

PORT AUTHORITY OF GUAM BACK WAGES SERIES, PART C

PERFORMANCE AUDIT
October 2010 through July 2022

OPA Report No. 22-05
November 2022



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EXECUTIVE SUMMARY
Port Authority of Guam Back Wages Series, Part C
OPA Report No. 22-05, November 2022

This performance audit concludes our three-part audit series of the Port Authority of Guam’s (Port) Back Wages of seven reinstated employees. This report presents the results of audit Series, Part C, which focuses on the execution of settlements and legal remedies of the remaining four employees, herein referred to as “Employee X,” “Employee N,” “Employee Z,” and “Employee E.”

The Port is highly commended for generally adhering to the administrative and judicial review judgments and orders, and Settlement Agreements in executing the reinstatements of these four employees. The Port paid total legal remedies of \$4.5 Million (M) to all seven reinstated employees and \$2.9M for the four employees covered in this audit. This comprised of back wages net of mitigation (\$1.8M), the Port’s share of employees’ retirement contributions (\$481 Thousand (K)), Medicare tax share (\$46K), and attorney fees (\$576K). Board Resolution (B.R.) No. 2020-04 (passed in June 2020), disclosed that the Port was able to mitigate \$1.5M, although mitigated amounts for two employees totaling \$303K could not be validated due to lack of documentation.

However, in our review of the documentation provided and analysis of the processes, we found deficiencies in documentation, deviations from certain provisions of Port Personnel Rules and Regulations (PRR) resulting in potential overpayments or lost savings, lack of or conflicting Notification of Personnel Actions (NPAs), payment of back wages to a retired employee, and other matters of concern. In this audit, questioned costs amounted to \$212K with a total financial impact of \$503K.

Deviations from Certain Provisions of Port’s Personnel Rules and Regulations

In the Port’s reinstatement process of the four employees, we found deviations from the Port’s PRR. Specifically:

Average Three Prior Years’ “Outstanding” Ratings Partly Based on Performance Evaluation Reports Not Approved by any General Manager (GM)

The Port adopted the average rating methodology of the employees’ last three years of employment at the Port in 2010, 2011, and 2012. This methodology of calculating back wages was ratified per B.R. No. 2022-01, passed in January 2022. With this methodology, the Port consistently used “5” incremental sub-steps for all four employees, corresponding to an “Outstanding” rating. Comparatively, another autonomous agency considered “5” as a rare rating, which means that the employee significantly exceeded expectations.

In our recalculations, we adhered to the Board’s ratified average rating methodology. However, our recalculations disclosed that all four employees only obtained averages of a “Satisfactory” rating or “3” sub-steps. This was due to the **lack** of the Employee Performance Evaluation Report (EPER)

and Notice of Results of Performance Evaluation Report (NRPER) for all four employees' increments due effective October 2012. These performance evaluation documents need to be prepared and signed by the former GM to signify his approval of the recommended increments. The present Port management consistently justified that employees' increments should not be denied since the former Port GM left the performance evaluation unsigned and did not deny the salary increment in writing. On the contrary, if the former GM intends to approve the employees' eligibilities for increments, he/she should have affixed his/her signature on the performance evaluation documents.

Although, we agree that the reinstated employees are entitled to due process, the Port is also bound to adhere to its own PRR in processing annual increments. Therefore, we recommend that Port management prepare and/or or approve the unapproved performance evaluation documents (EPER and NRPER) effective October 2012 to satisfactorily justify the average three prior years' "Outstanding" rating.

Seven-Year Increments with the Highest Sub-Steps Granted without Performance Evaluation Reports Approved by any GM

The seven-year annual increments of the four employees were not supported with the PRR-required performance evaluation documents such as the EPER and NRPER, which both require approval by the Port GM. The total annual increments granted to each employee from 2012 through 2019 (excluding Port-wide adjustments) ranged from \$25K to \$40K. Upon reinstatements, one employee's annual salary reached as high as \$154K.

In response to audit recommendations per OPA Report No. 21-09, Board Resolution No. 2022-01 ratified Board Policy 2022-01, which established and standardized a salary increment process to include a performance evaluation report to be signed by the incumbent GM, who approves the number of sub-steps in the personnel action forms. Even in the amended Board Policy, annual increments still require that performance evaluations reports be approved by the GM. Therefore, we recommend that performance evaluation documents such as the EPER and the NRPER be prepared and approved to support the GM's authorization and approval of all increments paid.

