial Council Hearing Officer may include in its decision, retroactive compensation and benefits to which the deceased employee would have been entitled to at the time of death.

K. Scope of Hearing

The scope of the appeal hearing shall be limited to:

1. The issues in dispute.
2. A review of compliance with procedural requirements for effecting an adverse action or an EEO Discrimination Charge Procedure.

L. Decision

1. The Judicial Council Hearing Officer shall decide the appeal on the basis of the evidence presented.
2. Except, as provided in Section I(L)(4) below, if management proves the charges against the appellant, the Judicial Council Hearing Officer shall sustain the adverse action or EEO Investigator's report.
3. If management fails to prove the charges, the Judicial Council Hearing Officer shall dismiss the adverse action with prejudice or may remand the EEO Discrimination Charge to the Investigator or EEO Officer.
4. In the case of an adverse action appeal, if management proves the charges, but the Judicial Council Hearing Officer finds that, because of the appellant's past record, the gravity of the offense, or the facts and circumstances of the case, the adverse action be modified, it may modify the adverse action accordingly. The reasons for such modification shall be stated, in sufficient detail, in the decision of the Judicial Council Hearing Officer. Any compensation or benefits due as a result of the modification shall be restored to the appellant.
5. If the Judicial Council Hearing Officer finds that the adverse action or EEO Discrimination Charge was substantially procedurally defective, because it is not in conformity with the applicable rules and regulations for either adverse actions or the EEO Discrimination Charge Procedure, it shall dismiss the

adverse action or reverse the EEO matter, with or without prejudice, as it considers fair and equitable under the facts and circumstances of the case. The Judicial Council Hearing Officer shall be satisfied that procedural requirements have been met before proceeding with the hearing on-the merits.

6. The Judicial Council Hearing Officer shall issue a written decision within thirty (30) calendar days after the hearing is completed and provide copies thereof to the parties and the Judicial Council. If the adverse action or EEO Investigator's Report is sustained, the effective date of the action shall stand as issued by the Administrator of the Courts or his designee.
7. A written decision or ruling from the Judicial Council Hearing Officer shall be dispositive of the issues presented therein. Notwithstanding any other Judicial Council Hearing Officer regulation, or policy, written decisions and rulings mentioned herein shall be issued within thirty (30) calendar days from the conclusion of the deliberation in which a decision or ruling is made, which forms the basis of the final written decision or ruling.
8. In the case of an adverse action appeal, if the adverse action is revoked by the Judicial Council Hearing Officer, all compensation and other benefits which would have accrued to the appellant from the effective date of the decision, shall be restored to the appellant.

M. Compliance

Compliance with any order specified in the decision is required by law. The Administrator of the Courts to whom an order is directed, must report, within ten (10) working days after receipt of the decision, that he has carried the order into effect, or he has taken action to have the decision judicially reviewed.

N. Judicial Review

The decision of the Judicial Council Hearing Officer is final, but subject to judicial review. In order to seek judicial review of a Judicial Council Hearing Officer decision, the Appellant shall file a petition for judicial review in the Superior Court within thirty (30) calendar days of the decision.

O. Amendment and Supplemental Policies

These procedures and guidelines maybe amended by the Judicial Council as the need arises, or may be amended or supplemented by other written appeal policies of the Judicial Council.

II. Grievance Appeals

A. Right to Appeal

An employee who is entitled to file a grievance under the Judiciary's Personnel Rules and Regulations, and who has complied with the grievance procedures therein may appeal the decision of the Administrator of the Courts.

B. Time Limit for Filing an Appeal

The appeal must be filed with the Judicial Council within five (5) working days of receipt of the decision by the Administrator of the Courts.

C. Judicial Council Hearing Officer

The adverse action appeal shall be heard, considered and decided by a Hearing Officer appointed by the Judicial Council.

D. A grievance appeal shall be allowed by the Judicial Council Hearing Officer only if predicated on:

1. A violation of the Personnel Rules and Regulations;
2. The procedural rights of the employee filing the complaint as outlined have been disregarded;
3. The decision of the supervisor, Grievance Committee, or Administrator of the Courts is unjust, inequitable or not in accord with the facts.

E. Appeal and Decision

1. The Judicial Council Hearing Officer shall review the official grievance file and all relevant written representations.
2. The Judicial Council Hearing Officer, in his or her discretion, may afford the parties an opportunity to appear personally and present oral arguments and representations.
3. The Judicial Council Hearing Officer shall normally be expected to issue a written decision within ten (10) working days after receipt of the grievance. Copies of the decision shall be provided to the parties and the Judicial Council.
4. Judicial Review. The decision of the Judicial Council Hearing Officer shall be final but subject to judicial review. In order to seek judicial review of a Judicial Council Hearing Officer decision, the Appellant shall file a petition for judicial review in the Superior Court within thirty (30) calendar days of the decision.