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Attorneys for Department of Corrections

IN THE SUPERIOR COURT OF GUAM
HAGÁTÑA, GUAM

SP 0083-22

DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

GUAM CIVIL SERVICE COMMISSION,

Respondent,

vs.

JOSEPH CRUZ II,

Real Party in Interest.

Case No. SP _____

VERIFIED PETITION FOR JUDICIAL
 REVIEW AND FOR WRIT OF PROHIBITION
 STAY OF CSC PROCEEDINGS REQUESTED

THE DEPARTMENT OF CORRECTIONS (“DOC”), by and through the Attorney General of Guam, respectfully petitions the court for judicial review and for a writ of prohibition.

INTRODUCTION

1. This is a simple case in which Joseph Cruz II was terminated by DOC for multiple instances of misconduct including insubordination, failure to follow orders, failure to submit requested documents, and failure to show up to work altogether. Cruz appealed to the Guam Civil

1 Service Commission ("CSC") with the assistance of a "Lay Representative" who apparently was
2 compensated for serving as such. Rather than following the law or respecting its statutory mandate,
3 the CSC has acted well beyond its jurisdiction. The CSC failed to consider the multiple instances
4 of Cruz's misconduct falling within the relevant time period forming the basis for his termination.
5 The CSC awarded attorney fees to Cruz even though there was no evidence or finding that Cruz
6 ever retained an attorney. The CSC violated the Open Government Law and DOC's due process
7 rights by conducting deliberations in private and without notice. The CSC further violated DOC's
8 due process rights by purposefully failing to comply with applicable statutes and the CSC's own
9 rules concerning the participation of "Lay Representatives" at CSC proceedings. The CSC denied
10 DOC due process by failing to conduct hearings to address disputed facts and mitigation. The CSC
11 denied DOC due process by failing to provide notice required by the CSC's own rules. The CSC
12 denied DOC due process by purposefully delaying service of the Decision so that DOC could not
13 enjoy the full ten days legally afforded to it to seek redress at the CSC for the erroneous decision.
14 The CSC also waited to serve the decision so that the DOC would be without the service of legal
15 counsel most knowledgeable about the case. The CSC promulgated and apparently enforces rules
16 which are in direct conflict with the Guam Administrative Adjudication Law, further denying DOC
17 due process. And the CSC repeatedly has permitted a non-lawyer to illegally engage in the practice
18 of law by filing pleadings, making legal arguments, and otherwise arguing in furtherance of Cruz's
19 legal rights and remedies.

20 JURISDICTION..

21 2. This court has jurisdiction to review the CSC's Decision and Judgment in the
22 proceeding before the CSC styled, *Joseph Cruz, II v. Department of Corrections*, Adverse Action
23 Appeal Case No. 21-AA03T signed on June 9, 2022 ("Decision") pursuant to 5 GCA § 9241, 4 GCA
24 § 4406(f) and 7 GCA §§ 3105, 31102, and 31202. A true and correct copy of the Decision is attached
25 as Exhibit A hereto.

1 timely requests for leave, or leave forms to Management. Documentation for the
2 first time period Cruz failed to show up for work was due on December 9, 2020
3 but Cruz failed to provide documentation on that date.

- 4 b. Cruz's failed to report for duty as scheduled or to inform DOC of his status on
5 December 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31, 2020;
6 and January 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28,
7 29, 30, 31, 2021. Cruz was not excused or approved to be on leave for any of the
8 foregoing dates.
- 9 c. Cruz's non-compliance in January 2021 and February 2021 with orders from
10 DOC Internal Affairs, his director, and supervisor. This included failure to
11 comply with written orders from Captain Lizama dated January 12, 2021 and from
12 DOC Internal Affairs directing Cruz to attend meetings and provide requested
13 documentation.
- 14 d. Cruz's insubordination, disobedience, and disrespectful conduct towards his
15 employer on multiple dates in January 2021 by failing to appear before DOC's
16 Director, by failing to provide all information required of him by February 4,
17 2021, and by failing to appear before DOC Internal Affairs on numerous dates in
18 January 2021 and February 1, 2021.
- 19 e. Cruz's insubordination in failing to comply with DOC Internal Affairs' February
20 5, 2021 order that Cruz provide documents to DOC by February 8, 2021 by the
21 close of business.
- 22 f. Cruz's violation of public trust by failing to put in an honest effort to perform his
23 duties and responsibilities, and by his continuing discourtesy and disrespect to his
24 supervisors and fellow officers by failing to report to work.
- 25 g. Cruz's failure to ethically and responsibly perform his duties and responsibilities.

1 11. On February 5, 2021 during his interview with DOC Internal Affairs investigators,
2 Cruz admitted that he failed to comply with the standard of conduct, failed to comply with
3 departmental rules and regulations, and failed to perform his job duties as required. Cruz further
4 admitted that he did not think it was a priority to provide documents to DOC and acknowledged he
5 had not received approval to be off work during his scheduled shifts between December 9, 2021 and
6 January 31, 2021.

7 12. Cruz appealed his termination to the Civil Service Commission on March 9, 2021 in a
8 matter styled, "*In the Matter of Joseph Cruz, II v. Department of Corrections, Adverse Action*
9 *Appeal Case No. 21-AA03T*". ("Matter Below")

10 13. The appeal was filed on behalf of Cruz by Robert Koss, "Lay Representative" of the
11 Guam Federation of Teachers.