Potential Overpayment or Savings in Using the "Satisfactory" ("3" sub-steps) Rating as opposed to "Outstanding" Rating ("5" sub-steps)

We acknowledge Port management's efforts to provide the reinstated employees with all the expected benefits "to make the employee whole" as if they were not terminated. However, the employees were only eligible for a "Satisfactory" rating ("3" sub-steps) due to the absence of approved performance evaluation documents, as required per the Port's prevailing PRR at the time of the action. Our recalculated "3" incremental sub-steps as opposed to "5" incremental sub-steps granted by the Port to these employees resulted in potential overpayments totaling \$204K, or lost savings to the Port. To reiterate, we recommend that Port management prepare or approve the unapproved performance evaluation documents (EPER and NRPER) effective October 2012 to satisfactorily justify the average three prior years "Outstanding" rating.

Annual Increments Paid without Notifications of Personnel Actions (NPAs)

Employee E's annual increments for seven years totaling \$40K, were granted without the required NPAs to be signed by the incumbent GM. According to Port, no NPAs were provided to Employee

E as both parties agreed to it, although this condition was not specified in the Settlement Agreement (SA). The SA simply stated that the “Employee shall be reinstated to [his/her] position at the pay range level to which the Employee would be entitled at the time of reinstatement had the adverse action not been taken against the employee.” The agreement further stipulated that Employee E’s base pay range level as of July 1, 2020 would be no less than Pay Range PP-11C (hourly rate of \$74.19). We recommend that Port management prepare the required NPAs to document the GM’s authorization and approval of the annual increments paid, if the employee is considered never retired.

Back Wages Earned during the Retirement Period Paid to a Retired Employee

According to the Port GM, Employee E retired from the Port effective January 2, 2013, as a consequence of wrongful termination. The employee received a retirement annuity effective such date until it was suspended on July 1, 2020, when the employee was reinstated to his/her previous position with the Port. From **January 2, 2013, to June 30, 2020**, the employee received retirement annuities totaling \$674.8K and annual Cost of Living Allowance (COLA) payments totaling \$13.8K for a collective amount of \$688.6K.

The Port-calculated employee back wages from October 13, 2012, through June 30, 2020, for a total of \$980K and was reduced (mitigated) by the total retirement annuity of \$684K, leaving a balance of \$296K. The balance was fully paid to the employee in March 2021. Based on the Government of Guam Retirement Fund’s (GGRF) confirmation, the mitigated amount was not reimbursed by the Port to GGRF. Therefore, the retirement from January 2013 to June 2020, was fully effected. The 5% or “5” sub-steps annual increments were factored in the Port’s calculation of back wages even though the employee retired from the Port and was receiving his/her monthly annuity.

In September 2021, OPA requested the Guam Office of the Attorney General’s (OAG) opinion relative to the proper calculation of back wages for a terminated employee who retired from government service during the termination period, and was later reinstated pursuant to a court order and settlement agreement. In the Chief Deputy AG’s response, it was stated that, *“No authority is provided that allows an employee to collect both a retirement annuity and employment compensation for the same period.”* It further stated that, *“The Port’s calculation of back wages may not include wages covering the period of time between the retirement and reinstatement for which [he/she] received an annuity.”*

We presented an analysis of the effect of the Port’s actions depending on how Port management will treat such retirement. If the employee is treated as *retired*, then he/she would only be entitled to salaries earned from October 13, 2012, through December 31, 2012, or a total of \$5,515 thus an overpayment of \$290.6K. However, if the employee is treated as *not retired*, he/she will be entitled to all the benefits of a terminated employee, and will only have a net overpayment of \$5K. However, the Port will need to reimburse GGRF for a total of \$689K. According to the GGRF Director, the Port may not reimburse the amount, however, there would be an effect or a loss of approximately \$25K annually, if the employee continues to receive his/her retirement annuities under the Defined Benefit Plan.

We refer the matter for Port management’s review and decision. The OPA is not in the position to

suggest how Port management decides on the issue. We merely recommend for an appropriate decision/action based on Port management's treatment of employee's retirement, to determine his/her entitlement.

Other Matters

Other matters we noted, which affected the reinstated employees, were related to potential violations of retroactive pay raises and the pay raise freeze mandate based on an OAG opinion issued in November 2021.

