

BOARD OF DIRECTORS

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Resolution No. 2020-04

RELATIVE TO INSTRUCTING MR. LUIS R. BAZA, DEPUTY GENERAL MANAGER OF ADMINISTRATION & FINANCE FOR JOSE D. LEON GUERRERO COMMERCIAL PORT OF GUAM TO PROCEED WITH FOUR (4) SETTLEMENT AGREEMENTS, AND TO HEREIN PROVIDE THE FINALIZED FOUR (4) SETTLEMENT AGREEMENTS TO THE HONORABLE BENJAMIN J.F. CRUZ, GUAM PUBLIC AUDITOR IN THE INTEREST OF TRANSPARENCY AND ACCOUNTABILITY

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE PORT AUTHORITY OF GUAM:

WHEREAS, on December 18, 2012, Port Authority of Guam issued final notices of adverse action of termination to former employees Josette J. Javelosa, Frances Arriola Cepeda, Francine T. Rocio, Jose B. Guevara III, Leonora V. Leon Guerrero, Bernadette Sterne Meno and Vivian Castro Leon; and

WHEREAS, the notices accused the former employees of processing an allegedly fraudulent Workers Compensation Claim (WCC) based on a slip and fall which occurred on September 22, 2011; and

WHEREAS, the former employees filed appeals with the Civil Service Commission (the "CSC") which the CSC Commissioners found the filing of such appeals were timely and scheduled motion and merit hearings for each employee; and

WHEREAS, below are events from 2013 to June 2020 which occurred involving the appeals of the former employees:

1. On May 1 and June 6, 2013, in separate hearings, CSC Commissioners granted Mr. Guevara's and Mrs. Cepeda's motions to null and void their final notices of adverse action of termination because the Port violated the 60-day rule.
2. Merit hearings were held for Mrs. Leon Guerrero on June/July 2014, Mrs. Javelosa in August/September 2014 and Mrs. Rocio in October 2014 which CSC Commissioners ruled the Port failed to meet its burden of proof that action taken against the employees and ordered they be reinstated to their prior employment.
3. From 2014 to 2015, CSC rescheduled Mrs. Leon and Mrs. Meno's status call hearings and merit hearings on numerous occasions and eventually informed them that their future hearings would be cancelled because the Commissioners' calendar was booked for the next few years until at least 2017.
4. Port appealed CSC's decisions and judgments in Superior Court rendered for Mr. Guevara in September 2013, Mrs. Javelosa on October 4, 2014, Mrs. Leon Guerrero on October 30, 2014, Mrs. Rocio on April 21, 2015, and Mrs. Cepeda on June 15, 2015.
5. On July 2, 2015 and June 24, 2016, Superior Court affirmed CSC's decision and judgement rendered to Mr. Guevara that the Port violated the 60-day rule and ordered to reinstate the employee to his prior position, which Port appealed to Supreme Court on October 26, 2016.
6. In September 5, 2015, Superior Court reversed CSC decision and judgment for Mrs. Javelosa and remanded the matter to CSC who shall determine, based upon substantial evidence, whether or not a criminal act or acts were committed, which the employee appealed to Supreme Court on October 5, 2015.
7. On March 15, 2016, in their regular meeting, CSC Commissioners decided to remove the status call conference and merit hearings for Mrs. Meno and Mrs. Leon indefinitely until Supreme Court issues a decision on Mrs. Javelosa's case.
8. On February 7, 2018, Supreme Court rendered a decision in favor of Mr. Guevara, and the Port requested for reconsideration on March 26, 2018, which the Court denied on April 17, 2018 and ordered the employee be reinstated to his prior position with the Port.
9. At their Board of Directors meeting of July 25, 2018, management was authorized to reinstate Mr. Guevara to his position as Financial Affairs Controller effective July 30, 2018 in compliance with Superior Court's decisions of 2015 and 2016.
10. On July 26, 2018 Supreme Court affirmed Superior Court's decision and order for Mrs. Javelosa and remanded the case to Superior Court so it may return the matter to CSC for a threshold determination of the proper standard of review in her case.
11. On August 24, 2018, Superior Court issued a decision and order to award Mr. Guevara full back pay and benefits, which the Port appealed on September 2, 2018.



