



Office of the Attorney General of Guam

590 S. Marine Corps Dr., Ste. 706, Tamuning, Guam 96913



March 2, 2016

OPINION MEMORANDUM

Ref: GVB 15-0666

TO: General Manager, Guam Visitors Bureau

FROM: Attorney General

SUBJECT: Civil Service Commission Post Audit Authority and Guam Visitors Bureau

This is in response to your request for this Office's legal opinion on the following matter:

QUESTION PRESENTED

Whether, pursuant to 4 GCA § 4403(d), the Civil Service Commission ("CSC") has authority to declare "null and void" a personnel action of the Guam Visitors Bureau ("GVB") not arising from an adverse action.

SHORT ANSWER

No. The CSC does not have authority under 4 GCA §4403(d) to declare "null and void" a personnel action of the GVB not arising from an adverse action.

ANALYSIS

Title 4 GCA § 4403(d) authorizes CSC to "investigate and set aside and declare null and void any personnel action of an employee in the classified service if the Commission finds after conducting the necessary investigation that the personnel action was taken in violation of personnel laws or rules[.]" For purposes of § 4403(d), "reference to classified employees will be deemed to mean classified employees of the Executive Branch, including agencies and authorities [.]" 4 GCA § 4403(g). (Emphasis added.)

GVB employees, with the exception of the General Manager, Deputy General Manager, and Secretary, are classified employees. 12 GCA § 9116. However, it is well settled that, while it is a public corporation created by the Guam Legislature, GVB "is not an instrumentality of the Executive Branch of the Government." 12 GCA § 9102; *see Bordallo v. Reyes*, 610 F.Supp. 1128 (D. Guam 1984), *aff'd* 763 F.2d 1098 (9th Cir. 1985); *GEDA v. Island Equip. Co., Inc.*,

March 2, 2016

Opinion

Subject: Civil Service Commission Post Audit Authority and Guam Visitors Bureau

Ref: GOV 15-0666

Page 2 of 3

1998 Guam 7. Thus, employees of GVB are not, legally speaking, “government of Guam employees”. See *Carlson v. Perez*, 2007 Guam 6 citing *Bordallo v. Reyes*, 610 F.Supp. 1128, 1133 (D. Guam 1984), aff’d 763 F.2d 1098 (9th Cir. 1985) (holding that employees of public corporations are not employees of the government of Guam).

Given that GVB’s classified employees are not classified employees of the Executive Branch agencies or authorities as defined in 4 GCA § 4403(g), it is our opinion that the CSC does not have post audit authority pursuant to 4 GCA § 4403(d) to “investigate and set aside and declare null and void” a personnel action of GVB.

Our determination is made notwithstanding GVB’s Personnel Rules and Regulations that seemingly provide for CSC post audit authority over GVB personnel selection processes. In particular, Section G(1) of the Merit Career Plan in GVB’s Personnel Rules and Regulations (Section G-1) states that the “CSC reserves the right to post audit selection documentation records.” *GVB Personnel Rules and Regulations* at 149.

In GVB’s opinion request, the agency states that GVB employees’ rights to appeal adverse actions to the CSC is “due to the GVB’s grant of limited authority” pursuant to 4 GCA § 4105(a),¹ and is not a “legislative award of general jurisdiction.” GVB’s assertion implies that the CSC could only exercise post audit jurisdiction if GVB itself granted CSC such “limited authority.” GVB asserts that it “has adopted a rule establishing an employee’s rights of appeal to the CSC,” but that it “has not . . . adopted a rule inviting a CSC investigation in the absence of an adverse action.” Section G(1), however, appears to contradict GVB’s latter assertion.

Regardless of this contradiction, Section G(1)’s purported grant of post audit authority to the CSC conflicts with 4 GCA §§ 4403(d) & (g), the statutory provisions limiting the CSC’s post audit authority to personnel actions of employees in the classified service of the Executive Branch of the government of Guam. Thus, to the extent it is relied upon to confer CSC with post audit authority over GVB, Section G(1) of the Merit Career Plan in GVB’s Personnel Rules and Regulations is invalid.² See *GVB Personnel Rules and Regulations* Sec. 1.600 (“In the event any

¹ 4 GCA § 4105(a) states in relevant part, “Rules subject to criteria established by this Chapter governing the selection, promotion, performance, evaluation, demotion, suspension and other disciplinary action of classified employees shall be adopted by . . . the Board of Directors of the Guam Visitors Bureau. . . .”

² This situation can be distinguished from GVB’s grant of jurisdiction, by rule, to the CSC over adverse action appeals by GVB employees. GVB’s grant of authority to the CSC to hear employee appeals from adverse actions is supported by statute. See 12 GCA § 9110(a) (requiring GVB to establish personnel rules and regulations pursuant to 4 GCA § 4105); 4 GCA § 4105(b) (requiring that classified employee appeals for various autonomous agencies and public corporations be heard by the CSC.); see also *Carlson v. Perez*, 2007 Guam 6 ¶ 49 (“[T]he Guam Legislature has the

March 2, 2016

Opinion

Subject: Civil Service Commission Post Audit Authority and Guam Visitors Bureau

Ref: GOV 15-0666

Page 3 of 3

rule or regulation is in conflict with statute, the statute shall prevail to the extent of inconsistency.”); see also *Town House Dep’t Stores, Inc. v. Dep’t of Educ.*, 2012 Guam 25 at n. 4; *Guerrero v. Santo Thomas* [sic], 2010 Guam 11 ¶ 36; *Fleet Serv., Inc. v. Dep’t of Admin., Gov’t of Guam*, 2006 Guam 6 ¶ 15.

CONCLUSION

For purposes of establishing CSC post audit authority pursuant to 4 GCA §§ 4403(d) and (g), GVB employees are not classified employees of the Executive Branch of the government of Guam. Accordingly, the CSC does not have post audit authority to “investigate and set aside and declare null and void” personnel action of the GVB not arising from an adverse action.



ELIZABETH BARRETT-ANDERSON
Attorney General

power to legislate a merit system for employees of the non-instrumentality corporations This directive is found in 4 GCA § 4105[.]”). In contrast, there is no separate specific authorization for a grant of § 4403(d) post audit authority to the CSC. *Cf. Superales v. Civil Service Commission*, Special Proceeding Case No. SP 261-00, Decision and Order (Sept. 20, 2002)(holding that 4 GCA Chapter 4 does not confer the CSC with “the power to enact rules governing the procedures for filing petitions for review with the Superior Court of Guam.”)