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Lourdes A. Leon Guerrero
Governor of Guam
Joshua F. Tenorio
Lieutenant Governor

November 25, 2020

The Honorable Benjamin J. Cruz
Public Auditor
Office of Public Accountability
Suite 401 DNA Building
238 Archbishop Flores Street
Hagatna, Guam 96910

Subject: Draft Report – Port Authority of Guam Back Wages Series, Part A

Dear Mr. Public Auditor:

Hafa Adai! We are in receipt of your draft report dated November 6, 2020, Subject: Port Authority of Guam Back Wages Series, Part A. This letter is to supplement our response, dated September 25, 2020, which we are also enclosing with the exhibits. We are concerned with your auditors' assertions of noncompliance with applicable laws, regulations, and internal policies, as well as lapses in the Port's internal processes. This letter, together with all of its supporting documents, will clear up any concerns raised in this draft audit.

Please note that our responses are in *italics*, and, in those instances where it is pertinent, we will restate what was already provided to your office by way of our September 25, 2020 letter.

Introduction

This report presents the results of our performance audit on the Port Authority of Guam's (Port) execution of settlements, or legal remedies, with one of the nine reinstated employees based on resolved Civil Service Commission (CSC) cases. We conducted this audit in response to the public's concern over Port's decision to keep confidential the settlement costs connected with nine previously-terminated employees—salary, employee benefits, and their attorney's fees and costs.

Response: *It is factually incorrect to state, "Port's decision to keep confidential the settlement costs connected with nine previously-terminated employees—salary, employee benefits, and their attorney's fees and costs", without stating that all of the settlements can now be found on the Port's website. Granted, these settlements were uploaded sometime after the development of this draft audit, we are requesting that a notation be made to reflect that all the settlements can be found on the Port's website. Although these settlements were uploaded to the Port's website for the general public to view a few months after your audit began, an objective review of the circumstances which were acknowledged in our meeting on November 20, 2020 show that the Port was following the advice of counsel which was to not disclose the settlements. The Port General*

Manager then requested that the OPA seek an opinion on this issue as the General Manager wanted to disclose but could not as the only standing legal advice prohibited those actions. Once the Attorney General opined that it was legal to release the settlements, the Port immediately uploaded all agreements to the website for full public transparency and released copies to all media who requested for hard copies as well. We believe that the statement in the Introduction that indicates “We conducted this audit in response to the public’s concern over Port’s decision to keep confidential the settlement costs connected with nine previously-terminated employees—salary, employee benefits, and their attorney’s fees and costs” is not factual and is misleading. Using Professional Judgment on this matter to include the collective knowledge of the circumstances already acknowledged by the Auditing Team clearly would deem this statement to be misleading and not a true and accurate reflection of all of the circumstances.

Our audit objective was to determine whether Port’s settlement, or legal remedies, with nine reinstated employees were properly accounted for and paid in accordance with applicable laws, regulations, and administrative and judicial review judgments. However, this specific report (Part A) focused on the audit results of only one of the nine reinstated employees, herein referred to as “Employee Q”. A separate report was necessary because of the significant amount of Employee Q’s legal remedies and the manner in which Port executed his payments.

In Part A, our audit scope covered the court orders and judgments, Port documents, and other documents that contributed to Port’s calculations and payments to Employee Q’s legal remedies during our audit engagement (i.e., October 2010 through October 2020).

Our audit results on the other eight employees’ settlements will be issued in separate audit reports. We detailed the objective, scope, and methodology in Appendix 1.

Background

Port is a public corporation and autonomous Government of Guam (GovGuam) agency, for which primary revenues are derived from providing services to major shipping line customers, tariffs, and rentals of equipment and spaces related to ocean commerce, recreational and commercial boating, and navigation. Since fiscal year (FY) 2016, Port revenues averaged \$54.4 million (M) a year. On average, 98% of Port’s revenues were derived from the tariffs and rentals paid by Port customers (ratepayers). Port prides itself in dedicating all of its profit to the upgrading of its equipment and facilities and the continued growth of Guam’s seaport.

Confidential Settlements of Multiple, Employee Termination Lawsuits

Port has been a defendant in nine employees’ adverse action (termination) lawsuits. All nine of these employees were reinstated to their original employment position and paid (or will be paid) back wages. Back wages represent the salaries owed to an employee for the period following their unlawful termination until they are reinstated. Port provided other legal remedies such as reimbursement for attorney’s fees and legal costs related to the employee’s lawsuit, and interest for the delay and loss of use of back wages as ordered in a court’s decision.

Our initial audit scope included only five reinstated employees with whom Port already executed settlement, or legal remedy, payments. With five reinstated employees set to receive back wages

around the same time, the public demanded for transparency. The confidential nature in which Port executed these initial five settlements, or remedies, created a climate in which the public appeared suspicious of whether the Port was following the law when executing these settlements or legal remedies.

Response: We would like to make it clear that it was not Port management that created a climate of non-transparency when executing these settlements. As you are aware, in March 2020, Port management requested the Public Auditor to reconcile a legal opinion issued by Port’s in-house staff attorney that settlement agreements are not subject to public disclosure because it is part of an on-going litigation. On July 22, 2020, the Attorney General issued an opinion stating when settlement agreements are finally adjudicated, it is open for public inspection under Guam’s Freedom of Information Act (FOIA). In a press release issued by the Port on July 22, 2020, we responded that we are pleased with the recent opinion by the Attorney General, which clarifies whether settlements are considered public documents. For the record, I, as General Manager, disagreed with the opinion issued by former Port legal counsel and former in-house counsel that settlements were not public documents and not subject to disclosure under the FOIA. Immediately following this AG opinion, Port management uploaded all signed settlement agreements, all of which can be found on the Port’s website. We believe that the statement “The confidential nature in which Port executed these initial five settlements, or remedies, created a climate in which the public appeared suspicious of whether the Port was following the law when executing these settlements or legal remedies” is misleading and that an objective review using Professional Judgment on this matter to include the collective knowledge of the circumstances already acknowledged by the Auditing Team clearly would deem this statement to be misleading and not a true and accurate reflection of all of the circumstances.

Results of Audit

Our audit found the Port paid \$542 thousand (K) for Employee Q’s back wages, Medicare tax, retirement contribution, interest charge, and attorney’s fees and legal costs. See Figure 1.

Figure 1: What Port Paid as a Result of Employee Q’s Termination Lawsuit

\$381K	\$20K	\$6K	\$40K	\$95K
Back Wages	Retirement	Medicare Tax	Attorney Fees & Legal Costs	Interest Charge

Source: Port’s Check and Deposit Documents

Based on the data and documents provided by Port, we determined that Port’s legal remedies with Employee Q were generally made in accordance with administrative and judicial review judgments. However, we found instances of potential noncompliance with applicable laws, regulations, and internal policies, as well as lapses in Port’s internal processes in executing Employee Q’s legal remedies. See Table 1. Specifically, we found:

- Different legal opinions resulted in unorganized remedial actions;
- Legal remedies were not ratified by a board resolution;
- Legal remedies were executed without a formal agreement and liability release until after the final payment in May 2020;

- Adherence to Employee Q's terms and conditions that were not required by CSC or the courts' judgments; and
 - Highest number of incremental sub-steps were granted based on prior "outstanding" performance evaluation ratings.
 - Two prior years' performance evaluation ratings were not approved by the former General Manager, which results in the lowest number of incremental sub-steps.
 - "A 6% interest charge *per day*¹ is effectuated. Payment to be made by the 60th day of management approval."
 - ¹ Emphasis added.
 - The 6% interest charge was not negotiated.
- Significant deficiencies in the basis of calculations for back wages and interest that resulted in overpayments.
 - Summary of overpayments of back wages, benefits, and interest charge.
 - Annual salary increments were included without performance evaluation reports approved by and accountable to the GM.
 - Back wages included three pay raises not covered by CSC or the courts' judgments and retroactive to their authorization dates.
 - Interest charge was paid without considering time in the calculation.

Also, we identified other matters where:

- Port unified existing employees' increment anniversary dates to reflect the dates of agency-wide pay adjustments.
- Port's Personnel Rules and Regulations (PRR) do not have a cap (limit) on salary increments.
- Port interpreted Superior Court Decision as Employee Q did not have to mitigate the wages he earned during this termination.

Table 1: What Port Paid Employee Q and Its Basis

Remedy	What Port Paid	Judgment/Order	Rendered by
Back Wages – Base Salary, plus Pay Raise Changes, minus \$209K of Outside Income	\$361,476	“The Port Authority of Guam is further ordered to fully compensate Employee [Q] for all the time following his termination on December 18, 2012 until the date he is reinstated to his prior position of employment.”	Civil Service Commission
		“[...] upholds the Civil Service Commission’s Order awarding [Employee Q] full back pay and benefits from the date of his termination until Petitioner PAG complies with the Commission’s Order and allows [Employee Q] to return to work.”	Superior Court of Guam
Pay Raise Changes after Reinstatement	\$19,273	<u>Not</u> ordered or required by CSC or judicial courts’ judgments, regulations, or laws.	
Pay Raise Changes before Termination	\$771	<u>Not</u> ordered or required by CSC or judicial courts’ judgments, regulations, or laws.	
Total Back Wages	\$381,520		
Retirement Contribution on Back Wages	\$18,548	“The compensation shall include all employer [Q’s] contributions to the Government of Guam Retirement Fund [...] for all the pay periods between December 18, 2012 and the date Employee [Q] is reinstated.”	Civil Service Commission
		“[...] upholds the Civil Service Commission’s Order awarding [Employee Q] full back pay and benefits from the date of his termination until Petitioner PAG complies with the Commission’s Order and allow [Employee Q] to return to work.”	Superior Court of Guam
Retirement Contribution on Pay Raise Changes after Reinstatement	\$1,186	Result of payout <u>not</u> ordered or required by CSC or judicial courts’ judgments, regulations, or laws.	
Retirement Contribution on Pay Raise Changes before Termination	\$39	Result of payout <u>not</u> ordered or required by CSC or judicial courts’ judgments, regulations, or laws.	
Total Retirement Contribution	\$19,773		

