

CIVIL SERVICE COMMISSION
GOVERNMENT OF GUAM

IN THE MATTER OF:

Lynda B. Aguon

Employee,

vs.

Department of Parks & Recreation

Management.

ADVERSE ACTION APPEAL

CASE NO: 19-AA02T SP

Notice of Motion Hearing- 9:00 a.m.
(IN-PERSON HEARING)

TO: Joseph A. Guthrie
590 S. Marine Corps Drive Suite 706, ITC B
Tamuning, GU 96910
475-3324 687-8585
FAX: 472-2493

The meeting for the ABOVE CAPTIONED case has been SCHEDULED for an IN-PERSON HEARING at the Civil Service Commission Conference Room, BELL TOWER, Suite 201, 710 West Marine Corps Drive, Hagatna, Guam 96910. Pursuant to 5GCA §43121 (d), all parties MUST BE PRESENT for all hearings before the Commission.

<i>MEETING</i>	<i>DATE</i>	<i>MEETING TIME</i>
Motion Hearing- 9:00 a.m.	Thursday, September 25, 2025	9 :00 AM

MOTIONS AND RELATED DOCUMENTS should be served on the opposing party and filed with the Commission no later than: Friday, August 8, 2025

RESPONSES TO MOTIONS should be served on the opposing party and filed with the Commission no later than: Friday, August 22, 2025

NOTE:

Should you have any questions, please contact Vickilynn Sablan or our office at 647-1855, 647-1857, FAX 647-1867, TTY 649-7002.



DANIEL D. LEON GUERRERO

EXECUTIVE DIRECTOR

7/10/2025
Date



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 Douglas B. Moylan
 Attorney General of Guam
 Solicitor Division
 134 W Soledad Avenue, Suite 302
 Hagatna, GU 96910
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Attorneys for Government of Guam

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 CIVIL SERVICE COMMISSION
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**BEFORE THE CIVIL SERVICE COMMISSION
 HAGATNA, GUAM**

11	IN THE MATTER OF:)	ADVERSE ACTION APPEAL
12	LYNDA B. AGUON,)	CASE NO.: 19-AA02T- <i>SP</i>
13)	
14	Employee,)	
15	vs)	TRIAL BRIEF FOR EVIDENTIARY
16	DEPARTMENT OF PARKS AND)	HEARING RE: MITIGATION OF DAMAGES
17	RECREATION,)	
)	
	Management.)	

On April 9, 2025, this Court issued a *Decision and Order* which ordered this case returned to the Civil Service Commission for consideration, *inter alia*, of mitigation of damages.

The Real Party in Interest was denied employment from June 18, 2019, the date of her Final Notice of Adverse Action, until April 9, 2025 the date of the aforesaid Decision and Order which reinstated her to employment. In that Decision and Order, the Court ordered that the Real Party in Interest be paid backpay for the period

1 between June 18, 2019 and April 9, 2025. Midway through that period, on July 4, 2020
2 the Real Party in Interest began collecting retirement benefits from the Government of
3 Guam Retirement Fund.

4 There are two issues before the Commission.

5 First, whether the doctrine of mitigation of damages requires deduction from
6 back pay of any retirement benefits received by the Real Party Interest during the
7 period for which back pay is awarded. If so, how much in retirement benefits should be
8 deducted from the award of back pay and what is the figure for back pay after
9 deduction of retirement benefits.

10 Second, whether the doctrine of mitigation of damages requires the deduction
11 from the back' pay figure of earnings garnered from employment by the Real Party in
12 Interest during the period for which back pay is awarded.

13 If so, what is the figure for back pay after deduction of both retirement benefits
14 received and earnings received during the period for which back pay is awarded.

15 Mitigation of damages on Guam.

16 In *Haeuser v. Dep't of Law* | 1999 Guam 12,11 the Guam Supreme Court held:

17 It is well-settled that any injured party, who is entitled to damages, is
18 required to mitigate those damages. In the case of an award for back pay
19 due to an aggrieved employee, that employee is under a duty to mitigate
20 damages. *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 868 (9th Cir.
21 1980). The employer has the burden of showing that the employee has
not mitigated damages. *Id.*

22 Mitigation was first addressed by Guam lower courts in *Port Authority of Guam*
23 *v. Frances Arriola, Decision and Order re Mitigation and Motion for Attorneys Fee,*
24 *Superior Court SP 0124-13.* In that case, the Court held that it did not have sufficient
25 basis to determine...

1 “(2) whether Arriola... fail[ed] to mitigate damages to an extent which
2 would preclude an award of back pay. See generally, Haeuser v. Dep 't of
3 Law, 2005 Guam 14. Therefore, the Court will schedule an evidentiary
4 hearing to determine the appropriate amount of back pay, if any.”