Conclusion and Recommendations

We acknowledge and commend the Port's general adherence to the court orders and judgments and Settlement Agreements in its reinstatement processes of the seven wrongfully terminated employees. Their commendable decisions and actions were intended to make the employee "whole" and granted them salaries and benefits as if there were no work interruptions.

We also compliment the Port management and the Port Board of Directors for B.R. 2022-01 in regards to the settlements in line with OPA recommendations per OPA Report No. 21-03 and No. 21-09, ratifying the legal remedies of the seven employees. We further commend them for ratifying Board Policy No. 2022-01, which incorporated the salary increment process for reinstated employees. The amended policy still retained the existing requirement of performance evaluation reports duly-approved by the GM and all annual increments must be supported with the NPAs. Since the incumbent Port GM approved the employees' NPAs to authorize the payments of annual increments due prior to and during the termination periods, the Port management needs to comply with the documentary requirements specified in its PRR in the processing of these increments.

This audit report emphasized that, in the implementation processes and execution of legal remedies for reinstated employees, the Port also needs to comply with its own policies and procedures embodied in its PRR, specifically on performance-based annual increments for all employees. Port management needs to institute proper implementation of its policies and control procedures for good governance. The Port management generally disagreed with our findings and six recommendations, and has not provided a formal management response as of the report release date.



Benjamin J.F. Cruz
Public Auditor



Introduction

This report presents the results of our performance audit on the Port Authority of Guam's (Port) Back Wages Series, Part C. This report focuses on the execution of settlements and legal remedies of the remaining four (4) of the selected seven (7) reinstated employees, herein referred to as "Employee X," "Employee N," "Employee Z," and "Employee E." This three-part audit series was initiated in response to the public's concerns on the confidentiality of the settlement costs of reinstated employees. Based on the Guam Attorney General's opinion that settlement agreements are public records, these were made available for public view.

Consistent with Parts A and B, our audit objective was to determine whether the Port's settlements or legal remedies were properly accounted for and paid in accordance with applicable laws, regulations, and administrative and judicial review judgments.

Our audit scope covered court orders and judgments and other documents that contributed to the Port's calculations and payments of legal remedies. The audit period spanned from October 2010 through July 2022 (fiscal years (FY) 2011 through part of FY 2022). Our initial audit scope included the nine reinstated employees with whom the Port executed settlements or legal remedy payments. Based on our professional judgment, we decreased the scope to only seven employees. The objective, scope, and methodology for Part C can be found in Appendix 1.

Results of our audit on Part A for Employee Q were released in OPA Report No. 21-03 in February 2021, and Part B for Employees S and T in OPA Report No. 21-09 in December 2021. The prior audit coverage can be found in Appendix 2.

Background

The 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 FY 2016, the Port's revenues averaged \$54.4 million (M) annually. On average, 98% of the Port's revenues were derived from the tariffs and rentals paid by Port customers (ratepayers). The Port prides itself in dedicating all of its profits to the upgrading of its equipment and facilities and the continued growth of Guam's seaport.

Confidential Settlements of Multiple, Employee Termination Lawsuits

The Port has been a defendant in nine employees' adverse action (termination) lawsuits. All nine of these employees were reinstated to their original employment positions 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. The Port provided other legal remedies such as reimbursement for the 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.

Results of Audit

The Port’s reinstatements of Employees X, N, Z, and E in June 2020 and July 2020 were generally made in accordance with administrative and judicial review judgments and orders. Additionally, the legal remedies stipulated in the Settlement Agreements (SA) were generally complied with by the Port and ratified per Board Resolution (B.R.) No. 2020-04, which passed in June 2020. B.R. No. 2022-01 was also passed in January 2022, which ratified the legal remedies of all seven employees, such as the computation of total back wages, interest, and legal fees and costs.

We commend the Port’s action relative to our prior audit reports’ recommendation for the Board to ratify the legal remedies and adhere to 12 GCA Chapter 10 §10107(d), which authorizes the GM to approve the demand for payments of obligation of the Authority as authorized by the Board.

The Port paid a total of \$2.9 million (M) in legal remedies for the four employees. The cash payments were comprised of gross back wages (net of mitigation), the Port’s share of employee retirement contributions, Medicare tax, and attorney fees and legal costs as directed in the Port’s B.R. and formal SAs. These documents were executed by the Port’s Deputy General Manager (DGM) and the four employees. See Table 1 for details of the legal remedies paid for each employee.

