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IN THE SUPERIOR COURT OF GUAM
HAGÁTÑA, GUAM

DEPARTMENT OF PARKS and
RECREATION,

Petitioner,

vs.

CIVIL SERVICE COMMISSION,

Respondent,

LYNDA B. AGUON,

Real Party in Interest.

) **SPECIAL PROCEEDINGS**
) **CASE NO. SP** **SP 0046-20**

) **VERIFIED PETITION FOR WRIT OF**
) **JUDICIAL REVIEW; REQUEST FOR**
) **DECLARATORY JUDGMENT AND**
) **RULINGS INVALIDATING CSC**
) **PRACTICES PURSUANT TO 5 GCA**
) **§ 9303 (c) AND 5 GCA § 9309; REQUEST**
) **FOR STAY OF EXECUTION OF CSC**
) **DECISION AND JUDGMENT**

The Department of Parks and Recreation, by and through the Office of the Attorney General, alleges as follows:

1. The Court has jurisdiction over this Petition for Judicial Review of CSC's Decision and Judgment and other matters set forth herein, pursuant to 7 GCA § 3015, 4 GCA

1 § 4406 and the Civil Service Commission's Adverse Action Rule ("CSC AA R") 11.7.8
2 (effective March 1, 2010). The Court has jurisdiction under 5 GCA § 5309 to issue a
3 Declaratory Judgment.

4 2. Petitioner is the Department of Parks and Recreation ("DPR"), a line agency of the
5 Government of Guam, an unincorporated territory of the United States of America. The current
6 Acting Director of DPR as of this filing is Jesse Garcia. The former Director of DPR on and
7 after January 2019 until this recent appointment was Richard Ybanez.

8 3. Respondent Civil Service Commission ("CSC") is an administrative tribunal
9 organized and operating under the laws of Guam, 4 G.C.A. § 4403, and is charged by law with
10 adjudicating adverse actions taken against Government of Guam employees.

11 4. Real party in interest Lynda B. Aguon ("Ms. Aguon" or "Employee") is a
12 natural person and a resident of Guam who was formerly a classified employee of the
13 Department of Parks and Recreation.

14 5. At all relevant times prior to her termination on June 18, 2019 by Petitioner,
15 Employee held the classified position of Guam Historic Preservation Officer. Employee
16 supervised other employees at the Guam Historic Preservation Division in Agana Heights,
17 Guam.

18
19 ***History/Background of Adverse Action and CSC Appeal***

20 6. On or about June 4, 2019, Employee was personally served with a Notice of
21 Proposed Adverse Action setting forth facts and the charges against her.

22 7. On or about June 18, 2019, the Petitioner took adverse action against Lynda B.
23 Aguon by terminating her employment for cause pursuant to 4 GCA § 4406, 4 GCA § 4106
24 (a)(2)(H), Chapters 3 and 11 of the Department of Administration's Personnel Rules and
25

1 Regulations (“DOA PR&R”) and for violations of Guam law and departmental policies
2 between March 21, 2019 and May 2019, as referenced in the Notices of Proposed and Final
3 Adverse Actions.

4 8. Petitioner timely filed and served the Notice of Proposed and Final Adverse
5 Action in accordance with Guam law, including but not limited to, 4 GCA § 4406.

6 9. Employee was allowed to respond to the Notice of Proposed Adverse Action
7 within ten (10) days and provided a written response to Petitioner. Employee did not request
8 to orally respond to the proposed adverse action. Employee’s written response was considered
9 prior to the decision to terminate her employment.

10 10. At the time of her termination, Employee’s classified job title was Guam
11 Historic Preservation Officer.

12 11. Lynda B. Aguon appealed her termination to the Civil Service Commission on
13 June 20, 2019. At the time of her appeal to CSC, she was represented by the Guam
14 Federation of Teachers (“GFT”) representative Robert Koss.

15
16 ***Request for Judicial Review and Stay of CSC Decision and Judgment February 11, 2020***

17 12. Petitioner requests judicial review of CSC’s Decision and Judgment signed by
18 the Commissioners on February 11, 2020, and served on the parties by CSC on February 12,
19 2020. See Exhibit 1.

20 13. Pending judicial review and the requested declaratory rulings in this case,
21 Petitioner seeks an immediate stay of execution and enforcement of this Decision and
22 Judgment, as CSC failed to set an evidentiary hearing to determine Employee’s damages or
23 reasonable attorney’s fees as of this filing.
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1 23. The official action of the Commission requires four (4) votes pursuant to 4
2 GCA § 4402.

3 24. Three (3) votes were taken on January 14, 2020 regarding the ALJ written
4 decision. The votes taken by the Commissioners related to whether or not they wanted to
5 modify, reject or accept the ALJ decision under 4 GCA § 4405.

6 25. On January 14, 2020, the Commissioners did not vote by four (4) affirmative
7 votes to modify the ALJ decision in whole or in part. See Exhibits 1 and 3.

8 26. On January 14, 2020, the Commissioners did not vote by four (4) affirmative
9 votes to reject the ALJ decision in whole or in part. See Exhibits 1 and 3.

10 27. On January 14, 2020, the Commissioners did not vote by four (4) affirmative
11 votes to accept the ALJ decision in whole or in part. See Exhibits 1 and 3.

12 28. Earlier in the rejection vote, however when Commissioners Rice, Benavente
13 “accepted” or “affirmed” the ALJ decision to terminate Employee, Chairman Calvo did not
14 seek or request Commissioner Tuncap’s vote. Her later vote was to accept the ALJ Decision.
15 Had she been asked, there may have been a 4-0 vote to accept. Unfortunately, despite
16 Petitioner’s counsel’s statement on the record that she had not voted, the Chairman then turned
17 the vote back to a rejection vote. See Exhibit 3.