4 In this case---the above captioned case--- this Court stated, at page 19 of its

5 *Decision and Order Re Petition for Judicial Review*, as follows:

6 However, to date, there has not been a hearing to determine Employee's
7 backpay, ***investigate her efforts toward her duty to mitigate***, or
8 determine the amount of attorney's fees that should be awarded. *Id.* at
9 paragraphs 56-57. Although this Court has chosen to affirm the
10 determinations in the CSC's February 11, 2020 Decision and Judgment,
11 the Court believes it is necessary to remand this case to the CSC for the
12 purpose establishing damages, including backpay and attorney's fees.
13 The CSC is ordered to hold an evidentiary hearing to establish the exact
14 amount of Employee's damages and fees, ***with that analysis including***
15 ***consideration of Employee's duty to mitigate, (Emphasis added)***

12 In *Guthrie v. J.C. Penney Co., Inc.*, 803 F.2d 202, 209-10 (5th Cir.1986) the
13 court held that "Guthrie's back pay award should be reduced by payments received
14 from Penney's retirement fund"¹ citing *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76 (2d
15 Cir. 1983) (set-off for lumpsum pension payment); *Fariss v. Lynchburg Foundry*, 769
16 F.2d 958, 966-67 (4th Cir. 1985); *Sandia Corp.*, 639 F.2d at 626-27 (set off for "lay off
17 allowances"). In *Smith v. Office of Personnel Management*, 778 F.2d 258, 263 (5th Cir.
18 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1949, 90 L.Ed.2d 358 (1986), defendant-

19 ¹ The Guthrie Court noted, however:

20 Most courts have refused to deduct such benefits as social security and unemployment
21 compensation from ADEA [The Age Discrimination in Employment Act of 1967] awards. *Marshall v.*
22 *Goodyear Tire Rubber Co.*, 554 F.2d 730, 736 (5th Cir. 1977); *Maxfield v. Sinclair International*, 766
23 F.2d 788, 793-94 (3d Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 796, 88 L.Ed.2d 773 (1986);
24 *McDowell v. Avtex Fibers, Inc.*, 740 F.2d 214, 215-17 (3d Cir. 1984), vacated and remanded on other
25 grounds, 469 U.S. 1202, 105 S.Ct. 1159, 84 L.Ed.2d 312 (1985); *Wise v. Olan Mills, Inc. of Texas*,
 495 F. Supp. 257 (D.Colo. 1980). These decisions follow the common law "collateral source rule,"
 according to which the defendants may not benefit from payments made to the plaintiff by third
 parties. See, e.g., *Bourque v. Diamond M. Drilling Co.*, 623 F.2d 351 (5th Cir. 1980). Although
 employers do contribute to the social security and unemployment insurance fund, the rule still applies
 because they do so in support of an independent, legislatively-mandated social policy. *McDowell*,
 740 F.2d at 217; *Equal Employment Opportunity Commission v. Sandia Corp.*, 639 F.2d 600, 624-25
 (10th Cir. 1980).

1 employer was the United States government. The Court held that "the collateral
2 source rule does not apply when the collateral source is the defendant," and ordered a
3 set-off.

4 In Guthrie, the Court stated, with respect to retirement plans/pension benefits:

5 [A]pplying the rationale of that case [Smith v. Office of Personnel
6 Management] and looking to the practice of the majority of the other
7 circuits, we hold that Guthrie's back pay award should be reduced by
payments received from Penney's retirement fund.

8 The collateral source rule provides that a plaintiff's recovery is not to be
9 reduced by benefits received from a third party.

10 Whether retirement benefits should be offset from an award of lost wages
11 depends on whether the benefits were provided or funded by the employer or
12 employee. Johnson v. Chapel Hill Independent School District 853 F.2d 375.

13 The cases in which the courts have not deducted retirement benefits from back
14 pay awards are those in which the employer made no contribution. When the
15 employer makes no contribution, the collateral source rule precludes any deduction.
16 See generally, McDowell v. Avtex Fibers, Inc., 740 F.2d 214 (3rd Cir.1984). For
17 example, in Salge v. Edna Independent School Dist. United States District Court, 320
18 F.Supp. 2d 542 S.D. Texas, 2004, the Court held that an award of back was not
19 offsetable by an amount of retirement benefits, given evidence of employee's
20 contribution to the state teacher's retirement fund which was source of benefits, and
21 lack of evidence of any district contribution to fund.
22