Table 1: Summary of Legal Remedies Paid

Type of Payments	Employee X	Employee N	Employee Z	Employee E	Total
Back Wages (Net of Mitigation)	\$409,357	\$437,787	\$646,989	\$296,082	\$1,790,215
Port Contribution for Employee Retirement	\$154,780	\$107,842	\$216,999	\$1,488	\$481,109
Attorney’s Legal Fees	\$48,438	\$87,454	\$131,915	\$308,648	\$576,455
Port’s Share of Medicare Tax	\$13,670	\$8,348	\$21,225	\$2,903	\$46,146
Total Payments	\$626,245	\$641,431	\$1,017,128	\$609,121	\$2,893,925

Based on the disclosure in B.R. No. 2022-01 the Port was able to mitigate a total of \$1.5M. For the four employees covered in this report, mitigation based on the B.R.’s data amounted to only \$1.1M. Mitigation for Employees X and N totaling \$303 thousand (K) could not be validated due to the absence of documents. See Appendix 3 for PAG Board Resolution 2022-01.

The mitigation of Employee Z’s \$69.3K was based on a legal counsel’s calculation, while Employee E’s mitigation of \$684K was the retirement annuity received from the Government of Guam Retirement Fund (GGRF). Per the Chief Deputy Attorney General’s opinion, *in an adverse action appeal, where an employee is entitled to an award for back pay, “that employee is under duty to mitigate damages.”* See Appendix 4 for the OAG’s Response to OPA’s request for a calculation of back wages for the reinstated PAG employee who retired during their termination

period.

In our review of documentation provided and analysis of processes executed to satisfy legal remedies, we have found and identified the following deficiencies.

Specifically, we found:

1. Inconsistencies and deficiencies in Board Resolution, Settlement Agreements, and Port execution of legal remedies.
2. Terms of Settlement Agreements were implemented prior to the Civil Service Commission's (CSC) Judgment of Dismissal.
3. Deviations from Certain Provisions of the Port's Personnel Rules and Regulations (PRR):
 - Average three prior years' "Outstanding" ratings were partly based on performance evaluation reports not approved by any GM;
 - Seven-year increments with highest sub-steps granted without performance evaluations reports approved by any GM;
 - Potential overpayment or savings in using the "Satisfactory" ("3" sub-steps) rating as opposed to "Outstanding" ("5" sub-steps) rating; and
 - Annual increments without Notification of Personnel Action (NPAs).
4. Back wages earned during the retirement period paid to a retired employee;
5. Deficiencies in Port back wages calculations with potential overpayments:
 - Unapproved increments prior to employees' terminations included in the paid back wages.
6. Inconsistencies in the performance evaluation documents not covered by fire loss certification.
7. Other Matters
 - Potential violation on retroactive pay raises on the increments prior to employee terminations;
 - Pay raise granted prior to end of freeze period potentially violated the freeze increment mandate; and
 - Potential agency-wide overpayment of increments during freeze period.

Inconsistencies and Deficiencies in Board Resolution, Settlement Agreements, and Port Execution of Legal Remedies

In June 2020, the Port passed and adopted B.R. 2020-04 instructing the Port DGM to finalize the SAs with the four employees and reinstate them into their prior positions. Employees X, N, and Z were reinstated in June 2020, while Employee E was reinstated in July 2020. See Appendix 6 for B.R. 2020-04. It also resolved and specified the following:

1. Gross back wages net of mitigation;
2. Payment schedule plan;
3. Reinstatement of annual leave and sick leave credits;
4. Reasonable legal fees; and
5. Remittance of retirement benefits owed to the employees.

Our review of the provisions per B.R.s, SAs, and the Port’s execution of legal remedies disclosed inconsistencies or deficiencies as follows:

- 1) Back wages per the B.R., SAs, the Port’s calculations, and the actual disbursements per the payroll register and the cashier’s checks differed in amounts.

Table 2: Discrepancies in Back Wages Amounts

Employee	Port Calculation (A)	Board Resolution (B)	Settlement Agreement (C)	Actual Payment (D)	Referenced Documents* (E)	Variance (F)
X	\$416,870	\$409,357	\$409,357	\$409,357	A - (B or C, or D)	\$7,513
N	\$448,691	\$437,269	\$437,269	\$437,787	A - (B or C)	\$11,422
					A - D	\$10,904
					(B or C) - D	\$518
E	\$296,082	\$296,915	\$296,082	\$296,082	(A or C or D) - B	\$833

*Column E contains the formulas done to obtain the variance on Column F of Table 2.