12. On March 6, 2019, the Superior Court remanded the cases of Mrs. Javelosa, Mrs. Leon Guerrero, and Mrs. Rocio to CSC for a threshold determination of the proper standard of review in their cases as concluded in the Supreme Court decision of July 26, 2018.
13. On March 29, 2019, the Board of Directors authorized Port Legal Counsel to proceed in settlement discussions with Mr. Guevara's attorney.
14. On July 25, 2019, Supreme Court affirmed in part and reversed in part the Superior Court's judgment for Mrs. Cepeda and remanded the matter to CSC for consideration of the merits of the allegation that Mrs. Cepeda backdated a memo to file and for other proceedings not inconsistent with this opinion.
15. In accordance with Superior Court's decision, the CSC scheduled hearings for Mrs. Rocio for August 2019 and for calendar year 2020 for Mrs. Leon Guerrero, Mrs. Javelosa, Mrs. Meno, Mrs. Cepeda and Mrs. Leon.
16. On August 27, 2019, CSC Administrative Law Judge held a motion hearing to null and void the personnel action of termination for Mrs. Rocio, and on September 30, 2019, he rendered a recommendation that Mrs. Rocio's motions to dismiss be granted.
17. In August of 2019, Mr. Joe McDonald, former Port Staff Attorney held discussions with the attorneys of Mrs. Javelosa, Mrs. Cepeda, Mrs. Leon Guerrero, Mrs. Meno and Mrs. Leon regarding settlement proposals and initial settlement proposals were submitted to the Port in September 2019.
18. On October 10, 2019, CSC Commissioners voted on Mrs. Rocio's motions that the Port did not notify her of adverse action within 60 days as mandated by law at the time, the Port's final notice of adverse action lacked specificity, and burden of proof was clear and convincing.
19. The Port filed with CSC a motion to reconsider its decision for Mrs. Rocio and CSC Commissioners on November 21, 2019 denied the Port's motion.
20. On November 26, 2019, the Port reinstated Mrs. Rocio to her position as Personnel Services Administrator and finalized the settlement agreement on December 13, 2019.
21. On December 19, 2019, the Board of Directors approved Resolution No. 2019-20 approving an offer to settle adverse action appeal between the Port and Mrs. Leon Guerrero.
22. On December 19, 2019, the Board of Directors passed Resolution 2019-22, authorizing Port Legal Counsel to enter into settlement agreements with Mrs. Javelosa and Mrs. Cepeda.
23. On December 23, 2019, the Port finalized the settlement agreement and reinstated Mrs. Leon Guerrero to her position of Planner-Work Coordinator on January 6, 2020.
24. On February 28, 2020, the Port Staff Attorney resigned with the Port and the settlement agreements for Mrs. Javelosa and Mrs. Cepeda were not yet finalized.
25. On March 11, 2020, the CSC Administrative Law Judge filed his "Recommendations of Administrative Law Judge on Motion to Void Based on Violation of the 60 Day Rule" in Mrs. Meno's case and found in his analysis "undisputed facts" that identified at least three dates management knew or should have known which were September 10, 2012, September 17, 2012 and October 16, 2012 which, according to the ALJ were 100 days, 93 days and 63 days and therefore stated that the adverse action taken against Mrs. Meno should be revoked; she should be reinstated immediately until such time the decision is overturned by judicial review; and that Mrs. Meno should be awarded back pay, reasonable attorney fees and costs.
26. On June 8, 2020, CSC Administrative Law Judge issued recommendations that the CSC grant Mrs. Javelosa's motion to void as to allegations of processing and conspiracy to process an allegedly fraudulent Worker Commission Claim because the final notice of adverse action violated the 60-day rule and stated with regards to the memo she was accused of backdating to file "There is no conceivable way to conclude that this memo in any way aided the process of the original approval of work related injury leave. Moreover, there is no way to conclude that the memo was an effort to cover up fraudulent acts. The undersigned concludes that the memo cannot support or justify the adverse action" and thus recommended that Mrs. Javelosa be awarded back pay, reasonable attorney fees and costs; and be reinstated immediately until such time the decision is overturned by judicial review.
27. The CSC Administrative Judge will be presenting his recommendations to the CSC Commissioners for Mrs. Meno on July 2, 2020 and Mrs. Javelosa on July 7, 2020; and