23 Employer-provided pensions received as a result of termination have been
24 generally offset from back pay claims under the ADEA [The Age Discrimination in
25 Employment Act of 1967] . See e.g. Hagelthorn v. Kennecott Corp., 710 F.2d 76, 87

1 (2d Cir. 1983); Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 756 (7th Cir.),
2 cert. denied, ___ U.S. ___, 104 S.Ct. 484, 78 L.Ed.2d 680 (1983); Wise v. Olan Mills,
3 Inc., 495 F. Supp. 257, 260 (D.Colo. 1980). But see McDowell v. Avtex Fibers, Inc.,
4 740 F.2d 214, 217-18 (3d Cir. 1984), vacated on other grounds, ___ U.S. ___, 105
5 S.Ct. 1159, 84 L.Ed.2d 312 (1985).

6 In Lubke v. City of Arlington, 455 F.3d 489, 499 (5th Cir. 2006), the Court said:

7
8 An employer's portion of retirement and other payments made to a
9 terminated employee must be deducted from an award of lost wages and
10 benefits in ADEA discrimination cases. See Brunnemann, 975 F.2d at 179
11 n. 7 (noting that "a deduction is allowed for sums received from retirement
12 benefits" upon termination); United Protective Workers, 223 F.2d 49 United
13 Protective Workers, 223 F.2d at 53 (back-pay award reduced by retirement
14 benefit payments); Jacob v. New Jersey State Highway Auth. (1969), 54
15 N.J. 393, 406, 255 A.2d ("Out of the sum of back wages recovered by
16 each man he is obliged to return to [state-public-employee retirement
17 system] the pension payments received"). Jacobs v. New Jersey State
18 Highway Authority (1969), 54 N.J. 393, 406, 255 A.2d. *Equal Emp't*
19 *Opportunity Comm'n v. O'Grady*, 857 F.2d 383, 389-91 (7th Cir. 1988)
20 (following the U.S. Court of Appeals for the Third Circuit in adopting a "flat
21 rule forbidding the setoff of pension . . . benefits"); McDowell, 740 F.2d at
22 217-18 (holding that pension plan benefits are collateral). But see Guthrie,
23 803 F.2d at 209-10 (stating that retirement benefits coming from an
24 employer are not collateral and should be offset from a damages award);
25 Hagelthorn v. Kennecott Corp., 710 F.2d 76, 86-87 (2d Cir. 1983)
(offsetting pension benefits from an award of back pay) (emphasis added)

19 However, the O'Grady court made it clear that no circuits have required that
20 pension payments be deducted from back pay awards. Rather, those circuits
21 permitting such deduction have left the decision up to the discretion of the trial court
22 and have not overturned such decisions barring abuse of discretion. See also Linn v.
23 Andover Newton Theological School, Inc., 874 F.2d 1, 9 (1st Cir. 1989), holding that "it
24 was not error in this case to subtract the received pension benefits"; Taylor v. Texas
25 Corp., 831 F.2d 255 (11th Cir. 1988), holding that such a deduction was permissible.

1 The Government of Guam makes contributions to the Government of Guam
2 Retirement Fund. 4 GCA 8137 provides, in relevant part:

3 § 8137. Contribution by the Government. The Government shall make
4 contributions to the Fund each year on an actuarial funded basis, toward
5 the annuities and benefits herein provided.

6 Allowing a reinstated employee to collect back pay un-reduced by retirement
7 benefits he or she received for the same period of time he or she received backpay
8 would constitute "double dipping".

9 Requiring a reinstated employee to disgorge the retirement benefits he
10 received by deducting them from backpay would put him in the same position he
11 would have been had he never been terminated. Allowing him to keep the retirement
12 benefits he received, plus backpay, during the period he received back pay would be a
13 windfall to the employee. Instead, the employee should be required to return the
14 retirement benefits received to the Retirement Fund. Somehow, however, the Real
15 Party in Interest was able to obtain a check from the Department of Administration for
16 the full amount of the back pay owed her, without deduction of the retirement benefits.
17 This oversight could be remedied by the Court ordering that the Retirement Fund
18 recoup the retirement benefits paid during the period back pay was received, by
19 deduction of the overpaid benefits from future retirement benefits. During the period in
20 which backpay was received, the amount of retirement benefits received was
21 \$272,407.52.