Remedy	What Port Paid	Judgment/Order	Rendered by
Medicare Tax on Back Wages	\$6,028	Result of... "The Port Authority of Guam is further ordered to fully compensate Employee [Q] for all the time following his termination on December 18, 2012 until the date he is reinstated to his prior position of employment."	Civil Service Commission
		Result of... "[...] upholds the Civil Service Commission's Order awarding [Employee Q] full back pay and benefits from the date of his termination until Petitioner PAG complies with the Commission's Order and allows [Employee Q] to return to work."	Superior Court of Guam
Medicare Tax on Pay Raise Change after Reinstatement	\$279	Result of payout not ordered or required by CSC or judicial courts' judgments, regulations or laws.	
Medicare Tax on Pay Raise Changes before Termination	\$11	Result of payout not ordered or required by CSC or judicial courts' judgments, regulations or laws.	
Total Medicare Tax	\$6,318		
Attorney Fees & Legal Costs	\$40,043	"The Port Authority of Guam is further ordered to pay the attorney's fees incurred by Employee [Q], during the appeal of the December 18, 2012 adverse action in the amount of \$9,380.95" <i>Judgment passed on May 13, 2013.</i>	Civil Service Commission
		"The Court hereby Orders that Real Party in Interest [Employee Q] is awarded the amount of Twenty-Two Thousand Eight Hundred Ten Dollars and Ninety-five Cents (\$22,810.95) as reimbursement for attorney's fees and costs Real Party in Interest [Employee Q] has incurred in his prosecution of his appeal of his termination." <i>Order passed on September 29, 2016.</i>	Superior Court of Guam
Interest Charge	\$94,621	Not ordered or required by CSC or judicial courts' judgments, regulations or laws.	
Total Remedy Cost	\$542,175		

Sources: Port’s Check and Deposit Documents; CSC Orders and Judgments; Superior Court Orders and Judgments.

Differing Legal Opinion’s Resulted in Unorganized Remedial Actions

According to CSC and the Superior Court of Guam’s (SC) judgments, Port is required to pay Employee Q back wages starting from his termination (in December 2012) and ending upon his reinstatement (in July 2018). Between July 2018 and late February 2020, Port received significantly different legal opinions from its former contracted Legal Counsel and former “in-house” Staff Attorney, that resulted in unorganized remedial actions, as shown in Table 2.

Port’s former Legal Counsel was still representing Port when Employee Q was reinstated on July 30, 2018. Prior to his reinstatement, Employee Q’s attorney submitted a letter (herein referred to as “declaration letter”), dated July 11, 2018, to Port’s former Legal Counsel. Attached to the letter was his calculation schedule of the back wages and interest to be paid with a notation that Employee Q was entitled to the annual salary increments and Port-wide pay adjustment that occurred during the termination period.

However, the former Legal Counsel opined that any payout to Employee Q would be based on the same pay range as when he was terminated (herein referred to as “base salary”) and without any salary increments. The former Legal Counsel held this opinion through to June 2019, when his contract with Port ended.

Then again, Port’s former Staff Attorney (who served form early August 2019 through the end of February 2020) did not find any legal authority to support the former Legal Counsel’s opinion. He rendered an opinion that Employee Q’s back wages must include salary increments.

Table 2: What Port Did After Employee Q’s Reinstatement

Year	Date	Port Action	Time Elapsed Since Reinstatement
2018	7/30/2018	Port reinstated Employee Q at base salary and continued to pay his regular wages at base salary until the start of February 2020.	0.0 months
	9/12/2018	Port filed a Motion for the Superior Court to reconsider its Decision to award full back pay and benefits to Employee Q.	1.4 months

Year	Date	Port Action	Time Elapsed Since Reinstatement
2019	2/5/2019	The Superior Court denied Port's Motion filed on September 12, 2018.	6.2 months
	4/30/2019	In a board meeting, Port's Board appropriated \$600K to pay Employee Q's back wages, based on his base salary, minus the income he earned during his termination, <i>and without any salary increments.</i>	9.0 months
	5/3/2019	Port processed six (6) Notifications of Personnel Action forms (NPA) - five for the termination period, plus one for the October 2012 salary increment (before his termination). Under the General Accounting Supervisor's guidance (instead of under the Human Resources Division's role), Employee Q's annual base salary was mitigated (reduced) by \$209K for the outside income earned during his termination period. These NPAs did not reflect any salary increments or Port-wide pay adjustments, consistent with the former Legal Counsel's opinion.	9.1 months
	5/10/2019	Port paid \$40K to Employee Q's attorney for attorney's fees and legal costs	9.3 months
	6/24/2019	Port paid \$243K to Employee Q for his back wages, based on his base salary and mitigated by the outside income. This payment was supported by the six NPAs filed on May 3, 2019.	10.8 months
	12/3/2019	Port's former Staff Attorney advised the Board of Directors that he found other judgments on similar cases in which reinstated employees were "entitled" to salary increments as part of their back wages.	1.3 years

Year	Date	Port Action	Time Elapsed Since Reinstatement
2020	2/7/2020	Port's Deputy GM of Administration & Finance approved Employee Q's additional terms and conditions listed in the remedy request letter dated February 6, 2020 addressed to him.	1.5 years
	2/10/2020	<p>Port canceled the six (6) NPAs issued on May 3, 2019 because they were processed incorrectly. These NPAs supported the \$243K payment of back wages made on June 24, 2019. Consequently, such payment was without supporting authorization.</p> <p>Then, Port replaced the six canceled NPAs with new NPAs that granted Employee Q the following:</p> <ul style="list-style-type: none"> • five annual salary increments for the termination period, in line with the former Staff Attorney's opinion, plus • October 2012 salary increment (before his termination). <p>Each salary increment was calculated at five sub-steps (or 5%) each, as requested by Employee Q and his attorney.</p> <p>Port processed four (4) additional NPAs that granted Employee Q with the following:</p> <ul style="list-style-type: none"> • 2011 salary increment (before his termination); • 2016 pay adjustment, in line with Employee Q and his attorney's declaration letter; • 2018 pay adjustment (after his reinstatement); and • 2019 salary increment (after his reinstatement). 	1.5 years
	2/21/2020	Port paid \$19K to Employee Q for the difference between the base salary he received (after his reinstatement) and the pay raises Port granted (on February 10, 2020) for his 2018 pay adjustment and 2019 salary increment.	1.6 years

Year	Date	Port Action	Time Elapsed Since Reinstatement
2020	4/7/2020	Port paid \$95K to Employee Q as an interest charge on his back wages. Port paid \$66 to Employee Q's attorney for the unpaid balance of attorney's fees and legal costs.	1.7 years
	5/1/2020	Port paid \$119K to Employee Q for the following: <ul style="list-style-type: none"> • \$118.6K for the difference between the base-salaried-back-wages (paid on June 24, 2019) and the pay raises Port granted (on February 10, 2020) for the salary increments and pay adjustment during the termination period. • \$771 for the difference between the base salary received before his termination and the October 2012 salary increment Port granted (on February 10, 2020). 	1.8 years

Sources: Various Port Documents; Superior Court Decision and Order.

The differences in legal opinions brought significant financial impact on the back wages paid to Employee Q. However, this did not motivate Port management to secure a Board ratification and execute a formal agreement with a liability release provision before final payments were made.

Response: *This finding is misleading and does not include the collective knowledge of all the factual circumstances. Management does not believe that the remedial actions were unorganized. Instead, it is accurate to say that different legal opinions resulted in delayed remedial actions. Also, this draft statement implies that the Port's corrective actions were unorganized, and such corrective actions were in contravention to law and the Port's Personnel Rules and Regulations. We are providing you with several conflicting legal guidance's that the Board and Management received relative to the inclusion of increments as part of wages and benefits when an employee is reinstated after termination which will give great insight and additional collective knowledge as to the delay of remedial action:*

1. *Email between our former legal counsel to former Deputy General Manager, Administration & Finance, dated November 25, 2019, Subject: Payment of Back Wages: former legal counsel opined they are unable to find any authority to include in the back wages, salary increments. Former legal counsel provides specific statutes which prohibits unappropriated expenditures.*
2. *Emails between the former in-house counsel and former Deputy General Manager for Administration and Finance on the following:*

- A. *November 26, 2019 email to former in-house Staff Attorney forwarding former Legal Counsel's November 25, 2019 email, Subject: Payment of Back Wages.*
- B. *November 29, 2019 email from former in-house Staff Attorney, Subject: Payment of Back Wages, states below:*
 - i. *"...when the situation is not a termination-reinstatement, in other words continuous civil service employment without adverse action-interruption, Port Personnel Rules 6.302 applies to require (a) employee's work performance; (b) performance review, (c) recommendation by the reviewing manager, and (d) certification by the GM that there is sufficient basis for giving the employee an incremental increase in his or her wage. However, that situation does not expressly cover termination-reinstatements after a judgment, lawful order, or other unlawful act.*
 - ii. *"The normal rule for consequential damages is whether they are (a) reasonably certain and (b) measurable...While there is no binding Civil Service Commission case on the issue from the Supreme Court of Guam...every case that I have reviewed from several other states made the civil servant-employee whole, including increments...Applied to the Port, increments are promised to be given according to the rules. At bottom, it does not appear likely that Superior Court of Guam or the Supreme Court of Guam will give a different rule other than to make the employee whole including increments because of the unanimity of the decisions from states. If Management decides not to give the increase, and the employee were to file a grievance or seek clarification of a judgment, he or she would at end be awarded increments given the unanimity of state law on public employees being entitled to increments after wrongful termination..."*

Former in-house counsel stated that in order for the increments to be included, there should be a judgment from the Commission or judicial courts. That is why Port management included increments, based on the 1984 and 2016 CSC decisions provided below which ordered Government of Guam departments/agencies to pay back benefits, including salary increments for reinstated employees.

- 1. *CSC Decision dated March 12, 1984, Juan Q. Lizama vs. Port Authority of Guam: CSC reversed the termination of this employee on March 12, 1984 and ordered the Port to:*
 - i. *Reinstate the employee to his position of Port Operations Manager effective September 12, 1983;*
 - ii. *Restore all salary deprived him from the date of his termination to the date of his reinstatement;*
 - iii. *Restore all benefits, rights and privileges deprived him because of the termination; and*
 - iv. *Report compliance to CSC within 5 work days from date the decision is received.*

A review of this employee's personnel jacket revealed:

- 1. Port had cancelled his termination action effective September 13, 1983; and*
- 2. Granted the employee a pay adjustment effective October 15, 1983 as a result of Public Law 17-26.*

Both personnel actions were processed on March 15, 1984 with retroactive dates of September 12, 1983 and October 15, 1983 to comply with CSC's orders.