12 14. On information and belief, the Guam Federation of Teachers is a chapter of the
13 American Federation of Teachers, AFL-CIO.

14 15. On information and belief, Mr. Koss is compensated by the Guam Federation of
15 Teachers for his service as "Lay Representative" at CSC proceedings, including for Mr. Koss's
16 services as a "Lay Witness" in the Matter Below.

17 16. On information and belief, before, during, and after the pendency of the Matter Below,
18 the CSC was aware that Mr. Koss is compensated by the Guam Federation of Teachers for services
19 rendered by him as a "Lay Representative" in CSC proceedings, including for services rendered on
20 behalf of Cruz in the Matter Below.

21 17. According to its website, the Guam Federation of Teachers Union receives payment
22 from its members and in exchange offers to provide certain "core" benefits including,
23 "Representation and advice on pay, working conditions, grievances and disciplinary actions!"

24 18. On information and belief, Cruz is a member of the Guam Federation of Teachers and
25 has remitted dues to that organization in exchange for "core" benefits as advertised by that

1 organization.

2 19. The Guam Federation of Teachers is not a law practice.

3 20. Mr. Koss is not admitted to practice law on Guam.

4 21. On information and belief, before, during, and after the pendency of the Matter Below,
5 the CSC knew Mr. Koss is not admitted to practice law in Guam.

6 22. DOC objected to Mr. Koss's unlicensed practice of law in the Matter Below.

7 23. CSC ignored DOC's objection.

8 24. Mr. Koss filed two motions in the Matter Below on May 11, 2021 on behalf of Cruz in
9 which Mr. Koss purported to apply the law to the facts and argued the adverse action terminating
10 Cruz should be voided.

11 25. Mr. Koss also made legal arguments in furtherance of the motions he filed on behalf
12 of Cruz.

13 26. Mr. Koss's motions were denied on or about September 28, 2021 because he cited the
14 wrong law.

15 27. The motions had been heard earlier but, because the CSC had failed to comply with the
16 Open Government Law, the motions were therefore decided on September 28, 2021.

17 28. A Merits Hearing was scheduled by CSC for May 10, 2022.

18 29. According to CSC procedural rules, the scope of a Merits Hearing is the issue in
19 dispute, and a review of compliance with procedural requirements for effecting an adverse action.

20 30. After the deadline for motions had passed and on the eve of the Merits Hearing, Mr.
21 Koss filed another brief in which he asserted DOC's non-compliance with the ninety-day rule
22 ("Third Motion").

23 31. Mr. Koss argued DOC had not terminated Cruz within ninety days of Cruz's first
24 absence from work and therefore the termination was null and void under the applicable statute.

25 32. Though his previous motions acknowledged the relevant date from which to calculate

1 the ninety days was December 9, 2020, the Third Motion argued the relevant date was December 2,
2 2020 because that date is listed in one part of the notice as being a date Cruz failed to show up to
3 work.

4 33. As part of the Third Motion filed with and accepted by the CSC, Mr. Koss attached the
5 Notice of Adverse Action which outlined the numerous instances of misconduct committed by Cruz
6 in December 2020, January 2021, and February 2021 including: insubordination in January 2021
7 and February 2021 by failing to show up for meetings, refusal to follow direct orders made to him
8 in January and February 2021, failure to comply with the standard of conduct, failure to follow
9 departmental rules and regulations in January 2021 and February 2021, and failure to perform job
10 duties.

11 34. The relief requested in the Third Motion was limited to having the adverse action be
12 declared null and void.

13 35. The hearing on the Third Motion occurred on May 10, 2022.

14 36. DOC argued that dates prior to December 9, 2020 were listed in error; however, the
15 CSC did not permit any testimony on this disputed issue and failed to hold any evidentiary hearing.

16 37. DOC further argued that Cruz's termination was proper due to the many other instances
17 of misconduct occurring within the ninety-day period that also formed the basis for Cruz's
18 termination.

19 38. These numerous other instances of Cruz's misconduct occurring within the ninety-day
20 period were set forth in the materials submitted by Mr. Koss to the CSC in connection with the
21 Third Motion.

22 39. The CSC did not consider or address in any manner Cruz's multiple episodes of
23 misconduct occurring within the ninety-day period.

24 40. The CSC deliberated on the matter on May 10, 2022.

25 41. The CSC voted in favor of the Third Motion.

1 42. With the approval of the CSC, Mr. Koss subsequently drafted and submitted a proposed
2 decision to the CSC.

3 43. The proposed order requested new relief that was not the subject of the original motion,
4 namely, to declare the adverse action null and void, to have the action expunged from the
5 employee's file, to reinstate the employee retroactive to the day of the action with all pay (43 hours
6 per week), rights and benefit fully restored without limitation.

7 44. Mr. Koss sent his proposed order to the CSC without copying DOC counsel.

8 45. DOC counsel has made several requests to Mr. Koss in this and other cases that Mr.
9 Koss not engage in *ex parte* communications with the CSC, to no avail.