22
23 In addition, during the period for which back pay was received by the Real
24 Party in Interest, she also had earnings from employment. Earnings from employment
25

1 must also be deducted in figuring back pay. In Martinez v. Rite Aid Corp. 63
2 Cal.App.5th 958, 975-976 (4/30/2031), the court stated:

3 Consistent with these principles, actual earnings from substitute
4 employment are offset from lost earnings awards. (Parker, supra, 3 Cal.3d
5 at p. 181, 89 Cal.Rptr. 737, 474 P.2d 689["[t]he general rule is that the
6 measure of recovery by a wrongfully discharged employee is the amount
7 of salary agreed upon for the period of service, *less the amount which the*
8 *employer affirmatively proves the employee has earned* or with
9 reasonable effort might have earned from other employment," (italics
10 added)); accord, Unzueta v. Ocean View School Dist. (1992) 6
11 Cal.App.4th 1689, 1701, 8 Cal.Rptr.2d 614 italics omitted [back pay
12 awards " 'are designed to make the employee whole,' " and awarding full
13 amount without offset for earnings from other employment "would make
14 [the employee] more than whole"]; Bevli v. Brisco (1989) 211 Cal.App.3d
15 986, 994, 260 Cal.Rptr. 57 ["[t]he obligation to reimburse a wrongfully
16 discharged employee may be mitigated by deducting compensation or
17 benefits actually received by the employee that are inconsistent with the
18 original employment"]; see also Currier v. Roseville (1970) 4 Cal.App.3d
19 997, 1003, 84 Cal.Rptr. 615 [former employees conceded that "from any
20 back payments due there must be deducted [their] earnings from other
21 sources"]; Wiles v. State Personnel Board (1942) 19 Cal.2d 344, 352, 121
22 P.2d 673 [ordering petitioner's reinstatement with backpay, less "any
23 remuneration received" from "other employment, if any, petitioner ...
24 engaged in" between termination and reinstatement].) The similarity or
25 dissimilarity of the substitute employment to the prior position has no
bearing on whether actual earnings, as opposed to projected earnings, are
deducted from a lost earnings award. (See Parker, supra, 3 Cal.3d at p.
182, 89 Cal.Rptr. 737, 474 P.2d 689 ["before projected earnings from
other employment opportunities not sought or accepted by the discharged
employee can be applied in mitigation, the employer must show that the
other employment was comparable, or substantially similar, to [the prior
employment]" (italics added)].) Although an employee may not be obliged
to accept inferior employment, if an employee accepts employment and
receives earnings, those actual earnings should be deducted from an
award of past lost earnings.⁹

The jury awarded Martinez \$464,258 in past economic damages for
wrongful termination. The parties agree that award includes \$140,840
Martinez earned from post-Rite Aid employment. Martinez's actual post
termination earnings should have been deducted from the past economic
damages award for wrongful termination. The judgment will be modified to
reduce the award of past economic damages for wrongful termination by
\$140,840.¹⁰

1
2 **Back Pay**

3 The amount of back pay to which the Real Party in Interest is entitled, is
4 calculated at \$41.98/hr from 06/18/2019 (the date of her final adverse action) until
5 04/9/ 2025, the date of the Decision and Order restoring her to employment. The rate
6 of \$41.98/hr is derived from Notification of Personnel Action dated 3/13/20 and reflects
7 her status on the date she was restored to employment by the **Civil Service**
8 **Commission** on June 18, 2019.

9
10 The Notification of Personnel Action dated 3/13/20 also indicates that the Real
11 Party in Interest's next increment date was due on 6/26/20. Including the latter, the
12 Real Party in Interest would be due three (3) increments until her reinstatement was
13 upheld the **Superior Court** on 4/ 9/ 2025. The Civil Service Commission is requested
14 to order the Petitioner, the Department of Parks and Recreation, to ask the
15 Department of Administration to calculate the effect of (3) three increments on the
16 backpay amount, and for the Petitioner to circulate the result among the parties.

17 **Deductions from Back Pay**

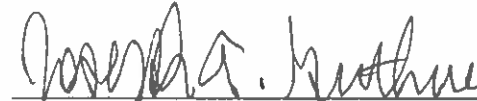
- 18 1. \$104,280.65, inclusive of a check in the amount of \$31,890.50 (Gov
19 Guam Check Number 0784219), issued by the Government of Guam to
20 Lynda Aguon on April 10, 2020. This was issued after, and in result of,
21 the Civil Service decision on Ms. Aguon's case. See Appendix A.
- 22 2. \$272,407.52, the amount of retirement pay received from July 4, 2020,
23 the date Ms. Aguon began receiving retirement pay to April 9, 2025, the
24 date of the Superior Court's Decision and Order reinstating Ms. Aguon.
- 25 3. The amount of earnings Ms. Aguon garnered from employment other
 than employment for the Defendant between June 18, 2019 and April 9,
 2025.