- A. CSC decision and judgment dated August 30, 2016, Eric SN. Santos vs Department of Corrections. The decision mandated Department of Corrections to restore the employee to his position; to receive all back-pay and benefits, including, but not limited to retirement and all forms of increments; and all leave owed to him since his termination on October 5, 2013, up to and including the date he is restored to his prior position of employment with Department of Corrections.*

We are also attaching to our response CSC's Administrative Law Judge email affirming the Port's decision in ensuring Employee Q acquires his back benefits lawfully due to him:

- 1. Email dated November 9, 2020, from CSC Administrative Law Judge Eric Miller regarding the Commission's authority only to affirm, revoke or modify an adverse action appeal.*

We would like to state that Employee Q's payment of back wages, including benefits, was not due to the terms and conditions outlined in his and attorney's letters as continually referred to by your auditor, but such payment was because of CSC and judicial decisions rendered.

We would like to point out and request it be included in the report that after 1 year, 8 months and 7 days when the Port's last motion to not pay Employee Q his back wages was denied by Superior Court, the Port finally complied with decisions issued by Civil Service Commission (CSC and judicial courts (Superior and Supreme)).

We again disagree with the auditor's assertion that the Board did not grant authority to process Employee Q's back wages and the Board's recommendation to ratify such action. We stated in our September 25, 2020 response that the Board appropriated \$600,000 in order to comply with the Supreme Court Order relative to Employee Q. Although your auditor stated Board approval was only for Employee Q's base salary, the motion passed by the Board in their April 30, 2019 meeting directed Management to remain within the budget authorized, and any amount over the budget would require Board approval. As we demonstrated in our September 25, 2020 letter, the Board was advised by former in-house counsel that Employee Q's back wages include increments. As shown in Table 1, the Port stayed within the \$600,000 allocation, including salary increments, retirement contributions, Medicare tax, attorney fees, and interest payment.

We respectfully disagree with the assertion that CSC and courts' judgments did not require Port to implement or make retroactive payments on salary increments Employee Q did not receive before he was terminated.

In our September 25, 2020 response, we provided you with a chronological event showing to you factors contributing to the delay in issuing the correct payments due to Employee Q. We are restating such event as shown below:

- 1. On June 1, 2018, former legal counsel informed Employee Q's attorney that the Port decided not to appeal the judicial decisions and prepared to facilitate his reinstatement. In the letter, he requested a statement indicating the amount of back pay and benefits owed to Employee Q. Such letter was provided to former legal counsel on July 11, 2018. Also, there were two executive sessions and a regular meeting where the Board authorized former legal counsel and in-house Staff Attorney to engage with Employee Q's attorney on the terms and conditions of his back wages and benefits;*
- 2. On July 25, 2018, the Board was informed by former legal counsel of Supreme Court's decision (CVA16-018) dated April 17, 2018, affirming the Superior Court's decision (SP0125-13), which upheld the Civil Service Commission's decision of May 13, 2013, on the reinstatement of Employee Q. According to the Commission's decision, Employee Q is to be reinstated to his prior position of Financial Affairs Controller, fully compensate him for all the time following his termination until the date he is reinstated. Such compensation shall include all employer's contributions to the Government of Guam Retirement Fund and the accumulation of vacation and sick days. Based on the executive session minutes, the Board was briefed by in-house counsel on his recommendation to reinstate Employee Q at the salary he separated with an effective date of July 30, 2018 with the understanding that appropriate compensation will be paid when his attorney has provided a calculation of back wages and benefits;*
- 3. On July 11, 2018, Employee Q's attorney submitted his back wage and benefit calculations to the Port's former legal counsel, including the interest rate. His attorney stated the final calculation included a 6% pre-judgment interest as allowed by law. This was never contested by the Port's former legal counsel;*
- 4. On July 30, 2018, Employee Q was reinstated to his position of Financial Affairs Controller. However, his division was divided into three divisions; he was not granted his full responsibilities as a Financial Affairs Controller by prior Management and was told by the previous Port General Manager that he only supervises the Budget Section of the Port's Finance Division;*
- 5. On August 22, 2018, Superior Court Judge Vernon Perez issued a decision to award Employee Q full back pay and benefits from the date of his termination until the day he is allowed to return to work, along with attorney fees;*
- 6. On March 29, 2019, the Port's former legal counsel reported to the Board the back wages and benefits entitled to Employee Q are in accordance with the Supreme Court decision. The Board authorized former legal counsel to work with Employee Q's attorney;*
- 7. On April 30, 2019, the Board appropriated \$600,000 for the back wages of Employee Q;*
- 8. Despite the fact that Employee Q had provided his calculation of back wages and benefits to the Port's former legal counsel and was reinstated to his position effective July 30, 2018, personnel actions reflecting his back wages and benefits were not processed until May 3,*

2019—ten months after his reinstatement. Based on these personnel actions, checks payable to Employee Q were processed on June 24, 2019;

9. On December 3, 2019, former in-house counsel advised the Board that his review of other judicial decisions of similar cases found reinstated employees were entitled to salary increments despite former legal counsel's opinion that Employee Q was not eligible for salary increments as part of his reinstatement;
10. On February 10, 2020, the Port canceled in its entirety personnel actions dated May 3, 2019, because of errors in Employee Q's salary and re-issued new personnel actions reflecting the correct salaries;
11. On February 19, 2020, and April 24, 2020, the Port issued checks payable to Employee Q for back wages due to him as a result of the errors in his salary;
12. On April 7, 2020, the Port issued a check payable to Employee Q for interest payment due to him; and
13. On July 23, 2020, Employee Q provided a letter to the Deputy General Manager, RE: Supplemental Document; Settlement Agreement, stating the terms and conditions outlined in CSC Decision and Judgment were fulfilled and released the Port of any future liability.

We factually reconstructed how prior Port management delayed the rightful processing of Employee Q's back wages almost ten months after his reinstatement and only issued his first payment two months after the personnel actions were signed and executed. This is the reason why it took one year and ten months for Employee Q to be made whole and to eventually be reinstated as if though he never left the Port.

Thank you for the opportunity to go over this audit's draft findings and allow Management to submit additional supporting documents. At issue is Management's recognition of Employee Q's 2011 and 2012 performance evaluation giving the draft audit claim that neither of these documents were signed. We did a further review of Employee Q's performance evaluation reports for 2011 and 2012, and discovered supporting documents. Indeed, we apologize for not offering up the following documents for your review:

1. Performance evaluation period from October 13, 2010 to October 12, 2011:
 - i. Employee Q's performance evaluation report was signed by his supervisor, the Corporate Services Manager, and Employee Q. Overall evaluation rating is Outstanding. The Human Resources staff reviewed the report on December 31, 2012;
 - ii. Notice of Results of Performance Evaluation Report dated December 31, 2012, which reflected the Overall Rating as Outstanding was presented to the most immediate former General Manager;
 - iii. Port's Human Resources worksheet stating his salary will be \$83,900.00 per annum;
 - iv. Memorandum dated February 6, 2013, from Interim Deputy General Manager, Mr. Felix R. Pangelinan, Subject: Salary Increment; Ref: Jose B. Guevara III and Frances T. Arriola, addressed to Acting Financial Affairs Controller and Acting Corporate Services Manager. The memorandum authorizes payment in accordance with Section 7.008 of the Personnel Rules and Regulations;

- v. *A copy of the signed performance evaluation for 2011 by the Interim Deputy General Manager is provided for your review. Note that the former General Manager was on leave and did not rescind this action at any time upon her return to work; and*
- vi. *Notification of Personnel Action No. 317-13 dated January 9, 2013, Effective Date of October 13, 2011, Remarks: Approved by the Board of Directors in their regular meeting of December 14, 2012.*

2. *Performance evaluation period from October 13, 2011 to October 12, 2012:*

- i. *Performance evaluation report was signed by his supervisor, Corporate Services Manager. Employee Q signed the evaluation on December 26, 2012. Overall evaluation rating is Outstanding. The report was reviewed by the Human Resources staff on August 20, 2013;*
- ii. *Port's Human Resources performance evaluation point worksheet;*
- iii. *Notice of Results of Performance Evaluation Report dated February 22, 2013, which reflected the Overall Rating as Outstanding. The document was not signed by the General Manager. However, there is no written letter denying Employee Q his increment, therefore, Employee Q's increment for 2012 has been effectuated; and*
- iv. *Notification of Personnel Action No. 652-13 dated August 16, 2013, Nature of Action: Salary Increment; Effective Date: October 13, 2012, salary to: \$88,180.00 per annum.*

As shown above, other factors, aside from the differences in legal opinions, were major reasons why Employee Q was not provided his entitled back wages, including salary increments. Again, this is the reason why it took one year and ten months for Employee Q to be made whole and to eventually be reinstated as though he never left the Port.

Legal Remedies Executed Without a Formal Agreement and Liability Release Until After the Final Payment in May 2020

Of the five employees covered by our initial audit scope, only Employee Q did not execute a settlement agreement, or other type of formal agreement specifying the amounts and terms for back wages, benefits, attorney fees, and interest charge Port has to pay, as well as a liability release provision.

Employee Q and Employee V's² cases are similarly appealed, affirmed and concluded in the judicial courts. In Employee Q's case, Port decided not to appeal further after five years of litigation and appeals. However, Employee V executed a settlement agreement containing provisions on the amounts and terms of back wages and interest charge to be paid with a mutual release from all claims and liabilities.

(²Our audit results on Employee V's settlement will be issued in a separate audit report.)

For the protection of all parties involved, every liability should be accompanied with a document setting the parties' agreement to the amounts and terms that would end said liability (e.g., an invoice, contract, or agreement). Ideally, this document should have been finalized and signed by both parties before any payouts. Without a valid formal agreement containing relevant and pertinent provisions, most importantly a liability release provision, Port risked the possibility of

Employee Q, or his beneficiaries, pursuing further financial demands and litigation on the same termination lawsuit.