- 2) Per Employee N’s SA, the employee has to be reinstated to the position of Personnel Specialist IV with the Human Resources Division earning a salary of \$41.89 per hour. However, the reinstatement NPA No. 132-20 processed on July 6, 2020 quoted an hourly rate of \$43.16, or over by \$1.27/hour. This was based on the adjusted rate effective on Oct. 13, 2019. We recommend that Port management rectify the discrepancies in the NPA hourly rates versus the actual rates used in the back wages calculation, whichever management deems accurate.
- 3) The mitigated amounts for Employees X (\$160K) and N (\$143K), which were ratified by the Board Resolution, lack supporting documentation.

Terms of Settlement Agreements Were Implemented Prior to the CSC’s Judgment of Dismissal

In September 2021, the Office of Public Accountability (OPA) requested for an opinion from the Office of the Attorney General (OAG) relative to the reinstatement of terminated employees prior to the CSC Judgment of Dismissal, which was signed by a majority of the Commissioners. In the Chief Deputy AG’s response to our request in May 2022, *“any action to implement and advance the terms of settlement agreement, including the reinstatement of the employees taken before the CSC judgment was issued would have been premature”*. In its conclusion, it emphasized that *“a judgment must be entered and signed by a majority of Commissioners before any settlement agreement incorporated into the judgment, are effective and actionable.”* See Appendix 4 for the Chief Deputy AG’s opinion.

We noted that the employees’ reinstatements and the implementation of the terms and conditions of the SAs were made prior to the signing of the CSC’s Judgment of Dismissal. The SAs generally stipulated the specific reinstatement dates, the amount of back wages, and the legal remedies to be paid. The SAs were, however, ratified by the Board in January 2022 per B.R. No. 2022-01. See Table 3.

Table 3: Comparative Dates of Reinstatement, SA, and CSC Judgments

Employee	Date Reinstated	Date of Settlement Agreement	Date of CSC Judgment of Dismissal
X	6/29/2020	6/26/2020	8/13/2020
N	6/29/2020	7/01/2020	3/16/2021
Z	6/29/2020	6/29/2020	8/13/2020
E	7/01/2020	7/23/2020	2/09/2021

The Port responded to the Chief Deputy AG’s opinion relative to the matter. See Appendix 5 for the Port’s response.

Port Annual Salary Increment System

Under the Port’s PRR and salary increment point system, an *approved performance evaluation report* serves as the basis for whether an employee receives a salary increment and for how high the increment would be. On a performance evaluation alone, the highest a Port employee’s salary can increase is up to five sub-steps (or 5%) every year. According to the 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 the former Port GM in October 2010, employees are eligible for the increment sub-steps that correspond with the total points *their overall performance earned*. 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 (increment) increase. See Table 4 below for the Port’s Salary Increment Point System.

Table 4: 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

Board Policy (B.P.) Memorandum No. 2022-01, which took effect in **January 2022**, introduced an amendment to the Port’s PRR relative to the salary increment process for reinstated employees. In Section 4, Item B, it states that, “*all salary increments will require approval by the GM,*” while Item D states that, “*all salary increments and performance appraisals for reinstated employees shall be approved and signed by the incumbent GM who approves the corresponding personnel action.*” It further states that salary increments for back wages of wrongfully reinstated employees shall be based on the averaged ratings of the employees’ last three years of employment at the Port. If a performance evaluation or increment certification is *unsigned (...) and a letter from the GM rejecting such was not submitted (...), the incumbent shall accept such submission of performance evaluation for purposes of reconstructing the employees back wages*. See Appendix 7 for PAG Board Policy Memorandum 2022-01.

Deviations from Certain Provisions of Port’s Personnel Rules and Regulations (PRR)

We commend the Port management and the Port Board of Directors for B.R. No. 2022-01 in regards to the terms aligning with OPA recommendations per OPA Reports No. 21-03 and 21-09, and ratifying the specific legal remedies. As stated therein, the Resolution was also aimed in providing a structure to establish uniformity and consistency on how management will prospectively address such personnel matters.

The following were resolved:

- 1) Ratifies Port management’s methodology to reconstruct the salaries of the seven reinstated employees;
- 2) Ratifies and accepts management’s submission of formal agreements for the seven reinstated employees;
- 3) Ratifies and accepts management’s submission of liability release provisions signed by the seven reinstated employees; and
- 4) Accepts and ratifies the GM submission (to be filed as B.P. 2022-01), which establishes and standardizes a salary increment process for back wages of reinstated employees to include a performance evaluation report to be signed by the incumbent GM, who approves the personnel action forms.