1 The amount of back pay owed Ms. Aguon, after the aforesaid deductions are
2 subtracted, is \$132,781.11 out of a total gross earning of \$509,469.28 from June 18,
3 2019 through April 9, 2025. The total gross needs to be adjusted for 3 increments per
4 above.

5
6
7 Dated this 11th day of August, 2025.

8 **OFFICE OF THE ATTORNEY GENERAL**
9 **Douglas B Moylan, Attorney General**

10 By:



11 **JOSEPH A. GUTHRIE**
12 Chief Deputy Attorney General
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GOVERNMENT OF GUAM
HAGATÑA, GUAM

101-5101214
1
BANK OF GUAM
PO BOX 847
HAGATÑA, GUAM 96932

CHECK
NO. **0784219**

CHECK DATE
4/10/2020

CHECK AMOUNT
31890.50

PAY EXACTLY **31890** DOLLARS AND **50** CENTS
THIRTY ONE THOUSAND EIGHT HUNDRED NINETY & 50/100

TO THE ORDER OF

LYNDA B. AGUON
5usc §552 (b) (6) PII

**PAYROLL ACCOUNT
VOID AFTER 6 MONTHS**

⑈0784219⑈ ⑆21405115⑆ 0101⑈281576⑈

WARNING: DO NOT CASH WITHOUT
NOTING WATERMARK
Featuring Federal Credit Un 256078446
X For Deposit Only
For deposit purposes only,
Account: 1
account 1
DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE
RESERVE FOR FINANCIAL INSTITUTION USE

Amount: \$-31,890.50
Statement Description: CHECK
Check Number: 784219
Posted Date: 5/12/2020
Type: Debit
Status: Posted

1877	compensation \$90,202.70	\$23,414	
For Official Use Only	3 Social Security wages \$0.00	4 Social Security tax withheld \$0.00	
	5 Medicare wages and tips \$104,280.65	6 Medicare tax withheld \$1,512.10	
Employers name, address and ZIP code GOV GUAM - DOA P.O. BOX 884 HAGATNA, GUAM 96932			
Employer Identification number (EIN)	Employee's social security number		
7 Social security tips	8	9	
10	11 Nonqualified plans	12a	See instructions for box \$4,171.27
Employee's First Name and initial, Last Name, suff 2530 LYNDA B. AGUON P.O. BOX 5268 HAGATNA, GU 96932		12b	
		12c	\$1,651.32
		12d	
13 Statutory Employees	Retirement Plan	Third Party Sick Pay	14 \$9,906.68

Department of the Treasury - Internal Revenue Service

2020

For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions.

Form W-2GU Guam Wage and Tax Statement

Copy A for Social Security Administration - Send this entire page with Copy A of Form W-2GU to Social Security Administration, photocopies are not acceptable

I-1877	compensation \$90,202.70	\$23,460.44	
For Official Use Only	3 Social Security wages \$0.00	4 Social Security tax withheld \$0.00	
	5 Medicare wages and tips \$104,280.65	6 Medicare tax withheld \$1,512.10	
c Employers name, address and ZIP code GOV GUAM - DOA P.O. BOX 884 HAGATNA, GUAM 96932			
b Employer Identification number (EIN)	a Employee's social security number		
7 Social security tips	8	9	
10	11 Nonqualified plans	12a	See instructions for box \$4,171.27
e Employee's First Name and initial, Last Name, suff 2530 LYNDA B. AGUON P.O. BOX 5268 HAGATNA, GU 96932		12b	
		12c	\$1,651.32
		12d	
13 Statutory Employees	Retirement Plan	Third Party Sick Pay	14 \$9,906.68

Department of the Treasury - Internal Revenue Service

2020

For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions.

Form W-2GU Guam Wage and Tax Statement

Copy 1 - For Guam Department of Revenue and Taxation

d Control Number I-1877	1 Wages, tips, other compensation \$90,202.70	2 Guam Income tax withheld \$23,460.44	
For Official Use Only	3 Social Security wages \$0.00	4 Social Security tax withheld \$0.00	
	5 Medicare wages and tips \$104,280.65	6 Medicare tax withheld \$1,512.10	
c Employers name, address and ZIP code GOV GUAM - DOA P.O. BOX 884 HAGATNA, GUAM 96932			
b Employer Identification number (EIN)	a Employee's social security number		
7 Social security tips	8	9	
10	11 Nonqualified plans	12a	See instructions for box \$4,171.27
e Employee's First Name and initial, Last Name, suff 2530 LYNDA B. AGUON P.O. BOX 5268 HAGATNA, GU 96932		12b	
		12c	\$1,651.32
		12d	
13 Statutory Employees	Retirement Plan	Third Party Sick Pay	14