10 46. In at least one other matter involving DOC counsel, Mr. Koss has intentionally
11 contacted clients whom he knows to be represented by counsel.

12 47. DOC counsel objected to the proposed order prepared by Mr. Koss as erroneous
13 because, among other things, it listed five commissioners were present when only four were present,
14 and it purported to award relief that was not contained in the original motion and had not been the
15 subject of deliberations.

16 48. DOC counsel further requested any proposed order be reviewed by CSC Administrative
17 Counsel.

18 49. The CSC initially set the signing for the decision for May 26, 2022.

19 50. The May 26, 2022 date subsequently was abandoned by the CSC.

20 51. On June 2, 2022, DOC counsel filed a motion with CSC to address sanctions against
21 Mr. Koss for *ex parte* communications and to set a hearing on the issue of mitigation or damages;
22 the CSC refused to address either request and ignored them altogether.

23 52. The CSC then set June 9, 2022 as the new date for signing.

24 53. In violation of CSC rules, the CSC failed to serve DOC counsel with notice that a
25 proposed judgment the CSC would be signing was before the CSC.

1 54. The CSC signed the Decision on June 9, 2022 at a public hearing.

2 55. The Decision granted the Third Motion.

3 56. The Decision justified its position based on the employee's purported absence two days
4 prior to the ninety-day period.

5 57. The Decision contains no reference to Cruz's multiple instances of misconduct
6 occurring within the ninety-day period, including in December 2020, January 2021, and February
7 2021.

8 58. The Decision ordered reinstatement pending judicial review apparently pursuant to 4
9 GCA § 4406(g), as well as back pay and benefits.

10 59. The Decision also awarded Cruz attorney fees apparently pursuant to 4 GCA § 4406.1.

11 60. The CSC's award of back pay, benefits, and attorney fees was not requested in the
12 Third Motion.

13 61. There is no evidence on the record Cruz retained an attorney in the Matter Below.

14 62. The CSC made no finding that Cruz had retained an attorney in the Matter Below.

15 63. There was no submission by Cruz as to attorney fees paid or due, nor was there any
16 showing as to the reasonableness of any such fees.

17 64. The CSC did not engage in any public deliberations over the award of attorney fees
18 prior to signing the Decision.

19 65. The CSC rules provide a party may file a motion to reconsider a CSC decision within
20 ten days of entry of the decision.

21 66. On information and belief, the customary practice of the CSC is to provide a copy of a
22 Decision to the parties the same day it is signed.

23 67. The Decision was not provided to DOC counsel on June 9, 2022 even though it was
24 signed that day.

25 68. On June 9, 2022, DOC counsel requested that the CSC email a copy of the Decision

1 because, as counsel had informed the CSC, counsel was scheduled to go on vacation on June 13,
2 2022, and because the fax machine at OAG was not working. The CSC did not provide a copy of
3 the Decision to DOC counsel on June 9, 2022.

4 69. DOC counsel was then required to make a Sunshine Act request for the Decision.

5 70. On June 10, 2022, DOC counsel went to the CSC in person and again requested a copy
6 of the Decision, informing the CSC of her impending vacation plans and the non-working status of
7 the OAG fax machine. Administrative individuals at CSC advised counsel she could not have a
8 copy of the Decision but acknowledged it had been signed. During that same visit to CSC, CSC
9 Administrative Counsel Eric Miller also refused to provide Management counsel with a copy of the
10 Decision.

11 71. On the morning of Monday, June 13, 2022, after DOC counsel left for vacation, the
12 CSC provided the Office of the Attorney General with a copy of the Decision that had been signed
13 the week earlier.

14 **THE CSC IMPROPERLY PERMITS THE ILLEGAL PRACTICE OF LAW
15 IN CSC PROCEEDINGS**

16 72. The Organic Act of Guam grants the Supreme Court of Guam the authority to govern
17 the practice of law on Guam. 28 U.S.C. § 1424-1(a)(7).

18 73. Inherent in the Guam Supreme Court's supervisory power is the authority to prohibit
19 the unauthorized practice of law.

20 74. The Guam Legislature does not have the ability to infringe on the authority of the Guam
21 Supreme Court in governing the practice of law.

22 75. The CSC does not have the ability to infringe on the authority of the Guam Supreme
23 Court in determining who may practice law.

24 76. It is unlawful for any person to practice law unless the person so doing is regularly
25 licensed and authorized to practice law in Guam. 7 GCA § 9A106.

1 77. Law enforcement is obligated to assist the Guam Supreme Court in investigating
2 persons accused of the unauthorized practice of law. 7 GCA § 9106.

3 78. No person is authorized to practice law in Guam unless he complies with the
4 requirements of the Superior Court of Guam thereto. 7 GCA § 9A102.

5 79. Any person who engages in the unauthorized practice of law is guilty of contempt of
6 the Superior Court and subject to punishment as provided by law. 7 GCA § 9A106.

7 80. "Person" is defined by Guam statute to include a corporation, firm, association,
8 organization, partnership, business trust or company unless otherwise provided by the statute. 1
9 GCA § 715(d).