WHEREAS, on January 16, 2019, the General Manager formed a task force to be chaired by the Deputy General Manager to review 18 adverse action appeal cases under litigation, examine each case, gather facts through review of documents, conduct interviews with active and inactive employee, identify inconsistencies, if any, in the rules, procedures and/or process; determine whether the provisions of the Personnel Rules and Regulations, required disclosure and transparency process and/or other mandates were complied with; identify the risk exposed, if any, to the Port, and provide the recommended administrative action(s) to the General Manager and/or Board of Directors; and

WHEREAS, the review of the task force revealed that because Supreme Court mandated the Port to pay Messrs. Guevara and Susuico the back wages, attorney fees and associated costs, the Port could not enter into settlement discussions with the employees and had no choice but to comply with the higher court’s orders resulting in the Port paying Mr. Guevara in three (3) staggered payments within a 10-month period a total amount of \$381,381.61 and to Mr. Kevin Susuico a one-time payment of \$99,000.16 without any mitigation; and

WHEREAS, Port Staff Attorney, through Board direction, entered into settlement agreements with Mrs. Rocio and Mrs. Leon Guerrero, which allowed the Port and the employees to agree upon a payment plan for back wages spreading over a year or two-year period which had a benefit to the port by not impacting cash flow with immediate, one-time payments and also mitigating the actual back wages at a significant cost savings to the Port worth several hundred thousand dollars; and

WHEREAS, the CSC Administrative Law Judge’s recent recommendations for Mrs. Rocio, Mrs. Leon Guerrero, Mrs. Meno and Mrs. Javelosa is to null and void the personnel actions of termination because the Port failed to comply with the 60-day rule; and

WHEREAS, the merits of the adverse action and the technical violations in the adverse action notices have been repeatedly ruled on by the CSC, Superior Courts, Supreme Court and the CSC Administrative Law Judge and yet for 7½ years the Port pursued this litigation and each time the employees continued to prevail; and

WHEREAS, the Port has paid millions of dollars to former Legal Counsel to pursue higher judicial reviews which has led to significant financial damage to the Port through continued legal losses and this liability continues to grow daily; and

WHEREAS, the Board of Directors find that the technical violations cited by the CSC Administrative Law Judge in the cases of Mrs. Rocio, Mrs. Leon Guerrero, Mrs. Meno and Mrs. Javelosa would also apply to Mrs. Cepeda and Mrs. Leon since the date management knew or should have known are exactly the same as Mr. Guevara, Mrs. Rocio, Mrs. Meno and Mrs. Javelosa in their final notices of adverse action; and

WHEREAS, if the Board of Directors wishes to continue to pursue litigation and appeal those who have prevailed in CSC to higher judicial review, the gross pay (**without benefits**) for the employees **without mitigation** as of June 30, 2020 which the Port would need to pay, if they prevail again in the higher courts are:

1. Josette J. Javelosa	\$569,810.44
2. Frances A. Cepeda	\$580,046.86
3. Bernadette S. Meno	\$716,274.92
4. Vivian C. Leon	<u>\$980,951.42</u>
Total:	\$2,847,083.64

WHEREAS, with mitigation, the Port would be able to offer terms to the employees in respect to a payment plan on their back wages and agree upon staggered payments to ensure the Port’s obligation to our revenue bond investors are met as well as its cash flow is not impeded; and

WHEREAS, for example, in the case of Mrs. Leon and if she prevails in her case, the Port would be obligated to pay her based on one of the following Option 1 or 2, and if settlement is pursued, Option 3 could be negotiated; and:

- Option 1. Non-mitigation: \$1,278,670.19 including benefits
- Option 2. Non-mitigation: \$1,278,670.19 including benefits and Port would pay the Retirement Fund \$674,036.00 for her annuities they remitted during 2013 to present; and
- Option 3. Mitigation: \$387,029.25 including benefits.