18 29. Commissioner Tuncap was not given the final opportunity to vote on the
19 rejection by Chairman Calvo, but there were three (3) votes opposing rejection of the ALJ
20 decision.

21 30. The video recording of this case publicly available on the Office of Public
22 Accountability’s (“OPA”) website further shows that after CSC staff Roland Fejerang
23 whispered in the Chairman’s ear, a break was then taken.
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1 31. The discussion between CSC staff and the Chairman was not placed on the
2 record despite the hearing being an open hearing and despite the requirement that deliberations
3 be made in public under CSC AA Rule 11.6 (March 1, 2010).

4 32. These allegations are set forth in the Declaration of Matthew Wolff filed with
5 his transcription of the rulings on January 14, 2020 in support of Petitioner's motions to
6 reconsider and vacate CSC's Judgment, and other requests, timely filed on February 21, 2020
7 pursuant to CSC AA Rule 11.7.7 (March 1, 2010).

8 33. There was no deliberation or discussion by the Commissioners on the record as
9 to the effect of their three (3) prior votes made regarding the ALJ decision at the hearing on
10 January 14, 2020.

11 34. As a consequent of the Commission's votes taken on January 14, 2020, the ALJ
12 decision dated December 31, 2019, stands as the only decision in this case. 4 GCA § 4405.

13 35. The ALJ's decision affirmed Employee's termination. The decision set forth
14 that Management proved the insubordination charges by clear and convincing evidence.
15 Exhibit 2.

16 36. Although the ALJ decision affirmed termination on several counts of
17 insubordination, other counts of insubordination presented to the ALJ were inadvertently
18 mentioned or not referenced in the ALJ decision.

19 37. The record before the ALJ, including the testimony of Employee, and
20 documents admitted by the ALJ, prove the multiple charges set forth in the Notice of Final
21 Adverse Action between March 21, 2019 and May 2019. These facts and the record before the
22 ALJ support Employee's termination despite omission by the ALJ in his written decision to all
23 such facts and charges stated in the Notice of Final Adverse action.
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1 38. The CSC Decision and Judgment incorrectly reflects the oral rulings,
2 deliberations, votes and official action taken by the Commissioners on January 14, 2020. See
3 Exhibits 1-3.

4 39. The conclusion in the written Decision and Judgment that Employee prevailed
5 and is to be reinstated with back pay and reasonable attorney's fees was not made after a
6 specific vote by the Commissioners to that effect on January 14, 2020.

7 40. Chairman Juan Calvo's erroneous conclusion that Employee prevailed and must be
8 reinstated was stated without any supporting vote, agreement or discussion on the record by the
9 Commissioners at the hearing on January 14, 2020. The Chairman did not discuss this or
10 request a vote to confirm his conclusion or interpretation of the votes. Chairman Calvo
11 abruptly ended the meeting shortly after he stated, without an official vote by the Commission
12 or supporting official action, that Employee prevailed and must be reinstated. See Exhibit 3.

13 41. This statement and result are not supported by the law, facts, substantial
14 evidence, the record or the official action taken by the Commissioners on January 14, 2020.
15

16 42. The Commission's Decision and Judgment failed to state any findings of fact or
17 any reference to the facts it relied on in reaching the conclusion in the Judgment to reinstate
18 Employee with back pay.

19 43. The Commission's Decision and Judgment failed to contain the applicable or
20 controlling law for which the Commission used to determine whether or not Petitioner met its
21 burden.
22

23 44. The conclusion that Employee prevailed is erroneous, is a mistake of law and/or
24 an incorrect interpretation or application by the Chairman of the three (3) votes taken by the
25 Commissioners on January 14, 2020.

1 45. Petitioner timely filed this appeal on March 13, 2019.

2 46. Petitioner was not required to get four (4) affirmative votes as the motion
3 hearing set on January 14, 2020, by CSC's Executive Director was for the Commission to take
4 action or not as to the ALJ decision which was read into the record and forwarded to the parties
5 for review. Both parties filed timely objections to this ALJ decision on January 10, 2020.

6 47. The Commissioners voted three (3) times on January 14, 2020, and did not vote
7 by an affirmative vote of four (4) to modify, reject or accept the ALJ decision in whole or in
8 part. See Exhibits 1 and 3.

9 48. As a consequence of the Commission's failure to act on its available choices
10 under 4 GCA § 4405 and the three (3) votes taken on January 14, 2020, the ALJ Decision
11 stands as the only decision in this matter. The ALJ decision affirmed Employee's termination.
12 See Exhibits 2-3; 4 GCA § 4402 and 4 GCA § 4405.

13 49. Instead of ruling in favor of Petitioner and affirming Employee termination,
14 however, Chairman Calvo unilaterally announced that Employee prevailed. See Exhibit 3.

15 50. The standard of review on appeal is de novo as Petitioner contends there was a
16 mistake of law, and erroneous interpretation by Chairman Calvo of 4 GCA § 4402, 4 GCA
17 § 4405, and/or a mistaken application of the three (3) votes taken on January 14, 2020, prior to
18 the Chairman's erroneous statement or conclusion that Employee prevailed because
19 Management failed to get four (4) affirmative votes.
20

21 51. The revocation of the adverse action is not supported by law, the record or
22 CSC's AA Rules 2, 11.6, 11.7.2, and Rule 14.1 (March 1, 2010).
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1 52. CSC did not set a motion hearing on the Petitioner's motions filed on January
2 15, 2020, to enter Judgment affirming Employee's termination or alternatively, to set further
3 evidentiary hearing as to Employee' damages.

4 53. The award of back pay to a prevailing Employee is subject to the employee's
5 duty to mitigate damages resulting from the initial termination. *Hauser*, 2005 Guam 14.