Average Three Prior Years’ “Outstanding” Ratings Were Partly Based on Performance Evaluation Reports Not Approved by any GM

The methodology of calculating back wages for the seven reinstated employees was ratified per B.R. No. 2022-01. The calculation methodology referred to in OPA Report No. 21-09 used the **average ratings of the employees’ last three years of employment at the Port**. This applied to performance evaluations for increments due in 2010, 2011, and 2012.

Consistently, we reviewed Port’s calculation of the four reinstated employees’ back wages during the seven-year (2013-2019) termination period. We found that the Port consistently used **“5” sub-steps**, which correspond to an “Outstanding” rating. While adhering to the Board-ratified average rating methodology, when we verified the employees’ performance evaluation reports for 2010, 2011, and 2012, our calculations found that all four employees obtained averages of a “Satisfactory” rating or “3” sub-steps only. This was due to the **lack** of an Employee Performance Evaluation Report (EPER) and a Notice of Results of Performance Evaluation Report (NRPER) for increments effective October 2012, which need to be signed by the former GM to signify approval of the recommended increments. Comparatively, another autonomous agency considered a **“5” as a rare rating, which means that the employee significantly exceeded expectations**.

The Port management consistently justified that employees’ increments should not be denied since the former Port GM left the performance evaluation unsigned and did not deny the salary increment in writing. Leaving the performance evaluation unsigned should not be akin to rejecting it. To quote, PRR 7.010, the GM shall make a final performance appraisal accepting or rejecting said recommendation and make the corresponding salary adjustment. If the approving officer intends to approve the employee’s eligibility for an increment, he/she should have affixed his/her signature on the NRPER. The employee might not be eligible for an increment of “5” sub-

steps using the “average three prior year rating methodology.” Although we agree that the reinstated employees are entitled to due process, the Port is also bound to adhere to its own PRR in processing annual increments. Therefore, we recommend that Port management prepare or approve the unapproved EPER and NRPER effective October 2012 to satisfactorily justify the average three prior year “Outstanding” rating.

Despite using the maximum of a “5” sub-step rating for increments for 2010 and 2011 in our calculation due to certification of fire loss, our recalculated eligible “3” sub-steps is **still way below** compared to the “5” incremental sub-steps granted by the Port. See Table 5 for a summary of incremental sub-step calculations.

Table 5: Summary of Incremental Sub-Steps Calculation

Performance Rating Period Ended	Overall Performance Rating	NRPER Signatory	Incremental Sub-steps Granted	Eligible Sub-steps	Remarks
Employee X					
10/12/2010	Outstanding	None	5	5	EPER provided, no NRPER. With certification of fire loss.
10/12/2011	Cannot be determined, however rated “Outstanding”	None	5	5	No NPA, EPER or NRPER provided. With certification of fire loss.
10/12/2012	Cannot be determined, however rated “Outstanding”	None	5	0	No EPER nor NRPER.
Average			5	3.3	
Employee N					
10/12/2010	Cannot be determined, however rated “Outstanding”	None	5	5	No EPER & NRPER. With certification of fire loss.
10/12/2011	Cannot be determined, however rated “Outstanding”	None	5	5	No EPER & NRPER provided. With

					certification of fire loss.
10/12/2012	Cannot be determined, however rated "Outstanding"	None	5	0	No EPER & NRPER.
Average			5	3.3	
Employee Z					
10/12/2010	Outstanding	Former GM	5	5	
10/12/2011	Cannot be determined, however rated "Outstanding"	Current GM	5	5	No EPER & NRPER. With certification of fire loss.
10/12/2012	Cannot be determined, however rated "Outstanding"	Current GM	5	0	No NRPER.
Average			5	3.3	
Employee E					
10/12/2010	Outstanding	Former GM	5	5	
10/12/2011	Outstanding	Former GM	5	5	
10/12/2012	Cannot be determined, however rated "Outstanding"	None	0	0	No NPA, EPER or NRPER
Average			5*	3.3	

*Not inclusive of 10/12/2012 NPA for Employee E as there was none prepared.

The Port prepared all applicable NPA forms in one day, on July 6, 2020, upon the employees' reinstatements, retroactive on the prior years when the increments were due. The current GM signed these NPAs for all employees except for Employee E, who had no NPAs processed.