Response: *As stated in our September 25, 2020 response to the draft audit report, former legal counsel was authorized to engage with Employee Q's attorney to facilitate his reinstatement because the Port decided not to appeal the judicial decisions. In the June 1, 2018 letter, former legal counsel asked for a statement indicating the amount of back pay and benefits owned to Employee Q, which was provided on July 11, 2018.*

There were two executive sessions (July 25, 2018 and March 29, 2018) and a regular Board meeting (April 30, 2019) where the Board authorized former legal counsel and in-house counsel to engage with Employee Q's attorney on the terms and conditions of his back wages and benefits.

In July 25, 2018, the Board was informed by former legal counsel that Employee Q is to be reinstated to his prior position of Financial Affairs Controller and to fully compensate him for all the time following his termination until the date he is reinstated. Such compensation shall include all employer's contributions to the Government of Guam Retirement Fund as well as the accumulation of vacation and sick days. Based on the executive session minutes, the Board agreed to reinstate Employee Q at the salary he separated with an effective date of July 30, 2018, with the understanding that appropriate compensation will be paid when his attorney has provided a calculation of back wages and benefits.

On July 11, 2018, the attorney for Employee Q submitted his back wage and benefit calculations to the Port's former legal counsel, which included the interest rate. His attorney stated the final calculation included a 6% pre-judgment interest as allowed by law.

On March 29, 2019, the Port's former legal counsel reported to the Board the back wages and benefits entitled to Employee Q are in accordance with the Supreme Court decision. The Board authorized former legal counsel to work with Employee Q's attorney on the matter.

On April 30, 2019, former legal counsel verbally stated at the Board meeting that Employee Q is not entitled to salary increments. The former Deputy General Manager for Administration and Finance informed the Board that Employee Q's attorney disagreed with the former legal counsel's position. Former legal counsel was instructed to continue to work with Employee Q's attorney.

At the April 30, 2019 meeting, the Board appropriated \$600,000 for the back wages of Employee Q. Payments were issued to Employee Q on June 24, 2019.

On December 3, 2019, former in-house counsel advised the Board his review of other judicial decisions of similar cases found that reinstated employees are entitled to salary increments despite former legal counsel's comment that Employee Q was not eligible for salary increments as part of his reinstatement.

February 19, 2020, April 7 and 24, 2020, the Port issued checks payable to Employee Q to include salary increments in accordance with the former in-house counsel's opinion.

On July 23, 2020, Employee Q provided a letter to the Deputy General Manager, RE: Supplemental Document; Settlement Agreement, stating the terms and conditions outlined in CSC Decision and Judgment were fulfilled and released the Port of any future liability.

We believe the finding which states, “Without a valid formal agreement containing relevant and pertinent provisions, most importantly a liability release provision, Port risked the possibility of Employee Q, or his beneficiaries, pursuing further financial demands and litigation on the same termination lawsuit” is moot, since Employee Q did provide a letter dated July 23, 2020, to the Port stating the terms and conditions outlined in CSC Decision and Judgment were fulfilled and released the Port of any future liability. As such, Employee Q or his beneficiaries cannot pursue further financial demands and litigation on this termination lawsuit.

Deficiencies in Employee Q’s Liability Release Letter

In his liability release letter addressed to Port’s Deputy GM of Administration and Finance (DGMA), Employee Q stated that as of July 23, 2020, all the terms and conditions have been fulfilled by Port, and that his case with the Port is “closed.” In the same letter, Employee Q formally declared that he and Port mutually release all claims and further discharge one another from any and all liability and claims connected with their employment relationship to date and the recently “closed” adverse action (termination) lawsuit.

However, we found the following in the liability release letter that we refer to Port management for review and consideration:

- In using Port’s letterhead, Employee Q signed off as if he was also representing the Port in this matter.
- Neither the incumbent GM, nor the DGMA (the delegated Port representative), signed this “mutual” release letter.
- Neither a notary or witness signed this letter.
- This letter was written in a manner that implied that all the terms and conditions in Employee Q’s February 2020 “remedy request letter” were the same as the conditions of CSC’s Decision and Judgment. The remedy request letter contained conditions not required by CSC or courts’ judgments.

Therefore, we recommend the GM execute a comprehensive formal agreement that includes (1) the purpose, amounts, and terms of what Port paid for Employee Q’s back wages, benefits, attorney fees, and interest charge; (2) a liability release provision; and (3) the signatures of the relevant part is and witness.

Response: *We agree that Employee Q should not have used a Port letterhead in releasing the Port of any liability of all claims. However, we do not find it of significant concern because no fraud or abuse was committed, and that the full force and effect of Employee Q’s liability release remains in effect, even if such were written on a napkin. Moreover, even though this draft audit states that a notary or witness nor acknowledgment by the GM or DGMA is lacking, the result is Employee Q provided a Port with a letter releasing the Port of any future claims. Therefore, Management believes that this finding is without merit.*

Regarding the draft audit's recommendation that the Port executes a formal agreement, Employee Q's payment of back wages, including increments and benefits, was not a result of terms and conditions outlined in letters from his and attorney's letters. It is inaccurate to refer to this as a settlement or imply that the Port "just accepted" all of Employee Q's demands, as continually referred to by this draft audit. Such payments were executed because of a Supreme Court order and not because of a settlement agreement. We also stated that the former in-house counsel accepted the terms and conditions in Employee Q's Attorney's letter and provided legal guidance relative to the process of payment for Employee Q's back wages.

Port Adhered to Employee Q's Terms and Conditions Not Required by CSC or the Courts' Judgments

Port calculated Employee Q's back wages based on CSC and the courts' judgments, as well as on the terms and conditions requested by the employee. These terms and conditions were communicated through the following:

- Employee Q's Attorneys declaration letter, dated July 11, 2018 and addressed to Port's former Legal Counsel; and
- Employee Q's remedy request letter, dated February 6, 2020 and addressed to and approved by the DGMA.

Employee Q's Attorney's Declaration Letter

With the attorney's declaration letter, he attached his calculation schedule of back wages and interest to be paid to his client, Employee Q. The calculation schedule contained terms, which are similar to the additional terms in Employee Q's remedy request letter. The terms contained the following statements, in which the attorney rendered several opinions regarding his client, Employee Q:

1. "Before termination of [Employee Q] on December 18, 2012, he received a performance evaluation from his supervisor, which entitles him [to] an increase [...]. Based on the prior years' performance evaluation[s] [...], his rating [was] Outstanding since 2005. This entitles him to receive the highest points or percentile on the subsequent years. The number of sub-steps for Outstanding ratings is 5 [five] sub-steps."
2. "In 2016, the Port Board approved a new pay scale increasing each position's pay range to match [the] 25% market percentile. This pay schedule is not showing [on] the Port's website. Therefore, [Employee Q's] salary range increased and it should affect [Employee Q's] calculation from the effective date of the new pay schedule to the work date prior to the official starting date he goes back to work at the Port."
3. "The final calculation also includes [a] six percent (6%) pre-judgment interest as allowed by law."

Employee Q's Remedy Request Letter

In his remedy request letter, Employee Q indicated that his terms and conditions were reasonable because they were in accordance with CSC and the Supreme Court of Guam's judgments and Guam law. According to Port, they followed all of Employee Q's terms and conditions, including the following statements, which were not specified in CSC or the courts' judgments, nor in Guam law:

1. “That [Employee Q’s] reinstatement includes **all** salary increments that were due for the period of December 18, 2012 to the current date [February 6, 2020] using the last performance appraisal rating on record of “*Outstanding*” to adjust [his] salary accordingly.”
2. “A 6% interest charge **per day**³ is effectuated. Payment to be made by the 60th day of management approval.”

³emphasis added

Response: *We disagree with your assertion that the Port followed all of the terms and conditions outlined in Employee Q’s attorney’s letter of July 11, 2018, and his letter of February 6, 2020, at face value. As explained in our letter of September 25, 2020, I recused myself on the litigation of the Port 7 employees and designated the former Deputy General Manager for Administration and Finance, Mrs. Connie J. Shinohara, to convene a task force to determine if it is in the Port’s best interest to continue all on-going personnel cases whose appeals were before the Civil Service Commission or in the judicial courts.*

In our September 25, 2020 letter, we explained that despite Employee Q’s reinstatement of July 30, 2018, his personnel actions to be used to compute his back wages were not processed until almost ten months after his reinstatement. His first payment was not issued to him until two months after the former General Manager signed the personnel actions.

One year and ten months after Employee Q received his first payment, and his release of liability was still pending, the Deputy General Manager for Administration and Finance and the Personnel Services Administrator reviewed the initial personnel actions. They discovered the salary reconstruction for Employee Q was done in error. Consequently, the Port canceled the first personnel actions and issued new personnel actions on February 10, 2020, reflecting the salaries that Employee Q was entitled to per the former in-house counsel’s presentation to the Board during the December 19, 2019 Board meeting.

Regarding his salary increments for 2013 to 2017, we went back three years (2010, 2011, and 2012) from the time Employee Q was employed at the Port, and took his overall performance rating for each year and simply averaged it. He received outstanding ratings during all those periods, and as such, the average sub-steps for each year he was entitled to a salary increment was five. As noted in our response above, we are providing you with a copy of the documents pertaining to Employee Q’s 2011 increment.

In regards to the 6% interest charge, Employee Q conferred with his attorney on his letter of February 6, 2020, and was advised to include the interest rate as part of his calculation, which the Port’s former legal counsel did not dispute. The 6% interest was initially included in his attorney’s letter dated July 11, 2018, to former Port legal counsel. This 6% is a pre-judgment interest, allowed by law and included in the calculations. Based on a review of the documents related to Employee Q’s case, both the former Port legal counsel and in-house counsel did not dispute this interest rate.

Additionally, we took into consideration how prior Port management continued to place salt on Employee Q's wounds and delay the administration of justice by:

1. Reinstating him at the salary he left—rather than reconstructing his salary as if though he never left the Port, a principle upheld following the Civil Service Commission's judgment;
2. Not giving him his full certification authority as a Financial Affairs Controller, which we corrected when we came on Board in January 2019;
3. Not processing his initial personnel actions until ten months after he was reinstated;
4. Not processing his back wage checks for almost two months after his initial personnel action; and
5. Erroneously processing the initial personnel actions, which had to be corrected almost eight months later.