6 54. Any such Judgment is not yet final as Employee's damages and her duty to
7 mitigate her damages has not yet been heard by CSC.

8 55. CSC set a motion hearing for March 10, 2020, relating to Petitioner's motions
9 filed on February 21, 2020 to reconsider, vacate or amend the CSC decision, or alternatively,
10 to stay the matter and set an evidentiary hearing to determine Employee's damages and fees.
11 This hearing did not go forward as there was no quorum at the hearing on March 10, 2020.

12 56. As of this filing, there has not been an evidentiary hearing held or determination
13 made, after inquiry, as to Employee's efforts to mitigate her damages, any efforts by her to
14 look for work or any employment or earnings by Employee from sources other than DPR since
15 her termination.

16 57. As of this filing, there has been no hearing by CSC to determine Employee's
17 reasonable attorney's fees. Petitioner is unaware of any such filing by Employee with CSC to
18 date or any information as to Employee's attorney's fees.

19 58. Petitioner contends the Judgment and order reinstating Employee is erroneous
20 and that Employee is not entitled to back pay, benefits or reasonable attorney's fees as she was
21 not the prevailing party based on the official action taken by the Commissioners at the hearing
22 on January 14, 2020.
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1 59. Petitioner requests that any personnel action regarding Petitioner's
2 reinstatement with a payment of back pay and attorney's fees is premature as there has no final
3 determination of her damages after an evidentiary hearing.

4 60. ALJ Miller refused to allow Petitioner's counsel to examine Employee
5 regarding her damages, her efforts to mitigate her damages or to allow inquiry into her
6 attorney's fees. Such examination was denied as being irrelevant. ALJ Miller stated that if
7 employee prevailed, such an inquiry would be heard by way of a motion hearing before CSC.
8 Such a hearing has not been held.

9 61. To date, CSC has not held any evidentiary hearing to determine Employee's
10 damages or reasonable attorney's fees.

11 62. Despite indicating he would file a request for attorney's fees with CSC,
12 Petitioner is unaware of any such filing by Employee or her counsel.

13 63. Upon information and belief, Employee has not filed any documents with CSC
14 or served Petitioner with any information concerning the mitigation of her damages or
15 attorney's fees incurred in this case.

16 64. Petitioner filed a motion to enter final judgment in its favor on January 15,
17 2020 and attached a Proposed Decision and Judgment.

18 65. Employee's attorney, John Bell, filed a Motion to Strike Management's motion
19 and also prepared and attached a Proposed Decision and Judgment to its motion filing.

20 66. CSC did not set a motion hearing on the parties' January 2020 motion filings at
21 any time.

22 67. CSC staff prepared a Proposed Decision and Judgment that was signed on
23 February 11, 2020.
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1 72. Petitioner sought declaratory rulings from CSC in its motion filed on August 6,
2 2019 to invalidate all CSC standing policies, policies and rules not promulgated under the rule-
3 making provisions of Article 3 of the AAL pursuant to 5 GCA § 9303 (c) and 5 GCA § 9308,
4 as well as a request to invalidate paragraph 10 of the Case Management Statement which set
5 advance time limits on testimony not otherwise set forth in CSC Adverse Action Rules of
6 Procedure (March 1, 2010). Petitioner sought orders authorizing it to call Employee as it first
7 witness and seeking to call witnesses without any arbitrarily set “advance” time limitations
8 prior to the hearing on the merits. Petitioner set forth its concerns in the required CMS as well
9 as its motions filed on August 6, 2020. See Exhibit 4.
10

11 73. Petitioner sought a ruling that Article 1 and 2 of the AAL did not apply to CSC
12 hearings as CSC has their own adverse action rules of procedure effective March 1, 2010.

13 74. Petitioner requested CSC apply only its adverse action rules dated March 1,
14 2010 to its hearings, including this appeal.

15 75. Petitioner requests relief from this Court under 5 GCA § 9309 as CSC failed to
16 issue written orders based on Petitioner’s requests made in its August 6, 2019 motions.

17 76. On or about October 3, 2019, CSC issued a written Decision and Order from a
18 motion hearing held on September 19, 2019, which failed to rule on Petitioner’s requests for
19 declaratory rulings sought in its August 6, 2019, motion filing. The request was made more
20 than ninety (90) day ago. See Exhibit 5.

21 77. Petitioner requests these practices and policies be deemed invalid under 5 GCA
22 § 9303 (c) and notions of fair play, substantial justice and due process as they concern
23 administrative “adjudication” and thus require strict compliance with the rule-making
24 provisions of Article 3. Such standing practices and policies also fail to comply with 4 GCA
25

1 § 4409 and CSC Rules 1-2 (March 1, 2010).

2 78. Petitioner requests this court issue a declaratory ruling ordering that no CSC
3 informal rule, practice, or policy, necessary to the adjudication of matters before CSC, be
4 applied to CSC hearings other than its current adverse action rules dated March 1, 2010. Such a
5 ruling will ensure consistency in this case and all pending and future cases and a level playing
6 field.

7 79. Petitioner was required to call Employee as its last witness in this case, as in
8 other cases, based on CSC's "standing policies," despite its rules allowing discretion to
9 Management (Petitioner) in the presentation of its case. See CSC Adverse Action Rules
10 11.2.4, 11.2.6 and 11.3 (March 1, 2010).

11 80. These matters are ripe for review by this Court under 5 GCA § 9309 and such
12 clarification and guidance by this court is requested to educate the parties, counsel,
13 Commission, and the public.

14 81. CSC is a party to this action as required to issue a Declaratory Judgment under
15 5 GCA § 9309, and has denied relief to Petitioner.