Seven-Year Increments with the Highest Sub-Steps Granted without Performance Evaluation Reports Approved by any GM

The seven-year annual increments of the four employees were not supported with the PRR-required performance evaluation documents such as the EPER and NRPER, both of which require approval by their GM. The total annual increments for each employee granted from 2012 to 2019 (excluding Port-wide adjustments) ranged from \$25K to \$40K. Upon reinstatement, one employee's annual salary reached as high as \$154K. See Tables 6A to 6D for the annual salary increments.

Table 6A: Annual Salary Increments from 2012-2019

NPA #	Effective Date	Pay Grade/Step	Adjusted Annual Salary per NPA	Total Annual Increments
Employee X				
354-20 SI	10/13/12	L-8D	\$ 63,286	\$ 3,071
355-20 SI	10/13/13	L-10A	\$ 66,514	\$ 3,228
356-20 SI	10/13/14	L-11B	\$ 69,907	\$ 3,393
357-20 SI	10/13/15	L-12C	\$ 73,473	\$ 3,566
125-20	10/1/2016 **	LL-4D	\$ 75,057	
358-20 SI	10/13/16	LL-6A	\$ 78,885	\$ 3,828
359-20 SI	10/13/17	LL-7B	\$ 82,909	\$ 4,024
126-20	9/16/2018 **	LL-8A	\$ 85,421	
360-20 SI	9/16/19	LL-9B	\$ 89,779	\$ 4,358
Total Excluding Port Wide Adjustment				\$ 25,468

Table 6B: Annual Salary Increments from 2012-2019

NPA #	Effective Date	Pay Grade/Step	Adjusted Annual Salary per NPA	Total Annual Increments
Employee N				
361-20 SI	10/13/12	L-8D	\$ 63,286	\$ 3,071
362-20 SI	10/13/13	L-10A	\$ 66,514	\$ 3,228
363-20 SI	10/13/14	L-11B	\$ 69,907	\$ 3,393
364-20 SI	10/13/15	L-12C	\$ 73,473	\$ 3,566
127-20	10/1/2016 **	LL-4D	\$ 75,057	-
365-20 SI	10/13/16	LL-6A	\$ 78,885	\$ 3,828
366-20 SI	10/13/17	LL-7B	\$ 82,909	\$ 4,024
129-20	9/16/2018 **	LL-8A	\$ 85,421	-
367-20 SI	9/16/19	LL-9B	\$ 89,779	\$ 4,358
Total Excluding Port Wide Adjustment				\$ 25,468

Table 6C: Annual Salary Increments from 2012-2019

NPA #	Effective Date	Pay Grade/Step	Adjusted Annual Salary per NPA	Total Annual Increments
Employee Z				
369-20 SI	10/13/12	N-7C	\$ 78,255	\$ 3,798
370-20 SI	10/13/13	N-8D	\$ 82,247	\$ 3,992
371-20 SI	10/13/14	N-10A	\$ 86,442	\$ 4,195
372-20 SI	10/13/15	N-11B	\$ 90,851	\$ 4,409
135-20	10/1/2016 **	NN-5C	\$ 92,720	-
373-20 SI	10/13/16	NN-6D	\$ 97,449	\$ 4,729
374-20 SI	10/13/17	NN-8A	\$ 102,420	\$ 4,971
136-20	9/16/2018 **	NN-8D	\$ 105,524	-
375-20 SI	9/16/19	NN-10A	\$ 110,906	\$ 5,382
Total Excluding Port Wide Adjustment				\$ 31,476

Table 6D: Annual Salary Increments from 2012-2019

NPA #	Effective Date	Pay Grade/Step	Adjusted Annual Salary per NPA	Total Annual Increments
Employee E – Based on Settlement Agreement				
N/A	10/13/12	P-9A	\$ 107,957	\$ 5,240
N/A	10/13/13	P-10B	\$ 113,464	\$ 5,507
N/A	10/13/14	P-11C	\$ 119,251	\$ 5,787
N/A	10/13/15	P-12D	\$ 121,648	\$ 2,397
N/A	10/1/2016 **	PP-7A	\$ 129,014	-
N/A	10/13/16	PP-8B	\$ 135,595	\$ 6,581
N/A	10/13/17	PP-9C	\$ 142,512	\$ 6,917
N/A	9/16/2018 **	PP-10B	\$ 146,830	-
N/A	9/16/19	PP-11C	\$ 154,320	\$ 7,490
Total Excluding Port Wide Adjustment				\$ 39,919

** Port-wide pay adjustments

We reiterate that we respect the Port management’s decision to grant the employees with the highest rating of “**Outstanding**” because they believed that these employees could render a consistently outstanding performance had they not been terminated. However, annual increments need to be supported by duly-approved performance evaluations reports to comply with the Port’s PRR.