Highest Number of Incremental Sub-Steps Granted Based on Prior “Outstanding” Performance Evaluation Ratings

Port's Annual Salary Increment System

On performance evaluation alone, the highest a Port employee's salary increment can increase is up to five sub-steps (or 5%) every year. According to Port's PRR 6.302, salary increments are based on an annual performance evaluation, for which the employee is given zero to five points for every performance factor evaluated. According to interim procedures approved by then Port GM in October 2010, employees are eligible to the increment sub-steps that correspond with the total points their overall performance earned, as shown in Table 3.

Table 3: Salary Increment Point System

Total Points	Overall Performance Rating	Sub-Steps
0-25	Unsatisfactory	0
26-34	Satisfactory (Marginal)	2
35-49	Satisfactory	3
50-59	Satisfactory (Highly)	4
60-65	Outstanding	5

Source: Port Inter-Office Memorandum, October 11, 2010.

PRR 6.302 also states that the salary increment will be granted by the GM's certification (signature) that satisfactory service was rendered for the performance-rating period preceding such (incremental) increase.

Under Port's salary increment point system, an employee's salary increment can increase up to five sub-steps (or 5%) every year, as opposed to a more common *one*-step salary increment widely used by the rest of GovGuam.

An “outstanding” rating is immaterial under the one-step salary increment system widely used by the rest of GovGuam. However, the annual salary increase of five sub-steps (or 5%) that

corresponds to an “outstanding” rating under Port’s salary increment point system is financially significant.

Response: We would like to clarify that the annual salary increment system was approved by the Board of Directors in their meeting of September 13, 2010.

Two Prior Years’ Performance Evaluation Ratings Not Approved by Former GM Results in the Lowest Number of Incremental Sub-Steps

During our September 2020 meeting with the GM and the DGMA, the incumbent GM insisted that Port determined the five-sub-step salary increments by averaging the overall performance ratings of Employee Q’s last three years actively employed at Port (2010, 2011 and 2012). Upon review of the three performance evaluations that Port based the paid back wages on, we noted that the overall performance rating for all three periods was “outstanding.” However, we found that, of the three performance evaluations, two (for the 2011 and 2012 annual increments) did not bear the former GM’s signature to indicate her certification (or approval) of the overall performance rating.

It is the incumbent GM’s understanding that the GM is required to reject a performance rating recommendation “in writing and provide justification” as to why he/she does not want to grant a salary increment. Additionally, he stated that “Employee Q should not be penalized for prior Port management’s failure to adhere to the [PRR] and process his salary increment due to him [...] on a timely basis prior to his termination on December 2012.”

However, we found at least three sections in Port’s PRR explaining that the GM has the final say on all salary increments, as follows:

- All salary increments will require the GM’s approval (PRR 7.008).
- The salary increment will be granted by the GM’s certification (signature) that satisfactory service was rendered for the performance rating period preceding such increase (PRR 6.302).
- A Division Head shall submit a written recommendation to the GM regarding the performance appraisal of every employee. The GM shall make a final performance appraisal accepting or rejecting said recommendation and make the corresponding salary adjustments. (PRR 7.010).

Based on the same sections of the PRR, Employee Q was not eligible to receive a salary increment for years 2011 and 2012 because the corresponding performance evaluations were not approved by the former GM. See Table 4 for what Port granted versus what Employee Q was eligible for.

Table 4: What Port Granted vs. What Employee Q Was Eligible For

Performance Rating Period Ending	Overall Performance Rating*	GM's Signature Approval**	What Port Granted	Increment Sub-Steps
				What Employee Was Eligible For
10/12/2012	Outstanding	X	5	0
10/12/2011	Outstanding	X	5	0
10/13/2010	Outstanding	√	6	6
Average			5	2

Sources: Employee Q's Performance Evaluation Reports; Notifications of Personnel Actions; Port Inter-Office Memorandum, October 11, 2010; PRR.

* Division Head's written recommendation to the GM regarding the employee's performance appraisal.

**The GM's final performance appraisal accepting or rejecting said recommendation for the corresponding salary adjustment.

When averaging the sub-steps allowable under Port's PRR and salary increment point system, Employee Q would be eligible for only "2" sub-steps (as shown in Table 4) or a "marginal" satisfactory" rating (as shown in Table 3). Employee Q's eligibility for increments of only *two sub-steps* results from the prior 2011 and 2012 performance evaluations that were not signed by the former GM. The absence of such signature signifies that there was no valid basis for granting Employee Q the highest number of incremental sub-steps to be applied to the five-year termination period.

Response: *In our response stated earlier, we explained that during a further review of Employee Q's performance evaluation reports, we found the following documents and apologize for not making this available for your review earlier:*

1. *Performance evaluation period from October 13, 2010 to October 12, 2011:*
 - i. *Employee Q's performance evaluation report was signed by his supervisor, the Corporate Services Manager, and Employee Q. Overall evaluation rating is Outstanding. The Human Resources staff reviewed the report on December 31, 2012;*
 - ii. *Notice of Results of Performance Evaluation Report dated December 31, 2012, which reflected the Overall Rating as Outstanding was presented to the most immediate former General Manager;*
 - iii. *Port's Human Resources worksheet stating his salary will be \$83,900.00 per annum;*
 - iv. *Memorandum dated February 6, 2013, from Interim Deputy General Manager, Mr. Felix R. Pangelinan, Subject: Salary Increment; Ref: Jose B. Guevara III and Frances T. Arriola, addressed to Acting Financial Affairs Controller and Acting Corporate Services Manager. The memorandum authorizes payment in accordance with Section 7.008 of the Personnel Rules and Regulations;*

- v. *A copy of the signed performance evaluation for 2011 by the Interim Deputy General Manager is provided for your review. Note that the former General Manager was on leave and did not rescind this action at any time upon her return to work; and*
- vi. *Notification of Personnel Action No. 317-13 dated January 9, 2013, Effective Date of October 13, 2011, Remarks: Approved by the Board of Directors in their regular meeting of December 14, 2012.*

As noted in the exhibits, the 2011 salary increment was signed by the former Interim Deputy General Manager, who was at that time Acting General Manager because of the General Manager's absence during that period, and note that the former General Manager at that time did not revoke that action upon her return to work.

2. *Performance evaluation period from October 13, 2011 to October 12, 2012:*

- i. *Performance evaluation report was signed by his supervisor, Corporate Services Manager. Employee Q signed the evaluation on December 26, 2012. Overall evaluation rating is Outstanding. The report was reviewed by the Human Resources staff on August 20, 2013;*
- ii. *Port's Human Resources performance evaluation point worksheet;*
- iii. *Notice of Results of Performance Evaluation Report dated February 22, 2013, which reflected the Overall Rating as Outstanding. The document was not signed by the General Manager. However, there is no written letter denying Employee Q his increment, therefore, Employee Q's increment for 2012 has been effectuated; and*
- iv. *Notification of Personnel Action No. 652-13 dated August 16, 2013, Nature of Action: Salary Increment; Effective Date: October 13, 2012, salary to: \$88,180.00 per annum.*

According to the HR staff, the performance evaluation rating for 2012 and Notification of Personnel Action were returned unsigned by the former General Manager in November 2013. And, the former General Manager did not submit a written letter denying Employee Q his increment.

Under Section 6.302 – Salary Increment – Procedure states: “When a division head determines that a particular employee shall not be granted a salary increment, the division head shall notify the General Manager of such denial prior to the employee's anniversary date. If the General Manager does not receive a performance report or a notification of denial of an employee's salary increment, no action will be taken to adjust the employee's pay.”

For the 2012 salary increment, Employee Q's immediate supervisor, who was also a division head, submitted his performance evaluation rating in December 2012. The overall evaluation rating was Outstanding. The Human Resources staff, based on the documents accompanying the 2012 performance evaluation rating form, processed and forwarded to the General Manager on August 16, 2013. According to the Human Resources staff, the documents were returned, unsigned by the former General Manager, in November 2013.

According to Section 6.302, his division head did comply by submitting his performance evaluation. However, the former General Manager did not comply with the rule by denying in writing his salary increment. As such, we determined that Employee Q's increment for 2012 was not rejected according to the Port's Personnel Rules and Regulations and recognized for purposes of reconstructing his back wages and current salary. No General Manager should ever be allowed to sit on any pending performance evaluation. Leaving a performance evaluation, unsigned should not be akin to rejecting it. Furthermore, there is no statute of limitation on when to act upon a performance evaluation, and once the performance evaluation is acted on, then there is a retroactive application to the date the respective increment is effective. In fact, the Port's PRR, Section 7.010 mandates that "The General Manager shall make a final performance appraisal accepting or rejecting said recommendation and make the corresponding salary adjustments." We are confident that this audit will have the same conclusion because although no employee is entitled to a salary increment, employees are entitled to due process.

Based on this, Table 4 would need to be corrected to reflect both the 2011 and 2012 to be 5 each.

Comparison of Annual Salary Increments Based on the Last Performance Rating

In our initial discussion, in July 2020, the DGMA explained that, although not stated in CSC's judgment, it is implied that Port will apply the last performance evaluation rating to the entire termination period's back wages. The DGMA, Employee Q's immediate supervisor, further stated the Port assumed Employee Q's performance evaluations would have been consistently rated "outstanding" had he not been unlawfully terminated. He further emphasized that Port's performance standards have not changed.

We acknowledge the immediate supervisor's determination to grant Employee Q an "outstanding" performance rating, however, his assumption that an employee's performance would not, or could not, have changed over time seemed unrealistic. It is possible for an employee's work performance to change because of external or internal factors that could influence a person's behavior. Even if an employee maintained the same quality of work performance, it is still possible for the performance evaluation rating to change if the evaluator or the evaluator's perception changed.

In apply his prior "outstanding" rating to five non-working (inactive) years, Port granted Employee Q the highest number of incremental sub-steps on the assumption that his work performance could not have possibly changed. See Table 5 for a comparison of the annual salaries using the different performance ratings.