16
17 ***Initial Scheduling of Matter Before Commissioners and Lack of Accommodation to***
18 ***Petitioner's Counsel/Accommodations to Employee's Counsel***

19 82. At a status conference on September 26, 2019, Administrative Counsel Eric
20 Miller set this matter to be heard before the Commissioners on October 17, 22, and 29, 2019 at
21 545 pm. Mr. Miller also set a prehearing conference date and deadlines in his role as
22 Administrative Counsel.

23 83. Prior to and on September 26, 2019 at the status conference, Petitioner's
24 counsel apprised CSC of her unavailability and off-island travel starting September 28, 2019,
25 through her return from leave on or about October 24, 2019.

1 84. Petitioner requested to schedule the second and subsequent hearings in the case
2 before the Commissioners on and after October 29, 2019, after its counsel returned, since Eric
3 Miller refused to continue the first night of hearing scheduled for October 17, 2019, while
4 AAG Lawrence was scheduled to be off-island.

5 85. No accommodation was made to accommodate Petitioner's counsel's schedule
6 and unavailability. As a result, AAG Matthew Wolff was asked to cover this matter.

7 86. As of Thursday, September 26, 2019, no other attorney at the Office of the
8 Attorney General was familiar with Petitioner's matter. AAG Lawrence was the only assigned
9 attorney, and CSC directed all notices to AAG Lawrence.

10 87. On September 26, 2019, despite request for an accommodation and to set dates
11 when Petitioner's counsel was available for hearing, CSC's Eric Miller refused to
12 accommodate Petitioner's counsel's request to schedule merit hearing dates on or after October
13 29, 2019, to accommodate her off-island travel and leave through October 24, 2019. A request
14 to subsequently continue the October 22, 2019, set by Eric Miller on September 26, 2019, to a
15 date after October 29, 2019, to accommodate Petitioner's counsel was also denied.

16 88. Petitioner's requests for accommodations were not granted despite advance
17 notice to CSC and Employee's counsel on or before September 17 at the motion hearing and
18 again on September 26, 2019 before Eric Miller.

19 89. AAG Matthew Wolff's was assigned to this matter as a result of these rulings.

20 90. While Petitioner's counsel was off-island, on October 3, 2019, the Commission
21 then appointed its Administrative Counsel Eric Miller to hear the merits of this case as an ALJ.
22 See 4 GCA § 4405 and CSC AA Rule 14 (March 1, 2010). See Exhibit 6.
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1 91. Prior to the ALJ appointment on October 3, 2019, Petitioner previously objected
2 to an ALJ hearing the merits of this case in Paragraph 12 of the CMS filed on July 16, 2019, as
3 Petitioner wanted the Commissioners to hear the specific testimony and evidence. Despite
4 this objection and while AAG Lawrence was off-island, the Commission appointed its legal
5 counsel to hear the merits of this matter as an ALJ. See Exhibit 4, ¶ 12.

6 92. The matter was subsequently scheduled to be heard by ALJ Miller for day time
7 hearings commencing on October 17, 2019, and continuing on and after October 21, 2019
8 through November 2019. The second date of hearing was expedited by ALJ Miller from
9 October 22, 2019 and scheduled to be heard during the day on October 21, 2019, October 22,
10 2019, October 23, 2019, and October 24, 2019, while AAG Lawrence was off-island and on
11 leave.

12 93. AAL Lawrence returned to Guam on October 22, 2019, and all attended all
13 subsequent hearings despite being on leave status.

14 94. After AAG Lawrence's return and during various hearing dates in this case,
15 ALJ Miller granted accommodations to Employee's counsel Mr. Bell, including vacating dates,
16 rescheduling hearing dates or times, and thereafter adjourning the matter to conclude upon Mr.
17 Bell's prior scheduled off-island travel. Such accommodation was not provided to Petitioner's
18 counsel despite Petitioner's request through counsel on and after September 26, 2019.

19 95. After hearing this matter on various dates in October and November 2019, ALJ
20 Miller prepared a written report dated December 31, 2019. See Exhibit 2.

21 96. Because ALJ Miller received the evidence and heard the testimony, it is
22 unknown what portions of the record were before the Commissioners on January 14, 2020,
23 other than the ALJ decision and the parties' filed objections and comments to his decision.
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1 97. On January 14, 2020, the Commissioners did not discuss any parts of the record
2 they wanted to review or vote to review any documents before their respective votes as to the
3 ALJ decision.

4 98. On review of this matter by this court, Petitioner asserts that there is substantial
5 evidence in the record and before the ALJ to support Employee's termination for the multiple
6 instances of misconduct between March 21, 2019, and May 2019, as set forth by Petitioner in
7 the Notice of Final Adverse Action which terminated Employee effective June 18, 2019.

8 99. Employee admitted in her administrative interviews in May 2019 to
9 insubordination. She further testified under oath before the ALJ in October 2019 that she
10 committed insubordination and violated the rights of John Mark Joseph. She admitted to
11 speaking with Mr. Joseph and requesting he drop his complaint and grievance against her. She
12 had been shown his May 1, 2019 complaint against her at her administrative interview on May
13 14, 2019. Contrary to her written and oral orders not to discuss this matter with DPR
14 Employees, she testified she speak to John Mark Joseph regarding the complaint she had just
15 seen.
16

17 100. The record before the ALJ supports a finding by clear and convincing evidence,
18 that termination is supported on multiple charges stated in the adverse action documents.

19 101. An order requesting CSC to provide the written record, including the exhibits
20 admitted and denied by the ALJ is also requested to ensure a proper record.