10 81. The "practice of law" includes but is not limited to providing legal advice, such as
11 recommending someone settle a case or commence a lawsuit; making an appearance in a tribunal
12 on behalf of another; drafting papers, pleadings, or documents; performing any act in connection
13 with proceedings pending or prospective before a tribunal constituted by law or having authority to
14 take evidence in or settle or determine controversies; meeting with clients for certain legal endeavors
15 such as discussing case strategy; questioning witnesses at a proceeding before the tribunal; arguing
16 motions; and acting in a representative capacity in protecting, enforcing or defending the legal rights
17 and duties of another and in counseling, advising, and assisting him in connection with those rights
18 and duties.

19 82. Limiting the practice of law to members of the bar protects the public against rendition
20 of legal services by unqualified persons.

21 83. Limiting the practice of law to members of the bar also provides redress for aggrieved
22 clients.

23 84. Attorneys owe their clients certain fiduciary and ethical obligations.

24 85. For example, an attorney is required to convey to his or her client a settlement offer
25 from the other side; a licensed attorney is not permitted to circumvent opposing counsel and speak

1 directly to a party represented by counsel; and a licensed attorney is required to competently
2 represent his or her client with diligence and competence.

3 86. Under Rule 1.1(m) of the Guam Rules of Professional Conduct, "Tribunal" is defined
4 as "a court, an arbitrator in binding arbitration proceedings or a legislative body, administrative
5 agency or other body acting in an adjudicative capacity. A legislative body, administrative agency
6 or other body acts in an adjudicative capacity when a neutral official, after the presentation of
7 evidence or legal argument by a party or parties, will render a binding legal judgment directly
8 affecting a party's interests in a particular matter."

9 87. CSC is a tribunal within the meaning of Rule 1.1(m) of the Guam Rules of Professional
10 Conduct.

11 88. As an agency, the CSC is a creature of the Legislature and cannot create policy or rules
12 that are inconsistent with the legislative scheme that authorized the CSC's creation. *Wade v.*
13 *Taitano*, 2002 Guam 16 ¶ 7.

14 89. The CSC does not have any authority to govern the practice of law on Guam or to
15 decide who may practice law in any tribunal.

16 90. A lay representative may appear with an employee of the Government of Guam at an
17 administrative body concerning the employee's government service under 7 GCA § 9A215(c)(16),
18 but such lay representative still is not authorized to practice law on Guam unless that individual is
19 admitted to practice law on Guam.

20 91. Under the statute, a lay representative is only permitted where appearing at no charge
21 to the employee. *Id.*

22 92. By statute the CSC may adopt rules to govern its procedures and the standards to be
23 maintained by non-attorney representatives appearing before it but the rules are to recognize that
24 the representatives are not attorneys. *See* 4 GCA § 4402.

25 93. Rule 13.2 of the CSC Amended Adverse Action Appeal Rules of Procedure provides,

1 "By agreeing to be a Representative, the Representative assumes an ethical and agency relationship
2 with the Employee that he represents. Lay Representatives may not be compensated for their
3 services but may seek reimbursement for reasonable, actual costs incurred and substantiated with
4 receipts in preparing for an appearing at hearing and status calls and conferences before the CSC
5 related to the action, such as, but not limited to, photocopying costs."

6 94. On information and belief, Robert Koss is employed by the Guam Federation of
7 Teachers Union as a "Field Representative" and in that capacity represents employees purportedly
8 as a "Lay Representative" at CSC proceedings.

9 95. Mr. Koss appeared in the Matter Below purportedly as a "Lay Representative" on
10 behalf of Cruz.

11 96. On information and belief, Mr. Koss has been and will be compensated by the union
12 for appearing at CSC proceedings in the Matter Below as a "Lay Representative" for Cruz, as well
13 as for meeting with Cruz, preparing pleadings, and arguing motions.

14 97. The CSC rules do not permit Mr. Koss to act as a "Lay Representative" in the Matter
15 Below because he has and will receive compensation for his services as a "Lay Representative".

16 98. Mr. Koss is not permitted to engage in the practice of law at CSC proceedings.

17 99. Mr. Koss is not licensed to practice law in Guam.

18 100. Mr. Koss engaged in the unauthorized and unlicensed practice of law before the CSC
19 in Matter Below by, among other things, preparing and submitting pleadings under his own
20 signature, applying law to facts, submitting and arguing legal motions to further the legal rights of
21 the employee, submitting the proposed judgment in this matter and, on information and belief,
22 advising employee of his legal rights.

23 101. Mr. Koss acknowledged in the Matter Below that he was arguing the Third Motion
24 based on his interpretation of the statute.

25 102. Mr. Koss further admitted in the Matter Below that he has filed pleadings in other

1 matters concerning how the law should be interpreted.

2 103. On information and belief, before, during, and after the pendency of the Matter Below,
3 the CSC was aware Mr. Koss was not licensed to practice law.

4 104. On information and belief, before, during, and after the pendency of the Matter Below,
5 the CSC was aware Mr. Koss was compensated for his services as a Lay Representative in the Matter
6 Below.

7 105. The CSC impermissibly permitted Mr. Koss to engage in the practice of law without a
8 license over the objection of counsel for Management in the Matter Below by, among other things,
9 allowing Mr. Koss to file pleadings concerning Cruz' legal rights and remedies in connection with
10 his employment such as motions to dismiss, to make legal arguments, to apply the law to facts,
11 argue motions, and prepare a draft judgment for the CSC applying facts to legal statutes.