Table 5: What Port Assumed vs. Eligible Satisfactory

Effective Date of Salary Increment	Port's Assumed Outstanding *****			Eligible "Marginal Satisfactory" **			
	Pay Grade /Step	Annual Salary	Hourly Rate	Pay Grade /Step	Annual Salary	Hourly Rate	Variance
10/13/2013	N 11D	\$92,678	\$44.56	N 8C	\$81,432	\$39.15	\$11,246
10/13/2014	N 13A	\$97,405	\$46.83	N 9A	\$83,069	\$39.94	\$14,336
10/13/2015	N 14B	\$102,374	\$49.22	N 9C	\$84,739	\$40.74	\$17,635
10/13/2016	NN 9D	\$109,808	\$52.79	NN 4B*	\$88,220	\$42.41	\$21,588
10/13/2017	NN 11A	\$115,410	\$55.49	NN 4D*	\$89,993	\$43.27	\$25,417
Total		\$517,675			\$427,453		\$90,222

Sources: Notifications of Personnel Actions; Port's Pay Plan.

*These are only estimates because they are dependent on the salary range Port would have granted for the 2016 agency-wide pay adjustment. Despite our requests, Port did not provide us with their detailed policy on how to migrate their employees' salaries into the pay plan that was first adopted in October 2009.

Under *Port's Assumed "Outstanding"* column, the October 2013 increment's pay range increased based on the five-sub-step pay ranges Port granted for years 2011 and 2012. Under the *Eligible "Marginal Satisfactory"* column, we did not factor in the 2011 and 2012 increments' pay ranges because their supporting evaluations lacked the former GM's signature approvals, as required by Port's PRR. If Port used the "marginal satisfactory" rating (or averaged "2" sub-step) in its calculation of annual increments, it would save approximately \$90K, as shown in Table 5.

While we acknowledge Port management's efforts to provide Employee Q with all the expected benefits "to make the employee whole" as if he was not terminated, we refer this calculation for Port's management's review and consideration.

Response: *As explained in our September 25, 2020 letter, the Port took the last three years of his performance evaluation ratings and averaged it. As noted in our responses above, the 2011 salary increment was signed by then Interim Deputy General Manager in the absence of the former General Manager who was on leave status. For 2012, because the former General Manager did not reject the performance evaluation of Employee Q, he is eligible for the salary increment.*

Regarding the statement that Employee Q's performance would not have changed over time seemed unrealistic. This finding is capricious and inconsistent with Employee Q's long-standing record of exemplary performance. We informed your auditors that during the time period, he earned his master's degree in public administration with the University of Guam, received the Professional Master Business Certification from the Association of Government Accountants in 2017, and held the position of Regional Vice President of the Pacific Rim for the Association of Government Accountants for June 2017 to June 2018. Through his discussions with his former

employers, Employee Q was praised for his work ethics and professionalism. To make the finding that his overall evaluation ratings for 2013 to 2017 should have been “marginal satisfactory” based on unsigned performance evaluations for 2011 and 2012 by the former General Manager is troublesome to not only Management, but also Employee Q or any other employee in this type of situation. Again, we are confident that in the justification, we offer as reasons why 2011 and 2012 were accepted and used to calculate Employee Q’s back wages.

Employee Q Paid a 6% Interest Charge Without Court Order Requirement and Negotiated Terms

Port paid Employee Q \$95K in interest for the period of December 19, 2012 through September 15, 2018. According to 18 GCA Chapter 47 §47106, the legal rate of interest is 6% per year on accounts “after demand or judgment rendered in any court of the territory.” Section 47106 further states that *it is acceptable for the parties involved to contract in writing an interest rate that does not exceed* the interest rates specified in 14 GCA, the Uniform Consumer Credit Code.

Interest Charge Paid Without Court Order Requirement

Neither CSC or the courts ordered Port to pay a 6% interest charge (or \$95K) to Employee Q. Yet, Port did not exercise its option to negotiate an interest rate lower than 6%, as allowed by 18 GCA §47106. According to the incumbent GM, Port’s former contracted Legal Counsel and Port’s former “in-house” Staff Attorney did not dispute the 6% interest rate.

Interest Charge Paid Without Negotiated Terms

In his February 2020 remedy request letter, Employee Q requested a 6% interest charge *per day* (or 2,190% per year). Upon approving such letter immediately, the following day, the DGMA apparently accepted the following issues surrounding this interest charge, as shown in Figure 2:

- Interest at 6% per day is effectuated. A daily 6% interest rate translates into interest of 2,190% per year, which is exceptionally above the legal rate. However, Port applied and paid the 6% interest on, generally⁴, an annual basis.
- The principal amount to be charged with interest was not stated and fixed.
- The time, or period (start and end date), in which interest was to be charged was not stated and fixed.

⁴This is further explained under the sub-header, “Interest Charge Paid Without Considering Time in the Calculation.”

Figure 2. What Port Accepted vs. Simple Interest Formula

What Port Accepted	vs.	Simple Interest Rate Formula
$? \times 2,190\% \times ? = /[\][\][\]\$$		$\$ \times \% \times \text{month/day} = /[\][\][\]\$$
Principal x Rate x Time = Interest		Principal x Rate x Time = Interest

Source: Employee Q’s Remedy Request Letter.

Port’s \$95K payment is based on an interest calculation schedule containing the following note, (disclosure) which reads as if Employee Q could still claim nine more months of interest.

“Interest calculation was from December 19, 2012 to September 15, 2018. Initial check payments for the salaries owed during my absence was cut on June 24, 2019. *Any interest owed from unpaid salary from September 16, 2018 to June 23, 2019 is not included in the interest calculation*⁵.”

⁵Emphasis added.

Therefore, we reiterate our recommendation to execute a comprehensive formal agreement that includes the provisions we previously stated.

Federal Interest Rates Used for Computation of Back Pay

In the U.S. Office of Personnel Management’s (OPM) chart of annual interest rates used for the computation of back pay⁶, the interest rate gradually increases from 3% to 5% over the time/period Employee Q charged Port. If Port had meant to negotiate the terms of the interest charge and used OPM’s graduating interest rate, the Port could have saved at least 2% a year, based on Table 6.

⁶<https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/interest-rates-used-for-computation-of-back-pay>

Table 6: What Port Accepted vs. OPM Interest Rates

Applicable Period Start	Applicable Period End	Annual Interest Rate Port Accepted	Interest Rate Port Applied	OPM’s Annual Interest Rates
12/19/2012	3/31/2016	2190%	6%	3%
4/1/2016	3/31/2018	2190%	6%	4%
4/1/2018	9/15/2018	2190%	6%	5%
Average		2190%	6%	4%

Sources: Port’s Interest Calculation Schedule; OPM Fact Sheet.

Response: *As stated in our September 25, 2020 letter, Employee Q’s attorney in his letter dated July 11, 2018, to the former Port legal counsel included the 6% interest in his calculation of the back wages. His attorney claimed that the interest was a pre-judgment interest as allowed by law. Employee Q conferred with his attorney about his February 6, 2020 letter, and was advised to update the July 11, 2018 calculation of his interest rate. We informed your auditors that both former legal counsel and former in-house counsel did not dispute this interest rate.*

Please elaborate how the Port could be in a position to negotiate the 6% interest when this entire matter resulted from a Supreme Court Order CVA-16-018 and both Port former legal counsel and in-house counsel did not dispute such interest rate with Employee Q’s attorney?

Significant Deficiencies in the Basis of Port’s Calculations for Back Wages and Interest That Resulted in Overpayments

We found significant deficiencies in the basis of Port’s calculations, which resulted in overpayments of back wages, benefits, and interest charge, as shown in Table 7. We considered the following deficiencies in Port’s calculation basis, such that:

- Annual salary increments were included for the termination period without duly accomplished performance evaluation reports approved by (and accountable to) the incumbent GM.
- Back wages included three pay raises not covered by CSC or the courts' judgments and retroactive to their authorization dates.
- Interest charge was paid without considering time in the calculation.

Summary of Overpayments of Back Wages, Benefits, and Interest

Based on our audit calculations, Port's payments to Employee Q resulted in a net overpayment of \$21K, as follows and as shown in Table 7:

- The net \$2K overpayment of total wages is attributed to mainly a difference in the work days and workhours calculated by Port.
- The net \$291 overpayment for retirement and the net \$822 overpayment for Medicare tax are attributed to the overpayment of total wages. Retirement contributions and Medicare tax are dependent on the amount of wages paid. Port might want to consider coordinating with the Government of Guam Retirement Fund, Guam Department of Revenue and Taxation and the U.S. Treasury to address the overpayments.
- The \$18K overpayment of interest is attributed to Port mainly not considering time in its calculation.

As a matter of disclosure, our audit calculations (and the resulting overpayments) in Table 7 did **not** factor in the averaged two sub-steps (or "marginal satisfactory") salary increments, as our audit determined.

Table 7: What Port Paid vs. What OPA Calculated

Remedy	What Port Paid	What OPA Calculated	Variance
Back Wages – Base Salary, minus \$209K of Outside Income	\$242,907	\$239,814	\$3,093
Back Wages – Pay Raise Changes during Termination	\$118,569	\$118,402	\$167
Pay Raise Changes after Reinstatement	\$19,273	\$19,135	\$138
Pay Raise Changes before Termination	\$771	\$1,743	-\$972
Total Wages	\$381,520	\$379,094	\$2,426
Retirement Contribution – Back Wages	\$18,548	\$18,208	\$339
Retirement Contribution – Pay Raise Changes after Reinstatement	\$1,186	\$1,186	\$0
Retirement Contribution – Pay Raise Changes before Termination	\$39	\$87	-\$49
Total Retirement Contribution	\$19,773	\$19,482	\$291
Medicare Tax – Back Wages	\$6,028	\$5,194	\$834
Medicare Tax – Pay Raise Changes after Reinstatement	\$279	\$277	\$2
Medicare Tax – Pay Raise Changes before Termination	\$11	\$25	-\$14
Total Medicare Tax	\$6,318	\$5,497	\$822
Attorney Fees & Legal Costs	\$40,043	\$40,043	\$0
Interest Charge	\$94,621	\$76,799	\$17,822
Total Remedy Cost	\$542,275	\$520,915	\$21,360

Source: Port's Check and Deposit Documents; OPA Analyses.

In our audit calculation used the average two sub-steps salary increments and excluded the 2012 increment, which performance rating was not approved, Port paid approximately \$96K more in addition to the \$21K overpayment. See Table 8.