21 102. Employee has attempted to re-file an exhibit in its opposition filed on February
22 28, 2020, previously denied by ALJ Miller as stated herein. Under CSC AA Rule 10.3, after
23 Petitioner filed objections to the late service of this filing and stated objections to exclude
24 Exhibits E1-E2 to Employee's filing, these documents are not provided to the Commissioners
25

1 and their admissibility, if at all, would be determined at a later hearing. No hearing was held
2 on March 10, 2020, and thus Employee's filing on February 28, 2020 should be deemed
3 inadmissible. Petitioner asserted untimely service, prior denial of Exhibit E1 by ALJ Miller
4 and that the exhibits and declarations be excluded as irrelevant under CSC AA Rule 11.2.5
5 (March 1, 2010).

6 103. As argued before CSC and ALJ Miller, there is no requirement under Guam law
7 for mandatory progressive discipline. One instance of insubordination can be grounds for an
8 Employee's termination. An employer has the discretion to determine the penalty based on the
9 Employee's position, the gravity of the offenses and other factors.

10 104. The totality of the circumstances and the multiple instances of misconduct and
11 insubordination alleged, support the ALJ's ultimate conclusion affirming Management's
12 termination of Employee.

13 105. Although Petitioner requests this court reverse CSC's Decision and Judgment
14 and enter Judgment in favor of Petitioner based on the official record and the votes taken on
15 January 14, 2020, as well as the law, Petitioner also requests an immediate stay of this
16 Decision and Judgment in terms of reinstating Employee under the law pending this court's
17 review and decision, as there is no final Decision and Judgment made based on determination
18 of Employee's damages and fees.

19 106. In the event reinstatement and/or payment of compensation or fees is made to
20 Employee and/or her attorney, and the courts overturn CSC's Decision and Judgment which
21 orders her reinstatement, then Petitioner requests reimbursement and disgorgement from
22 Employee and her counsel of all such monies, benefits and fees received as a result of CSC's
23 erroneous conclusion.
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1 107. The CSC meeting on February 11, 2020, was not a motion hearing but only a
2 signing of a Decision and Judgment. CSC's adverse action rules do not require attendance at
3 these signing, but attendance by the parties and their representatives are required under CSC's
4 rules at motion and merit hearings unless good cause is shown for such absence.

5 108. Petitioner timely filed motions with CSC on February 21, 2020, to reconsider
6 and vacate its judgment under CSC AA Rule 11.7.7 (March 1, 2010) or to alternatively to stay
7 the prior decision and set an evidentiary hearing to determine Employee's damages. These
8 motions were not heard.

9 109. After receipt of Petitioner's motions filed on February 21, 2020, CSC set a
10 motion hearing for March 10, 2020, at 545 pm.

11 110. CSC also set a deadline for Employee to file and serve Petitioner with an
12 Opposition by February 28, 2020.

13 111. Employee untimely served Petitioner on March 3, 2020, despite the CSC notice
14 setting forth service to be made by February 28, 2020.

15 112. Petitioner filed an objection with CSC on March 3, 2020, to strike Employee's
16 filing on February 28, 2020 for non-compliance with CSC's notice, and also to strike the
17 Declarations of John Bell and Lynda Aguon and Exhibits E1-E2 under CSC AA Rule 11.2.5 as
18 these documents were irrelevant to the motions filed.

19 113. ALJ Miller previously ruled to exclude Exhibit E1 attached to Employee's
20 filing on February 28, 2020. The filing of this Exhibit was also irrelevant to Petitioner's
21 timely motions to have CSC reconsider, vacate and/or to clarify, correct or amend its Judgment
22 authorized by CSC's AA Rule 11.7.7.
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1 114. On March 10, 2020, the parties and counsel appeared before the Commission.
2 The Executive Director announced there was no quorum. No motion hearing was held. No
3 official action was taken by the Commission as there was no quorum.

4 115. Under CSC's Rule 10.3, Employee's filing on February 28, 2020, were not
5 provided to the Commission and thus the exhibits and opposition's admissibility was not
6 determined by CSC.

7 116. At the status conference on July 16, 2019, Petitioner filed its Case Management
8 Statement. In its CMS, Management objected to using an Administrative Law Judge to hear
9 the merits of this case, as it wanted the Commissioners to hear the evidence instead of an ALJ.
10 See Exhibit 4, CMS, ¶¶ 6, and 12. The requirement to file a CMS was added by CSC
11 Resolution 2018-002 adopted by the Commissioners on September 18, 2018.

12 117. In the CMS, Petitioner noted its objections to the wording of Paragraph 10 as it
13 improperly attempts to substantively impact and change CSC's amended adverse action rules
14 effective March 1, 2010, namely; CSC adverse action rule 11.2.6 (order of presentation) by
15 setting advance time limits on "witness" and "employee" and "Management" testimony in
16 terms of direct examination and cross-examination. CSC's amended adverse action rules,
17 including but not limited to, CSC Rule 11.2.6 (March 1, 2010) do not set any advance time
18 limits on any witness or party testimony. See Exhibit 4.

19 118. Petitioner set forth in ¶¶ 4, 7, 10 its objections and the basis for its later motions
20 filed on August 6, 2019, requesting rulings under 5 GCA § 9308 to invalidate CSC's "standing
21 policies" or practices attempting to modify its rules effective March 1, 2010, without going
22 through the required rule-making process of the AAL found in Article 3 commencing with 5
23 GCA § 9300 et .seq. Petitioner requested CSC follow only its enabling legislation and
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1 promulgated rules as set forth in *Wade v. Taitano*, 2002 Guam 16, which held that where an
2 agency has the authority to adopt rules and does it, it must follow them. An agency cannot
3 ignore its own rules.

4 119. Petitioner is not aware of any promulgated new rules, amendments or
5 rescissions to CSC's amended adverse action rules effective March 1, 2010 or any other rules
6 applicable to the current action other than the March 1, 2010 adverse action rules.