12 CLAIMS FOR RELIEF

13 COUNT ONE 14 DECISION UNSUPPORTED BY EVIDENCE 15 [DISPUTED MATERIAL FACTS]

16 106. Petitioner repeats and realleges the averments of all prior paragraphs as if fully set forth
17 herein.

18 107. The Decision relies solely on a statement that Cruz first failed to show up for work on
19 December 2, 2020, which was beyond the ninety-day period.

20 108. This date is contradicted by every other date recited in the paperwork considered by
21 the CSC, which instead reflects December 9, 2020 as the first date of Cruz's unauthorized absence
22 from his place of employment.

23 109. DOC made clear at the motion hearing that there was a material dispute as to the first
24 date Cruz failed to show up for work, and that the listing of dates prior to December 9, 2020 was in
25 error.

110. DOC maintains December 9, 2020 was the first date Cruz failed to show up for work.

1 111. December 9, 2020 was within ninety days of Cruz's termination.

2 112. The CSC refused to receive any testimony on this disputed material issue.

3 113. The CSC relied on a disputed material fact to render its decision and denied DOC due
4 process and the ability to present evidence concerning the issue; the Decision must be vacated on
5 that basis. *See Port Auth. of Guam v. Civil Svc. Comm'n (Arriola)*, 2019 Guam 13.

6 **COUNT TWO**
7 **DECISION UNSUPPORTED BY EVIDENCE**
8 **[FAILURE TO CONSIDER MISCONDUCT OCCURRING**
9 **WITHIN 90 DAY PERIOD]**

10 114. Petitioner repeats and realleges the averments of all prior paragraphs as if fully set forth
11 herein.

12 115. The materials the CSC was required to but did not consider demonstrate Cruz first
13 failed to show up for work on December 9, 2020, a fact Cruz admitted in the first round of motions
14 filed by Mr. Koss.

15 116. The materials the CSC was required to consider also reflect Cruz's insubordination and
16 failure to follow orders in January 2021 and February 2021, but the CSC failed to consider that
17 information altogether.

18 117. The materials before the CSC also reflect Cruz's admission in February 2021 that he
19 failed to comply with the standard of conduct, failed to comply with departmental rules and
20 regulations, and failed to perform his job duties as required not only because he failed to report to
21 work, but because he was insubordinate and failed to comply with direct orders issued to him in
22 January 2021 and February 2021.

23 118. The foregoing are material facts were argued by DOC counsel and are potentially
24 dispositive of the matter.

25 119. Nonetheless, misconduct occurring within the ninety days was not considered by the
CSC at all even though DOC counsel argued in support.

1 120. The Decision is erroneous and contrary to law because it failed to consider the
2 numerous bases for Cruz's termination which fell within the statutory time frame.

3 121. The Guam Supreme Court found such a failure reversible error in *Port Authority of*
4 *Guam v. Civil Service Commission (Arriola)*, 2019 Guam 13. There, the CSC dismissed a case for
5 violating the 60-day rule but failed to consider the merits of separate misconduct that fell within the
6 relevant period before the final notice of adverse action was issued. *Arriola*, 2019 Guam 13 ¶ 29.
7 The Guam Supreme Court found the CSC's failure to consider the factual allegation was reversible
8 error, and remanded the matter for the CSC to conduct "a fuller evidentiary hearing" because there
9 were material issues of fact regarding the merits of the 60-day rule. *Id.* at ¶¶ 30, 31.

10 122. The CSC's failure to independently consider Cruz's misconduct falling within the
11 ninety-day period was erroneous and therefore the Decision must be vacated on that basis.

12 **COUNT THREE**
13 **DUE PROCESS VIOLATION**
14 **[FAILURE TO PERMIT MITIGATION EVIDENCE]**

15 123. Petitioner repeats and realleges the averments of all prior paragraphs as if fully set forth
16 herein.

17 124. DOC is entitled to due process in CSC proceedings as a party whose rights are affected
18 by the actions of the CSC.

19 125. Fairness in procedures conducted by a fair tribunal is a basic requirement of due
20 process.

21 126. Fair notice and an opportunity to be heard similarly, are basic requirements of due
22 process.

23 127. After the CSC orally granted the Third Motion, DOC filed a motion requesting a
24 mitigation hearing.

25 128. DOC is entitled to a hearing to determine whether Cruz made any efforts to mitigate
his damages, thereby establish the true amount of liability, if any.

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129. CSC ignored DOC's motion for a mitigation hearing.

130. Failure to consider the issue of mitigation is erroneous. *See Haeuser v. Dep't of Law*, 2005 Guam 14 ¶ 21-22.

131. By denying the DOC the opportunity to address whether Cruz mitigated his damages, the CSC violated the DOC's due process rights, denied DOC its right to determine the true measure of its liability, and impermissibly favored Cruz.