WHEREAS, the Board of Directors finds that if the Port were to enter into settlement negotiations with Mrs. Javelosa, Mrs. Cepeda, Mrs. Meno and Mrs. Leon and **mandate mitigation** in the settlements then the cost to the port would be \$1,790,529.80 instead of \$2,847,083.64 for a savings to the Port of \$1,056,553.84; and

WHEREAS, the Board of Directors finds that it is in the best interest of the Port to explore and offer settlement terms that **include mitigation** to Mrs. Javelosa, Mrs. Cepeda, Mrs. Meno and Mrs. Leon which will save the Port a minimum of \$1,056,553.84; now therefore be it



RESOLVED, that the Board of Directors of the Jose D. Leon Guerrero Commercial Port hereby provide Mr. Luis R. Baza, Deputy General Manager for Administration & Finance the latitude to negotiate the final settlement agreements which is to incorporate the benefits owed, execute and deliver such documents, undertake such acts, and provide direction to staff as are necessary to comply with the terms of the settlement after an employee has signed the agreement; and be it further

RESOLVED, the first settlement agreement for Mrs. Josette J. Javelosa be based on the following terms:

1. Back wages (net gross pay after mitigation) \$409,356.68;
2. A payment schedule plan favorable to the Port;
3. Reinstatement of sick leave hours and annual leave hours owed;
4. Reasonable legal fees;
5. Remit to Retirement Fund retirement benefits owed to employee; and be it further

RESOLVED, that the second settlement agreement for Mrs. Frances Arriola Cepeda be based on the following terms:

1. Back wages (net gross pay after mitigation) \$437,268.94;
2. A payment schedule plan favorable to the Port;
3. Reinstatement of sick leave hours and annual leave hours owed;
4. Reasonable legal fees;
5. Remit to Retirement Fund retirement benefits owed to employee; and be it further

RESOLVED, that the third settlement agreement for Mrs. Bernadette Sterne Meno be based on the following terms:

1. Back wages (net gross pay after mitigation) \$646,988.76;
2. A payment schedule plan favorable to the Port;
3. Reinstatement of sick leave hours and annual leave hours owed;
4. Reasonable legal fees;
5. Remit to Retirement Fund retirement benefits owed to employee; and be it further

RESOLVED, that the fourth settlement agreement for Mrs. Vivian Castro Leon be based on the following:

1. Back wages (net gross pay after mitigation) \$296,915.42;
2. A payment schedule plan favorable to the Port;
3. Reinstatement of sick leave hours and annual leave hours owed;
4. Reasonable legal fees;
5. Remit to Retirement Fund retirement benefits owed to employee; and be it further

RESOLVED, that Mr. Luis R. Baza forwards the finalized and signed settlement agreements to the Honorable Benjamin J.F. Cruz, Guam Public Auditor in the interest of transparency and accountability; and be it further

RESOLVED, the Civil Service Commission shall be notified of the settlements and the parties' desires to withdraw the litigation before the Commissioners and comply with the Rules and Regulations of the Commission with regards to settlement of the Adverse Action Appeal; and be it further

RESOLVED, the Chairman certify to and the Secretary attest to the adoption hereof and that a copy of this resolution be transmitted to the Civil Service Commission.

PASSED AND ADOPTED BY A MAJORITY VOTE BY THE BOARD OF DIRECTORS THIS 25th DAY OF JUNE, 2020.

**FRANCISCO G. SANTOS
CHAIRMAN, BOARD OF DIRECTORS
PORT AUTHORITY OF GUAM**

**ISA MARIE C. KOKI
SECRETARY, BOARD OF DIRECTORS
PORT AUTHORITY OF GUAM**