7 120. ALJ Miller, however, refused to admit CSC's adverse action rules dated March 1,
8 2010 that Petitioner attached to its exhibit filing as Exhibit 47 (M348-M373) on October 2,
9 2019. These exhibits were filed prior to his appointment as an ALJ in this case. ALJ Miller
10 refused to admit these rules despite the lack of objection from Employee. No explanation was
11 provided.
12

13 121. The assignment of this matter to ALJ Miller over Petitioner's objection is also
14 requested to be reviewed as part of this appeal in addition to the various inconsistent
15 evidentiary rulings made. Petitioner asserts the record will show favorable treatment to
16 Employee, including rulings in favor of Employee previously denied to Petitioner before the
17 merit hearing. As part of Petitioner's objections are the conflicting and various roles held by
18 Eric Miller such that Petitioner contends these conflicting rules would disqualify him from
19 acting as a hearing officer.
20

21 122. Clarification of the rules currently applicable to adverse action appeals, and as
22 to rules applicable to merit hearings heard by an ALJ is also requested as result of his failure to
23 admit these rules as part of the record in this case. These adverse rules (March 1, 2010) were
24 referenced and stated in Petitioner's motion filing on August 6, 2019, for which no specific
25 order was received as stated herein.

1 ***Dismissal of GFT as Employee Representative/Ex Parte Contact by GFT with CSC***
2 ***staff July 24, 2019 Regarding Discovery***

3 123. Upon receiving a discovery order dated July 31, 2019, from CSC staff via
4 email, which Petitioner contends is not a form of service under CSC's Adverse Action Rules 6
5 or 6.1 (March 1, 2010), Petitioner timely filed and served on August 2, 2019, an objection to
6 the premature discovery order dated July 31, 2019, and requested that the Executive Director
7 vacate, stay or void the order in addition to other relief, including the Commissioner's review
8 of the order under CSC AA Rule 8.1.

9 124. Petitioner sought protective orders and non-disclosure orders in its filing on
10 August 2, 2019, and sought to clarify the discovery request process as it was not aware of any
11 motion to compel discovery being filed by GFT.

12 125. At a motion hearing on September 17, 2019, which was continued to September
13 19, 2019, CSC later ratified the discovery order, but denied Petitioner's request to order Robert
14 Koss to testify at an evidentiary hearing as to his ex parte communication with CSC's Roland
15 Fejerang and Executive Director Daniel Leon Guerrero on or about July 24, 2019.

16 126. At a hearing on September 17, 2019, Chairman Baza and the Commissioners
17 unanimously voted to allow Petitioner to file exhibits with the Commission after an offer of
18 proof was made that that Employee's GFT representative Robert Koss communicated ex parte
19 with CSC staff without advising Petitioner or its counsel. Petitioner filed and served Exhibits
20 A-F with the Commission. These exhibits were admitted and the motion hearing was continued
21 to September 19, 2019.

22 127. Upon information and belief, CSC did not issue a Decision and Order reflecting
23 the orders made on September 17, 2019, including its ruling by a vote of 5-0 authorizing
24 Petitioner to file Exhibits A-F, its denial of the Petitioner's request to hold an evidentiary
25

1 hearing into Robert Koss' communication with CSC on July 24, 2019, and its order to continue
2 the hearing of September 17, 2019, to September 19, 2019.

3 128. On or about August 23, 2019, CSC's Administrative Counsel, Eric Miller,
4 forwarded to Petitioner's counsel Donna Lawrence, Robert Koss, Roland Fejerang and
5 Executive Director Daniel Leon Guerrero an email Robert Koss sent to CSC's Executive
6 Director Daniel Leon Guerrero and Roland Fejerang dated July 24, 2019.

7 129. This email was sent to Petitioner's deadline after the deadline of August 20,
8 2019, to respond. This email was received on August 23, 2019 well after Petitioner's counsel
9 communicated with CSC staff and GFT seeking to know if any ex parte communications had
10 been made. This email dated August 23, 2019, forwarding GFT's prior email dated July 24,
11 2019, was marked and admitted on September 17, 2019, as Management's Exhibit A.

12 130. No response was forthcoming by CSC staff or GFT until August 23, 2019,
13 despite Petitioner's inquiry on July 31, 2019, its review of CSC's file on July 31, 2019 after
14 receipt of the Discovery Order, and well after Petitioner filed and served its objection and
15 motions to void or vacate the discovery order on August 2, 2019. Petitioner requested an
16 evidentiary hearing to determine how a discovery order issued with no motion or other filing
17 by GFT requesting such an order, which was denied on September 17, 2019.

18 131. CSC rules do not authorize a reply unless previously requested and authorized
19 by CSC. Replies are routinely denied when requested.

20 132. Petitioner's counsel was apprised by GFT's Robert Koss that legal counsel may
21 be coming into the case, but that it did not appear counsel would not enter an appearance until
22 after August 5, 2019. Petitioner, through its counsel, requested to arrange an inspection of
23 documents under 4 GCA § 4406 with Employee's GFT representative for August 5, 2019.
24
25

1 133. In communications with GFT, Petitioner, through counsel, was not apprised of the
2 name of the proposed legal counsel, although this request was made, as Petitioner sought to
3 discuss protective orders and non-disclosure orders with Employee's future counsel in advance
4 of providing discovery.

5 134. Despite timely filings its objections and motions to have the Commissioners
6 review the Executive Director's discovery order dated July 31, 2019, in its filing on August 2,
7 2019, Petitioner provided discovery to Employee's counsel, John Bell on August 9, 2019,
8 based on GFT's prior discovery request served on July 16, 2019.

9 135. Service of the discovery was personally delivered to Employee's attorney's
10 office on August 9, 2019, consisting of a five (5) page letter, a thumb drive consisting of 24
11 audio files, and documents marked D1 through D440.