**COUNT FOUR
DECISION UNSUPPORTED BY LAW
[4 GCA § 4406.1 DOES NOT ALLOW FOR THE AWARD OF
ATTORNEY FEES HERE]**

132. Petitioner repeats and realleges the averments of all prior paragraphs as if fully set forth herein.

133. The Decision's award of attorney fees is unsupported by the law.

134. Section 4406.1 only allows for an award of attorney fees "[i]f an employee in the classified service *retains an attorney to represent him* or her before the Civil Service Commission ... to challenge an adverse action brought against the employee, and ... prevails". (emphasis added).
4 GCA § 4406.1.

135. There is no evidence in the record that Cruz retained an attorney to represent him in the Matter Below.

136. Cruz himself never requested attorney fees and never submitted anything indicating he paid or owed attorney fees.

137. CSC made no factual finding that Cruz retained an attorney to represent him in the Matter Below.

138. Because he did not retain an attorney to represent him in the Matter Below, Cruz is not entitled to attorney fees.

139. Because the Third Motion did not seek attorney fees, the CSC did not deliberate on the

1 issue at the public hearing on May 10, 2022.

2 140. The CSC failed to provide notice it intended to award attorney fees, or the factual basis
3 therefor.

4 141. By awarding attorney fees to Cruz, the CSC exceeded its jurisdiction.

5 **COUNT FIVE**
6 **CSC'S VIOLATION OF THE OPEN GOVERNMENT LAW**
7 **[AS TO DELIBERATIONS OF ATTORNEY FEE AWARD]**

8 142. Petitioner repeats and realleges the averments of all prior paragraphs as if fully set forth
9 herein.

10 143. Under the Guam Open Government Law, with the exception of executive sessions and
11 other meetings so noticed, every meeting of a public agency shall be open and public. 5 GCA §
12 8103.

13 144. The CSC, as a Guam public agency, must comply with the provisions of the Guam
14 Open Government Law.

15 145. Deliberations of the CSC are to be conducted in public.

16 146. CSC, as a public agency, cannot hold an executive or closed meeting to discuss legal
17 matters but instead must hold all such discussions in a public meeting, and minutes are to be kept
18 and open to the public. 5 GCA § 8111(c).

19 147. Should the CSC wish to hold an executive meeting, notice of the meeting shall be given
20 as required for any other meeting, and shall indicate the place and time of the meeting, the general
21 subject matter to be discussed, as well as the specific exemption permitting an executive or closed
22 meeting. 5 GCA § 8111(c)(4).

23 148. Under no circumstances shall the CSC vote on any matter before it during an executive
24 or closed meeting. 5 GCA § 8111(d).

25 149. The Third Motion did not request attorney fees.

150. There is no evidence on the record Cruz retained an attorney in the Matter Below.

1 151. The CSC's deliberations on May 10, 2022 did not include whether Cruz was entitled
2 to or should be awarded attorney fees.

3 152. Nonetheless, the Decision awarded attorney fees to Cruz on June 9, 2022.

4 153. As the issue of attorney fees was not part of the CSC's public deliberations on May 10,
5 2022, the deliberations on the issue were made in private and without notice, in violation of the
6 Guam Open Government Law.

7 **COUNT SIX**
8 **CSC'S FAILURE TO FOLLOW ITS OWN RULES REGARDING**
9 **"LAY REPRESENTATIVES"**

10 154. Petitioner repeats and realleges the averments of all prior paragraphs as if fully set forth
11 herein.

12 155. Mr. Koss appeared in this matter as a "Lay Representative" on behalf of Cruz.

13 156. On information and belief, Mr. Koss receives compensation from the Guam Federation
14 of Teachers for his services at CSC proceedings, including for this case.

15 157. On information and belief, before, during, and after the pendency of the Matter Below,
16 the CSC was aware that Mr. Koss is compensated by the Guam Federation of Teachers for his
17 services at CSC proceedings, including for services rendered in the Matter Below on behalf of Cruz.

18 158. Under the CSC's Amended Adverse Action Appeal Rules of Procedure, a person may
19 not appear as a "Lay Representative" where he is compensated for his services.

20 159. By Mr. Koss to appear as a "Lay Representative" in this matter, the CSC has violated
21 its own rules and exceeded its authority.

22 160. Accordingly, a writ of prohibition should issue directing the CSC to cease violating its
23 own rules and exceeding its authority by permitting "Lay Representatives" who are compensated
24 for their services from appearing before the CSC.

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COUNT SEVEN
CSC PERMITTING THE UNLICENSED PRACTICE OF LAW
IN CSC PROCEEDINGS

161. Petitioner repeats and realleges the averments of all prior paragraphs as if fully set forth herein.

162. The determination of who may practice law in Guam is within the sole jurisdiction of the Guam Supreme Court.

163. The CSC does not have the authority to permit the unlicensed practice of law in its tribunals or anywhere else.

164. The CSC was aware throughout the pendency of the Matter Below that Mr. Koss is not licensed to practice law in Guam.

165. Even though he is not admitted to practice law in Guam, Mr. Koss engaged in the practice of law in this matter by preparing and submitting pleadings, filing and arguing motions, preparing the proposed judgment in this matter, and otherwise acting in a representative capacity in protecting, enforcing or defending the legal rights and duties of Cruz and in counseling, advising, and assisting Cruz in connection with those rights and duties.