Table 8: What Port Paid vs. What Employee Q Was Eligible For

Salary Increment Year	Performance Evaluation Deficiency	Eligible Sub-Steps	Eligible Pay Raise Changes	What Port Paid for Pay Raise Changes	Variance
2011	Not Approved	0	\$0	\$0	\$0
2012	Not Approved	0	\$0	\$7,604	\$7,604
2013	None Prepared	2	\$1,602	\$12,584	\$11,253
2014	None Prepared	2	\$3,257	\$17,644	\$14,386
2015	None Prepared	2	\$4,796	\$22,108	\$17,312
2016	None Prepared	2	*\$8,415	\$29,627	\$21,212
2017	None Prepared	2	*\$9,428	\$33,673	\$24,246
Total			\$27,497	\$123,510	\$96,013

Sources: Table 4; Table 5; Table 7.

*These are only estimates because they are dependent on the salary range Port would have granted for the 2016 agency-wide pay adjustment. Despite our requests, Port did not provide us with their detailed policy on how to mitigate their employees' salaries into the pay plan that was first adopted in October 2009.

We refer the above calculation of overpayments to Port's management for review and final decision.

Response: *We respectfully disagree with your auditor's assertion that overpayment was made to Employee Q. Reiterating our September 25, 2020 letter of response, had the Port initially complied with CSC and judicial courts' decisions in reinstating Employee Q to his position as Financial Affairs Controller and awarded him his full back pay and benefits from the date of his termination until the Port complied with the order and judgments, the erroneous initial personnel actions and the re-issuance of the correct personnel actions would not have provided your auditors with the perception that the Port erroneously calculated his back wages.*

In our teleconference with your auditors on September 29, 2020, we stated we would re-look at the calculations and determine if the Port overpaid Employee Q by \$17,000. In our November 13, 2020 teleconference, we informed your auditors that a recalculation was made and it revealed we owe Employee Q approximately \$4,729.26 in interest. According to staff, who was a former employee of your agency, she noted OPA used network days and hourly rate per year to compute the estimated annual salary and used the number of days for the interest payment. With this method of calculation, it would show the Port did overpay Employee Q by \$17,000. However, the Port's review notes that when interest was paid to Employee Q, a significant balance in salary payable was not settled. As such, the Port underpaid Employee Q \$4,729.26.

Because Employee signed a document releasing the Port from any future liability, how are we now supposed to reconcile this finding of an underpayment?

Annual Salary Increments Included Without Performance Evaluation Reports Approved by and Accountable to the GM

Our audit calculation of back wages followed Port's method of compounding the annual increments to the base salary. When there is no work interruption (e.g., termination), this is the regular calculation method for annual increments, which should be supported with a duly accomplished and approved performance evaluation report.

If we consider Employee Q's \$79,828 annual base salary (as of reinstatement) and compare it to the \$126,222 annual salary given for the last pay raise Port included in his back wages, the total salary increase is only \$46,394. However, on the same pay raises, Port paid Employee Q \$139K for the increments alone (without the base salary), because of the cumulative (compounding) method Port applied as if no termination occurred. The prior year's annual increment rate per hour was added to the succeeding year's increment per hour, and the pattern continued until the end of the period set by Port.

We respect that Port's calculation was based on the understanding that Employee Q's back wages and benefits should be processed using the regular method as if there was no work interruption. However, the annual increments granted for 2013 through 2017 were not supported with duly accomplished performance evaluation reports, which need to be approved by (and accountable to) the incumbent GM in order to standardize the process, in compliance with the PRR. Even without the approved evaluation reports, Port prepared personnel action forms for these annual increments.

In line with the existing PRR for annual increments, we recommend that the GM and the Board standardize a salary increment process for back wages to include a required performance evaluation report (of sort) accountable to the incumbent GM who signs the personnel action forms.

***Response:** This finding is baseless. The Port does have a standardized salary increment process provided for in the Port's Personnel Rules and Regulations. Such rules were followed to reconstruct the back wages for Employee Q.*

Back Wages Included Three Pay Raises Not Covered by CSC or the Courts' Judgments and Retroactive to Their Authorization Dates

Requoted in Table 1 is CSC's order that Port fully compensate Employee Q for all the time *following his termination* on December 18, 2012 *until the date he is reinstated* to his prior position of employment (July 30, 2018).

There were six pay raises within the scope of back wages – five salary increments and one pay adjustment, as shown within Table 9's green box. However, Port paid three pay raises retroactive to their authorization dates even though these were not covered by CSC or the courts' judgments, as shown in Table 9's red boxes.

Table 9: What Port Paid as Back Wages and Retro Base Pay

Effective Date	Pay Raise Type	Eligibility Date	Authorization Date	Time Lapse	Port Paid as Back Wages
10/13/2011	Salary Increment	X	2/10/2020	8.3 years	
10/13/2012	Salary Increment	X	2/10/2020	7.3 years	Paid
10/13/2013	Salary Increment	7/30/2018	2/10/2020	1.5 years	Paid
10/13/2014	Salary Increment	7/30/2018	2/10/2020	1.5 years	Paid
10/13/2015	Salary Increment	7/30/2018	2/10/2020	1.5 years	Paid
10/1/2016	Pay Adjustment	7/30/2018	2/10/2020	1.5 years	Paid
10/13/2016	Salary Increment	7/30/2018	2/10/2020	1.5 years	Paid
10/13/2017	Salary Increment	7/30/2018	2/10/2020	1.5 years	Paid
9/16/2018	Pay Adjustment	9/16/2018	2/10/2020	1.4 years	Paid
9/16/2019	Salary Increment	9/16/2019	2/10/2020	4.8 months	Paid

Sources: Notifications of Personnel Action; Employee Q’s Performance Evaluation Reports; Port’s Check and Deposit Documents; Port’s Calculation Schedules; PRR.

According to 4 GCA Chapter 6 §6218.1, “whenever a classified or unclassified employee of the Government of Guam, including all departments, agencies and instrumentalities, *whether or not autonomous*⁷, receives an increase in pay resulting from step increase, pay range increase, promotion or any other cause, such increase in pay *shall not be retroactive from the date of its authorization, unless so specified by law.*⁸”

⁷Emphasis added.

⁸Emphasis added.

As a matter of disclosure, we did not consider this law’s application on the retroactive pay raises that resulted from CSC or the courts’ judgments. The retroactive payment of the six eligible pay raises would have been available to Employee Q as early as his reinstatement, but because of differing legal opinions, these six eligible pay raises were not authorized until a year and a half later (as shown in Table 9) or paid until almost two years later (as shown in Table 2). We did not seek a legal opinion on this matter. We plan to cover this issue together with the other reinstated employees in our subsequent reports.

Response: *In our response above, we provided our review regarding Employee Q’s 2011 and 2012 performance evaluation reports. Regarding the three (3) pay raises your auditors are referencing—these are not to be considered pay raises because these salary adjustments for 2016 and 2018 resulted from a market percentile implementation which the Board approved for all Port employees. We respectfully caution against referencing an authority-wide salary correction made due to an authority-wide pay reclassification based on the market percentiles as a pay raise. In reconstructing Employee Q’s salary structure as if he never left the Port, the two times—and not three (3) which your auditors keep referencing—these compensation studies were implemented during the affected period. Therefore, since this is not a pay raise, then there is no illegal retroactive application.*

Retroactive Salary Increments Not Approved by Former GM and Its Domino Effect on Subsequent Years' Salary Increments.

Port authorized the October 2012 salary increment in February 2020, which is seven years after its effective start date and potentially noncompliant with 4 GCA §6218.1. In May 2020 (almost three months after authorizing it in February 2020), Port paid the October 2012 salary increment, retroactive to October 2012.

After Port did not make a retroactive payment for the October 2011 salary increment, the NPA supporting the October 2011 salary increment of five sub-steps had a domino effect on the subsequent years' pay raises. This 2011 NPA became the basis for subsequent pay raises – salary increments of 2012 through 2017, 2016 and 2018 pay adjustments, and the 2019 salary increment. See Table 5 and Table 8 for the financial effect on the salary increments for 2013 through 2017.

To reiterate, the financial effect of the 2011 and 2012 annual salary increments, for which performances were not approved by the former GM, needs to be reviewed by the incumbent management.

Differing Legal Opinions Resulted in Retroactive Payments of Raises Not Covered by Judgments

Also in February 2020, Port authorized and paid the September 2018 pay adjustment more than one year after its effective (and eligibility) date, and the September 2019 salary increment almost five months after its effective date.

Also previously explained, Port received differing legal opinions on which Employee Q's back wages included salary increments for the termination period. Employee Q was reinstated at his base salary without any prior pay raises factored in. Later, when Port's former Staff Attorney opined that back wages did include salary increments, the salary ranges of these eligible pay raises had a domino effect on subsequent pay raises – the 2018 pay adjustment and the 2019 salary increment. As such, Port updated the salary ranges and made retroactive payments on the 2018 and 2019 pay raises.

***Response:** We disagree with your auditor's assertion that the retroactive payment of raises were not covered under the judgments. As explained above and in our September 25, 2020 letter, although judgment or decision did not expressly state salary increments and pay adjustments, Employee Q is entitled to salary increments and market percentile implementations. We are providing you with past CSC decisions, which provides the justification for paying the salary increments and market percentile implementations to Employee Q.*

Interest Charge Paid Without Considering Time in the Calculation

Port's \$95K interest payment (for the period of December 19, 2012 through September 15, 2018) was \$18K over compared to our audit calculation of only \$77K. See Table 7. This overpayment was due to primarily Port's method of using a 6% flat rate regardless of how much time had actually passed, be it 11, 300 or 365 days. Port did not consider time in its interest calculation.

Response: *We respectfully disagree that Employee Q was overpaid in his interest payment. Based on our recalculation, the Port underpaid him \$4,729.26.*

Other Matters

Although not directly related to our audit objective, we became aware of other matters that warrant Port's, and possibly the Guam Legislature's, attention.

Port Unified Existing Employees' Anniversary Dates to Reflect the Dates of Agency-Wide Pay Adjustments

In reviewing the personnel action forms of the five reinstated employees in our initial audit scope, we noticed identical increment anniversary dates among four of them. When Port implemented its new pay plan's first, agency-wide, pay adjustment in October 2009, it unified the existing employees' anniversary dates to reflect the transfer from the Hay Plan to Port's Compensation and Classification Plan. Similarly, when Port implemented the September 16, 2018 agency-wide pay adjustment, the existing employees' increment anniversary dates changed in uniformity to the pay adjustment's effective date.