12 136. Prior to service of this discovery, Employee's attorney, Mr. Bell, indicated that
13 both he and GFT were representing Employee. Employee's counsel confirmed discovery could
14 be provided solely to his office.

15 137. At the hearing on September 17, 2019, Petitioner's counsel advised the
16 Commission as to the communication received from Eric Miller on August 23, 2019 and to
17 Robert Koss's improper ex parte contact with CSC staff. GFT did not appear as Employee's
18 representative for this hearing.

19 138. In its offer of proof, Petitioner advised the Commissioners that it had requested
20 CSC and GFT advise of any ex parte communications in communications made on July 31,
21 2019 after receiving the discovery order, and that no confirmation of any such contact occurred
22 until Petitioner's counsel received the email from Administrative Counsel Eric Miller on
23
24
25

1 August 23, 2019. Management filed its motions and objections to the discovery order on
2 August 2, 2019.

3 139. The Commissioners voted 5-0 on September 17, 2019, to allow Petitioner to file
4 exhibits that evening and to continue the hearing to September 19, 2019.

5 140. Petitioner filed Exhibits A-F on September 17, 2019. All exhibits were served
6 on Employee's counsel.

7 141. Exhibit A consisted of the email to CSC from Robert Koss on July 24, 2019.

8 142. Exhibit C consisted of Petitioner's email to CSC staff and to Robert Koss on
9 July 31, 2019, asking if there had been any communications from Robert Koss (oral or written)
10 with CSC staff regarding an order to compel as Petitioner's counsel has not been privy to any
11 such communications he may have had with any CSC staff. his email referenced the
12 communications between representatives on July 30, 2019, as to a discovery inspection date of
13 August 5, 2019.
14

15 143. Petitioner's Exhibit D filed on September 17, 2019, was the email sent to Mr.
16 Koss on July 31, 2019, as he had requested as to the inspection date of August 5, 2019, so he
17 could check his calendar. This email was forwarded to CSC staff on July 31, 2019, after
18 Petitioner's counsel was served with a discovery order via email.

19 144. Petitioner, through its counsel, reviewed CSC's file on July 31, 2019, and
20 confirmed there were no filing with CSC from GFT between its filing of a discovery request on
21 July 16, 2019, and the Discovery Order which was emailed to Petitioner on July 31, 2019.

22 145. Petitioner requested that CSC issue orders concerning this conduct by
23 Employee's representative at the motion hearing scheduled for September 17, 2019. Such
24
25

1 request was denied but CSC ordered GFT to cease representation of Employee on September
2 17, 2019.

3 146. Present at the motion hearing on September 17, 2019, in this case was Chairman
4 Luis Baza, and Commissioners John Smith, Vice Chairman Juan Calvo, Emilia Rice and
5 Catherine Gayle. CSC staff present at the hearing included Administrative Counsel Eric
6 Miller, Executive Director Daniel Leon Guerrero, Cynthia Camacho, and Susan Corbin.

7 147. At the hearing on September 17, 2019, Mr. Bell requested that GFT remain as a
8 representative in the case, but the Commission ordered GFT's discharge despite this request.
9 The Commission did not make any other orders pertaining to GFT, including admonishing or
10 sanctioning GFT for its improper ex parte contact with CSC on July 24, 2019.
11

12 148. Although CSC held the initial motion hearing on September 17, 2019, and later
13 continued this hearing to September 19, 2019, after a unanimous vote, Petitioner is not aware
14 of any written Decision and Order issued referencing the Commission's oral rulings and
15 discussions on September 17, 2019.

16 149. At the September 17, 2019, hearing, several Commissioners, also disclosed their
17 relationship or connection to Employee or her family, including Commissioners Rice, Vice-
18 Chairman Calvo and Chairman Luis Baza.

19 150. On or about August 1, 2019, Mr. Bell entered an appearance in this appeal and
20 filed Employee's motions to void or modify the adverse action on August 6, 2019, with other
21 requests.
22

23 151. Employee's motions were to void or modify were denied by a vote of 4-0 per
24 CSC's Decision and Order signed on October 3, 2019 from the hearing on September 19, 2019.
25 See Exhibit 5. This Decision and Order confirms that the discovery documents Management

1 provided to Employee would stay with Employee's attorney, John Bell, and would not be
2 provided to the Guam Federation of Teachers, as GFT no longer represents Employee.

3 152. In this Decision and Order dated October 3, 2019, from their rulings on
4 September 19, 2019, the Commission affirmed that the allegations in the Notice of Final
5 Adverse Action, the unauthorized use of a government vehicle, did not constitute a crime for
6 the purposes of determining the burden of proof. Management's burden of proof was stated to
7 be clear and convincing evidence. See Exhibit 5.

8 153. Petitioner filed motions with CSC on August 6, 2019, requesting the lower
9 burden of proof of substantial evidence for the criminal conduct and misuse of the official
10 vehicle on several dates as stated in the Notice of Final Adverse Action.
11

12 154. Petitioner asserts the denial of its request for the lower burden of proof is
13 erroneous and that the factual allegations and charges set forth in the final adverse action for
14 official misconduct (9 GCA § 49.90 and violation of 4 GCA § 1103) charges support the lower
15 burden of proof under 4 GCA § 4407 (a) and as set forth by the Guam Supreme Court in
16 Javelosa.

17 ***ALJ Miller Refused to Admit CSC Rules March 1, 2010 Despite Timely Exhibit***
18 ***Filing October 2, 2019/Clarification of Applicable CSC Rules is Requested on Review***

19 155. ALJ Miller refused to admit CSC's adverse action rules into evidence despite
20 their timely filing with the Commission on October 2, 2019. CSC's adverse action rules were
21 attached as Exhibit 47 and consisted of M348-M373.