166. The CSC not only permitted Mr. Koss to practice law without a license in the Matter Below, it encouraged Mr. Koss to do so by, among other things, accepting and hearing motions filed by Mr. Koss, allowing him to make legal arguments, and by allowing Mr. Koss to prepare the proposed judgment in this matter.

167. DOC objected to Mr. Koss's unlicensed practice of law in the Matter Below and in other CSC proceedings where Mr. Koss purportedly appears as a "Lay Representative" but engages in the unlicensed practice of law.

168. The CSC ignored DOC's objection.

169. The CSC's encouragement of Mr. Koss's illegal conduct is evident at least in its decision to award attorney fees to Mr. Koss in the Matter Below.

1 170. In allowing the unlicensed practice of law in the CSC proceedings here, the CSC has
2 exceeded its authority.

3 171. A writ of prohibition should issue directing the CSC to cease permitting and
4 encouraging the unlicensed practice of law in CSC proceedings.

5 **COUNT EIGHT**
6 **DUE PROCESS VIOLATION**
7 **[FAILURE TO ENSURE CSC PROCEEDINGS ARE FAIR, IMPARTIAL,**
8 **AND CONDUCTED IN ACCORDANCE WITH THE LAW]**

9 172. Petitioner repeats and realleges the averments of all prior paragraphs as if fully set forth
10 herein.

11 173. DOC is entitled to due process in CSC proceedings as a party whose rights are affected
12 by the actions of the CSC.

13 174. The CSC acts through its Commissioners, Administrative Counsel, and staff, all of
14 whom are public servants.

15 175. Fairness in procedures conducted by a fair tribunal is a basic requirement of due
16 process.

17 176. Fair notice and an opportunity to be heard, similarly, are basic requirements of due
18 process.

19 177. DOC has a right to expect CSC proceedings to comply with applicable law and
20 procedures, and that CSC Commissioners and staff will ensure compliance.

21 178. Through the actions of its Commissioners, Administrative Counsel, and staff, the CSC
22 has repeatedly violated DOC's due process rights.

23 179. CSC failed to serve DOC counsel with notice of the proposed judgment CSC intended
24 to sign on June 9, 2022, in violation of CSC rules.

25 180. CSC staff and Administrative Counsel refused to provide DOC counsel with a copy of
the Decision on June 9, 2022 and June 10, 2022.

1 181. CSC Commissioners and Administrative Counsel are aware that CSC rules allow an
2 aggrieved party ten days in which to file a motion for reconsideration.

3 182. CSC's refusal to provide the Decision until four days after it was signed was done
4 intentionally and for the purpose of a) denying DOC the benefit of a full ten-day period during
5 which to seek redress from the CSC for the erroneous ruling; and b) to deny DOC the benefit of
6 legal services of the attorney most familiar with the case.

7 183. CSC rules also impermissibly fail to comply with Guam Administrative Adjudication
8 Law ("AAL"), 5 GCA § 9233, which provides an agency decision is effective thirty days after it is
9 delivered or mailed to respondent. CSC Rule 11.7.5 of the Amended Adverse Action Appeal Rules
10 of Procedure states that a judgment is entered and becomes final and effective on the date a majority
11 of the Commissioners sign the judgment at a Commission meeting. The Guam Supreme Court
12 affirmed that the AAL applies to CSC proceedings. *See Guam Police Dep't v. Guam Civil Svc.*
13 *Comm'n*, 2020 Guam 12 ¶ 9. The CSC's promulgation and enforcement of rules which contradict
14 and circumscribe DOC's rights under the AAL violate DOC's due process rights.

15 184. CSC permitted Mr. Koss to appear as a "Lay Representative" in the Matter Below
16 despite knowing Mr. Koss is not a lawyer, and that Mr. Koss is compensated by the Guam Federation
17 of Teachers for his services as a "Lay Representative".

18 185. CSC permitted Mr. Koss to appear as a "Lay Representative" in the Matter Below
19 despite knowing that the CSC Rules do not permit someone to appear in CSC proceedings as a "Lay
20 Representative" where that person is compensated for his or her services.

21 186. CSC either failed to make reasonable inquiry to ensure Mr. Koss's appearance as a
22 "Lay Representative" in the Matter Below was in compliance with CSC rules, or purposefully
23 disregarded the fact that Mr. Koss's activities as a "Lay Representative" violated the law and CSC's
24 own rules.

25 187. As public servants, CSC Commissioners and staff cannot deprive another person of a

1 benefit by knowingly refraining from performing a duty clearly inherent in the nature of his or her
2 office.

3 188. Through its commissioners and staff, CSC knowingly failed to provide statutory notice
4 to DOC as to the proposed Decision CSC intended to sign on June 9, 2022.

5 189. Through its commissioners and staff, CSC knowingly denied DOC the benefit of the
6 full ten days in which to seek redress for CSC's erroneous decision, and denied DOC the benefit of
7 DOC's legal counsel most familiar with the facts and circumstances of the Matter Below.

8 190. CSC Commissioners and staff have knowingly permitted Mr. Koss, who is not a
9 licensed attorney, to improperly and illegally practice law without a license in proceedings before
10 the CSC in this matter with the intent and for the purpose of depriving Management of the benefit
11 of fair and impartial proceedings conducted in accordance with the law.