According to PRR 6.301(C)(1), the pay grade reassignment for classes of positions (Port-wide pay adjustment) will not change increment anniversary dates. Furthermore, the salary increment of all Port employees shall be based on an annual review of performance (PRR 7.008), and the performance appraisal is *every 12 months* of service (PRR 7.007(A)).

When Port unified the increment anniversary dates in October 2009, for some employees, it likely shortened the performance appraisal period to less than 12 months. Before the September 16, 2018 agency-wide pay adjustment, we know that at least three of the reinstated employees had an October 13 incremental anniversary date. After the 2018 pay adjustment, their increment anniversary changed to September 16, which is 20 workdays (or two pay periods) less than "12 months of service."

Calculating the potential financial impact of unifying increment anniversary dates is not covered in our audit scope. However, because of the unification may have potentially negative financial impacts on Port's resources, and in compliance with PRR 6.301(C)(1), we recommend that the GM and the Board reconsider their practice of unifying employees' increment anniversary dates moving forward.

Response: *In our response of September 25, 2020, we did agree with your auditor's statement that the salary increment anniversary dates should not have changed when the Port mitigated into the 2018 market percentile. We explained when we talked to the Human Resources staff about the changes, we were told they were being guided by former Port management to change the employees' salary anniversary dates to reflect the pay adjustment into the 25th market percentile.*

Port's PRR Does Not Have a Cap on Salary Increments

According to 4 GCA Chapter 6 §6202, employees (autonomous agency employees included) at Steps 7 through 9 are entitled to an increment after 18 months of satisfactory performance, while employees at Steps 10 through 20 are entitled to an increment that is 3.5% of the employee's base

salary after 24 months of satisfactory performance. It was in 1991 when P.L. 21-59 amended §6202 by placing caps (limits) on the salary increments of employees at higher pay steps.

However, Port grants salary increments on an annual basis. According to PRR 7.008, the salary increment of all Port employees shall be based on an annual review of performance, and according to PRR 7.007(A), the performance appraisal period is every 12 months of service. It was in 2009 when the Guam Legislature adopted the PRR into Port's enabling legislation (12 GCA Chapter 10).

Although salary increment caps were passed by law in 1991, Port's PRR, adopted in 2009, did not incorporate the relative provisions of 4 GCA §6202, or any other cap, on its salary increments.

It is the GM's understanding that the salary increment caps required by 4 GCA §6202 were intended for those entities that rely on the General Fund. The GM explained that because Port is autonomous and generates its own income, Port employees are not subject to the salary increment caps required in §6202. Combined with Port's generous salary increment point system (as shown in Table 3), a Port employee's salary can increase by 2% to 5% each year without a cap. This presents a potentially negative financial impact on Port's resources.

As such, we recommend the Board consider incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202.

***Response:** We do not think this recommendation is feasible as a matter of practical application. The Port's PRR was adopted by statute, so the Board does not have the unilateral authority to simply "incorporate into the Port's Personnel Rules and Regulations the provisions of 4 GCA Chapter 6 §6202 moving forward." Moreover, we are perplexed that this is even a finding? This audit should focus on a determination if the law and rules and regulations applicable to the Port were followed in the execution of complying with Supreme Court Order No. CVA16-018.*

Regarding the salary increment caps in the Department of Administration please check the latest Hay Plan implementation whereby increments do go beyond Step 20.

Port Interpreted Superior Court Decision as Employee Q Did Not Have to Mitigate the Wages Earned During His Termination

Port paid Employee Q his back wages, minus \$209K for the outside income he earned during his termination, as indicated in Tables 1, 2 and 7. According to the GM, Port mitigated (reduced) the back wages because Employee Q *requested* that his back wages be mitigated by his earnings during the period he was terminated. Based on his reading of the Superior Court's September 26, 2016 Decision and Order, it is the incumbent GM's understanding that:

- Port is obligated to pay Employee Q his full reinstated salary *without* mitigation; and that
- Employee Q did not have to mitigate the income he earned in the private sector and, as such, could have insisted that Port pay him his full back pay, in compliance with the Superior Court's order.

See Appendix 2 for a copy of the Superior Court's ruling. The GM's understanding of the Superior Court ruling in the September 26, 2016 Decision and Order could open up the possibility of Employee Q's supposed entitlement to the \$209K of outside wages he "voluntarily agreed" to be deducted from his back wages. Again, we reiterate our recommendation to execute a comprehensive formal settlement agreement that includes the provisions we previously stated.

***Response:** In our response letter of September 25, 2020, we went into great detail about the Hauser versus the Department of Law 2005 Guam 14 case when determining if an employee is qualified for full back pay. Based on the Decision and Order by Superior Court Judge Vern Perez on September 26, 2016, he found that there were no substantially equivalent jobs on Guam during the time period in question for Employee Q. It should be noted that Employee Q held positions with his private employers as a Bookkeeper and Accountants, which is not equivalent to his position as Financial Affairs Controller.*

In our exit conference, we also explained that it was Employee Q's attorney who informed him to mitigate his outside wages he earned from 2014 to 2018 in the amount of \$102,748.75, which they did not have to do based on Judge Perez's decision. However, Employee Q submitted his calculations based on mitigation because his attorney advised him to do so.

This finding is moot since Employee Q's back wages included mitigation, and also since Employee Q submitted his liability release to the Port on July 23, 2020.

Conclusion and Recommendations

Our audit found that Port paid \$542K for Employee Q's back wages, Medicare tax, retirement contribution, interest charge, and attorney's fees and legal costs. Port's legal remedies with Employee Q were generally made in accordance with administrative and judicial review judgments. However, our audit calculated a total of \$521K, or a difference of \$21K, following Port's annual salary increment calculation.

Our audit amount did not factor in Employee Q's eligibility for only two sub-steps annual salary increments instead of the five sub-steps Port gave. Port granted five sub-steps based on three prior years of "outstanding" performance evaluation ratings, for which two were not approved by the former GM. If our audit calculation used the average two sub-steps and excluded the 2012 increment, for which the performance evaluation was not approved, Port paid approximately \$96K more in addition to the \$21K overpayment. While we acknowledge Port management's efforts to provide Employee Q with all the expected benefits "to make the employee whole" as if he was not terminated, Port's rules and regulations should be followed to support such a significant payment. As such, we refer this calculation for Port's GM and Board to review and consider.

Moreover, in executing Employee Q's legal remedies, we found instances of potential noncompliance with applicable laws, regulations, and internal policies, as well as lapses in Port's internal processes. These included: a) unorganized remedial actions; b) legal remedies not ratified by the Board; c) legal remedies without a formal comprehensive agreement and liability release; d) highest incremental sub-steps not required by CSC or the courts but based on two "outstanding" performance evaluations that were not approved by the prior GM; e) a 6% interest payment not

required by court order and improperly calculated; f) annual salary increments without performance evaluation reports; and g) apparent retroactive pay raises.

We became aware of other matters not related to our audit objective that warrant Port's, and possibly the Guam Legislature's, attention – i.e., the uniformity of exiting employees' anniversary dates and no caps on Port's salary increments.

As a result of our audit, we recommended the following:

- The GM seek the Board's ratification, via board resolution, on the total back wages and interest paid to Employee Q.

Response: *This recommendation is not necessary as Management believes it complied with statutory authority expressly provided to the General Manager, and wherever it was prudent and necessary, the Board provided the appropriation when it adopted a motion on April 30, 2019, which authorized a payout not to exceed \$600,000.*

- The GM execute a comprehensive formal agreement that includes (1) the purpose, amounts, and terms of what Port paid for Employee Q's back wages, benefits, attorney fees, and interest charge (2) a liability release provision; and (3) the signatures of the relevant parties and witness.

Response: *This recommendation is not necessary. Employee Q submitted his liability release to the Port on July 23, 2020.*

- The GM and the Board standardize a salary increment process for back wages to include a required performance evaluation report (of sort) accountable to the incumbent GM who signs the personnel action forms.

Response: *This recommendation is unnecessary. The Port does have a standardized salary increment process provided for in the Port's Personnel Rules and Regulations. Such rules were followed to reconstruct the back wages for Employee Q.*

- The GM and the Board reconsider their practice of unifying employee's increment anniversary dates moving forward.

Response: *As stated in our response, going forward, an incumbent employee's anniversary date will remain the status quo when the Port implements a market percentile in the future.*

- The Board consider incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202 moving forward.

Response: *We do not agree with this recommendation. Public Law 30-43, which approved the Port's Compensation and Classification Plan, also codified our Personnel Rules and Regulations into the Guam Code Annotated. As such, the Board does not have the unilateral authority to simply incorporate into the Port's Personnel Rules and Regulations the provisions of 4 GCA Chapter 6, Section 6202 moving forward.*

In thinking very analytically of how to conclude our response to this draft audit, we are focusing on your letter of November 6, 2020, and our teleconference of November 13, 2020, wherein your auditors expressed that some documents they requested have yet to be provided by the Port. This revelation is deeply concerning to us, especially since we pride ourselves on being transparent and accountable in our work.

Mr. Public Auditor, please recall that no specifics were provided to us when we inquired during our teleconference on what documents were still pending. As a result of your auditors' non-response and the lack of specificities of outstanding documents, we are conducting an internal review to determine what documents your auditors requested and deemed pending. We have yet to find any non-compliance, but our review is still ongoing. Port employees involved with this particular audit are currently being asked to review all their correspondences with your auditing team.

Our hope and trust are that your audit examines the payments made to nine (9) affected Port employees would encompass a thorough review based on all of the documents surrounding these cases. This letter, therefore, respectfully requests that this draft audit be held in abeyance, so your auditors can provide us with an inventory of documents requested and allow the Port sufficient time to transmit such documents.

There are ethical requirements to produce a full and thorough audit based on all matters' collective knowledge. In order to uphold these ethical standards, a temporary pause is warranted so that your auditors can provide us with an actual inventory of outstanding documents. We are also requesting additional time to compile the migration study documents. Because of the magnitude of this audit and its impact on the subsequent related matters, we believe that it is in the public's best interest that all of the documents needed for your auditing team are before them for consideration.

Should you have any questions, or require additional information, please do not hesitate to contact me directly. *Si Yu'os Ma'ase!*

Respectfully,



Rory J. Respicio
General Manager