22 156. This refusal serves as a basis to have this matter clarified and reviewed on
23 appeal, and is pertinent to the request for declaratory rulings so the parties can be apprised as to
24 what rules apply to CSC adverse action appeals, including this matter.
25

1 157. CSC's rules dated March 1, 2010, give Petitioner (and agency counsel)
2 discretion in the order of the presentation of its case and do not pre-determine Management's
3 witness order, the order in which Management must call Employee, or the presentation of its
4 case in general. See CSC AA Rule 11.2.6 (March 1, 2010). There is no reference in these
5 CSC's adverse action rules to any required order for Employee's testimony or to any advance
6 time limits set on testimony. Employee is required to attend without a subpoena and CSC AA
7 Rules 11.2.4 and 11.3 (March 1, 2010) discusses the parties' right to call and examine
8 witnesses.
9

10 158. CSC AA Rule 14 (March 1, 2010) authorizes the Commission to appoint its
11 Administrative Counsel as a hearing office.

12 159. CSC AA Rule 14.1 states, "Hearing Counsel shall use these Rules in conducting
13 hearings." See CSC AA Rules 14 (March 1, 2010).

14 ***Judicial Notice of CSC Adverse Action Rules dated March 1, 2010 Requested***

15 160. Judicial notice of all of CSC's adverse action rules dated March 1, 2010, is
16 requested with this filing as well as the rule-making provisions of Article 3 commencing with 5
17 GCA § 9300-9309.
18

19 WHEREFORE, the petitioner prays for the following relief:

20 1. Petitioner requests judicial review of CSC's Decision and Judgment signed by
21 the Commissioners on February 11, 2020, and served on the parties by CSC on February 12,
22 2020.
23
24
25

1 2. Pending judicial review and the requested declaratory rulings in this case,
2 Petitioner seeks an immediate stay of execution and enforcement of this Decision and
3 Judgment, as CSC failed to set an evidentiary hearing to determine Employee's damages or
4 reasonable attorney's fees as of this filing.

5 3. That the CSC Decision and Judgment of February 11, 2020, be reversed or
6 vacated by this Court as being contrary to law, the record an official action taken by the
7 Commissioners on January 14, 2020;

8 4. The Court find Respondent exceeded its statutory authority and its rules by
9 applying an incorrect standard of review ("clear and convincing evidence") as to the
10 allegations of official misconduct and misuse of the official vehicle;
11

12 5. Petitioner met its burden of proving by the official misconduct and misuse of
13 the official vehicle by substantial evidence;

14 6. Petitioner met its burden of proving by clear and convincing evidence the
15 charges set forth in the Notice of Final Adverse Action, including but not limited to, all charges
16 of insubordination;

17 7. Alternatively, that the case be remanded to the Civil Service Commission for
18 further proceedings as indicated by this court based upon this petition, including but not
19 limited to, an order requiring CSC to hear Petitioner's motions filed on January 15, 2020, and
20 February 21, 2020, directing CSC to vacate or amend its Decision and Judgment to affirm
21 Employee's termination, and/or setting an evidentiary hearing to determine Employee's
22 damages, should the court desire to have the damages finalized prior to reviewing this matter
23 further on appeal;
24
25

1 8. An order staying the implementation and enforcement of this Decision and
2 Judgment, including Employee's reinstatement to DPR and any execution or enforcement or
3 payment to Employee or her counsel pursuant to this Decision and Judgment pending judicial
4 review of this matter;

5 9. Alternatively, if reinstatement and or payment to Employee and/or her counsel
6 is made pending review of this matter, that an order be issued requiring Employee and/or her
7 counsel to reimbursement DPR and the Government of Guam for any and all compensation
8 and the value of all benefits and attorney's fees received as a result of the CSC Decision and
9 Judgment through the date of any future order or judgment issued in favor of Petitioner on
10 review;

11 10. Disgorgement by Employee of all monies and benefits paid to Employee or to
12 be paid to Employee for backpay and benefits as a result of the erroneous CSC Decision and
13 Judgment;

14 11. Disgorgement by Employee's attorney of all monies paid to Employee's
15 attorney John Bell for attorney's fees as a result of the erroneous CSC Decision and Judgment
16 pending final resolution of this matter.

17 12. For an order of this court invaliding paragraph 10 of the CMS;

18 13. For declaratory rulings and a Declaratory Judgment invalidating CSC's standing
19 practices, policies or rules requiring Management to call Employee as its last witness;

20 14. For declaratory rulings and a Declaratory Judgment invalidating CSC's
21 practices, policies or rules setting advance time limits on witness and Employee testimony;

1 **VERIFICATION**

2 I, Jesse Garcia, being first duly sworn, say that I am the Acting Director of the
3 Department of Parks and Recreation, and that the foregoing petition is true and correct to the
4 best of my knowledge except for such matters as are stated to be upon information and belief
5 and as to those matters I believe them to be true.

6 Dated: 3/13/2020

7
8
9 By: _____

JESSE GARCIA, Acting Director DPR

10
11 This Certificate is attached to a ___ page document dealing with or entitled VERIFIED
12 PETITION FOR JUDICIAL REVIEW/REQUEST FOR DECLARATORY JUDGMENT/STAY
13 and dated March 13, 2020.

14
15 **JURAT CERTIFICATE**

16 Territory of Guam.

17 Subscribed and sworn before me this 13th day of March, 2020, by JESSE G. GARCIA.

18 In Witness Whereof, I have hereunto set my hand and affixed by official seal this 13th day of
19 March, 2020.

20
21 _____
22 **MARIA ANNA U. BLAS**

23 Notary Public

24 **MARIA ANNA U. BLAS**
25 **NOTARY PUBLIC**
In and for Guam, U.S.A.
My Commission Expires: **SEPT. 14, 2023**
P.O. Box 1006 • Hagåtña, Guam 96932