12 191. By failing or refusing to prevent the unlicensed practice of law in the Matter Below,
13 CSC Commissioners have failed or refused to fulfill their duty to ensure CSC proceedings are fair,
14 impartial, and conducted in accordance with the law.

15 PRAYER FOR RELIEF

16 Petitioner prays for the following relief:

- 17 A. That the Decision and Judgment of the CSC be vacated and reversed in its entirety as
18 being erroneous, contrary to law and unsupported by substantial evidence;
- 19 B. That the matter be remanded to the CSC for a Hearing on the Merits or, in the
20 alternative, that the matter be remanded to CSC for a Hearing as to the employee's
21 mitigation efforts;
- 22 C. That the CSC be found in violation of the Guam Open Government Law by
23 conducting deliberations concerning the award of attorney fees in private and without
24 notice;
- 25 D. That a writ of prohibition issue directing the CSC to 1) cease violating the Open

1 Government Law by discussing or deliberating upon any potential official action in
2 private and without notice; 2) cease permitting the unlicensed practice of law in CSC
3 proceedings; 3) cease violating applicable law and the CSC's own rules regarding the
4 appearance of "Lay Representatives" in CSC proceedings; and 4) cease denying
5 DOC's right to fair and impartial hearings that comply with applicable law;

6 E. For a stay of proceedings in the Matter Below, including a stay of enforcement of the
7 Decision pending judicial review;

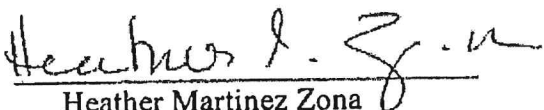
8 F. For disgorgement of any benefits, compensation, attorney fees, and all other monies
9 received by Cruz and/or his Lay Representative pursuant to the Decision and
10 Judgment dated June 9, 2022 in 21-AA03T at any time pending final judicial review
11 and decision in this matter;

12 G. For costs of suit; and

13 H. For such other and further relief as the court deems appropriate.

14
15 Dated: June 17, 2022

OFFICE OF THE ATTORNEY GENERAL
Leevin Taitano Camacho, Attorney General

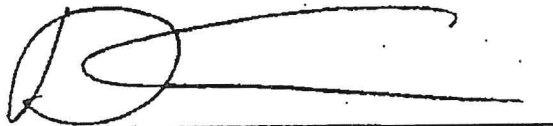
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17 By: 
18 Heather Martinez Zona
19 Assistant Attorney General
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VERIFICATION

I, ROBERT D. CAMACHO, being first duly sworn, say that I am the Acting Director of
Petitioner Department of Corrections. I have read the foregoing Verified Petition for Review
and Writ of Prohibition. Based on a review of the materials in my possession as well as my
participation in proceedings before the Civil Service Commission in the matter below, I know
the contents of the foregoing document to be true and correct, except for matters which are
therein stated upon information and belief; and as to those matters, I believe them to be true.

Executed this 17th day of June, 2022 at Chalan Pago, Guam.



ROBERT D. CAMACHO

EXHIBIT A

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**BEFORE THE
GUAM CIVIL SERVICE COMMISSION
BOARD OF COMMISSIONERS**



IN THE MATTER OF:

JOSEPH CRUZ II,

Employee,

vs.

DEPARTMENT OF CORRECTIONS,

Management.

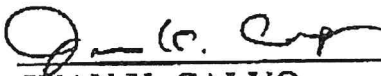
**ADVERSE ACTION APPEAL
CASE NO.: 21-AA03T

DECISION AND JUDGMENT**

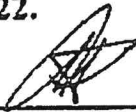
This matter came before the Commission May 10, 2022, on Employee's Motion to Dismiss for violation of the 90-day Rule. Director Robert Camacho of the Department of Corrections, appeared for Management with his counsel Assistant Attorney General Donna Lawrence. Employee appeared with his Lay Representative, Robert Koss.

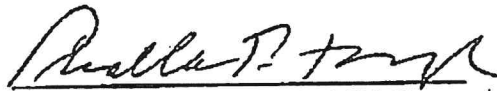
1 Employee is reinstated immediately pending judicial review. Section 4406
2 (g), and is awarded back pay and benefits and attorney fees. Section 4406.1. Failure
3 to adhere to this decision shall result in reduction in salary of ten percent
4 (10%) for the Agency head and his deputy from the date of the decision until the
5 date of reinstatement in full compliance with this decision. Section 4406 (h).
6

7 **SO ORDERED** this 9th day of June, 2022.

8 

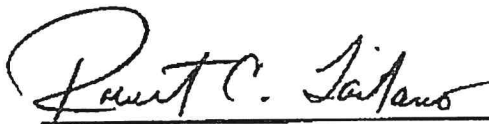
9 **JUAN K. CALVO**
Chairman

10 
ANTHONY P. BENAVENTE
Vice Chairman

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12 **PRISCILLA T. TUNCAP**
Commissioner

13 
JOHN SMITH
Commissioner

14 

15 **ROBERT C. TAITANO**
Commissioner

16 **(absent)**
FRANCISCO T. GUERRERO
Commissioner

17
18
19 **DECISION AND JUDGMENT**

20 *Joseph Cruz II vs. Department of Corrections*
Adverse Action Appeal CSC Case No.: 21-AA03T

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