In response to audit recommendations per OPA Report No. 21-09, B.R. No. 2022-01 ratified B.P. 2022-01, which established and standardized a salary increment process *to include a performance evaluation report to be signed by the incumbent GM who approves the number of sub-steps in the personnel action forms*. Therefore, we recommend that performance evaluation documents be prepared and approved to support the GM’s authorization and approval of all increments paid prior to and during the employees’ termination periods.

Potential Overpayment or Savings in Using the "Satisfactory" ("3" sub-steps) Rating as opposed to "Outstanding" ("5" sub-steps) Rating

We acknowledge Port management’s efforts to provide the reinstated employees with all the expected benefits “to make the employee whole” as if they were not terminated. However, the employees were only eligible for a “Satisfactory” rating (“3” sub-steps) due to the absence of approved performance evaluation documents, as required per the Port’s prevailing PRR at the time of the action. Our recalculated three incremental sub-steps as opposed to five incremental sub-steps granted by the Port to these employees resulted in unfavorable variances totaling \$204K, which could translate into potential overpayments or savings for the Port. Our calculation excluded the pay adjustments in 2016 and 2018, as those were not performance-based increments. See Tables 7A, 7B, and 7C for details.

Table 7A: What Port Granted vs. Eligible Marginal Satisfactory Rate - Employees X & N

Effective Date of Salary Increment	Port's Assumed "Outstanding"			Eligible "Satisfactory"			Variance
	★★★★★			★★★☆☆			
	Pay Grade /Step	Annual Salary	Hourly Rate	Pay Grade /Step	Annual Salary	Hourly Rate	
10/13/2012	L-8D	\$63,286	\$30.43	L-8B	\$62,039	\$29.83	\$1,247
10/13/2013	L-10A	\$66,514	\$31.98	L-9A	\$63,919	\$30.73	\$2,595
10/13/2014	L-11B	\$69,907	\$33.61	L-9D	\$65,856	\$31.66	\$4,051
10/13/2015	L-12C	\$73,473	\$35.32	L-10C	\$67,851	\$32.62	\$5,622
10/13/2016	LL-6A	\$78,885	\$37.93	LL-3C	\$71,414	\$34.33	\$7,471
10/13/2017	LL-7B	\$82,909	\$39.86	LL-4B	\$73,578	\$35.37	\$9,331
9/16/2019	LL-9B	\$89,779	\$43.16	LL-5D	\$78,104	\$37.55	\$11,675
		\$524,753			\$482,761		\$41,992
Total for X & N		\$1,049,506			\$965,522		\$83,984

Table 7B: What Port Granted vs. Eligible Marginal Satisfactory - Employee Z

Effective Date of Salary Increment	Port's Assumed "Outstanding"			Eligible "Satisfactory"			Variance
	★★★★☆			★★★☆☆			
	Pay Grade /Step	Annual Salary	Hourly Rate	Pay Grade /Step	Annual Salary	Hourly Rate	
10/13/2012	N-7C	\$78,255	\$37.62	N-7A	\$76,713	\$36.88	\$1,542
10/13/2013	N-8D	\$82,247	\$39.54	N-7D	\$79,037	\$38.00	\$3,210
10/13/2014	N-10A	\$86,442	\$41.56	N-8C	\$81,432	\$39.15	\$5,010
10/13/2015	N-11B	\$90,851	\$43.68	N-9B	\$83,900	\$40.34	\$6,951
10/13/2016	NN-6D	\$97,449	\$46.85	NN-4B	\$88,220	\$42.41	\$9,229
10/13/2017	NN-8A	\$102,420	\$49.24	NN-5A	\$90,893	\$43.70	\$11,527
9/16/2019	NN-10A	\$110,906	\$53.32	NN-6C	\$96,485	\$46.39	\$14,421
Total		\$648,570			\$596,680		\$51,890

Table 7C: What Port Granted vs. Eligible Marginal Satisfactory - Employee E

Effective Date of Salary Increment	Port's Assumed "Outstanding"			Eligible "Satisfactory"			Variance
	★★★★★			★★★☆☆			
	Pay Grade /Step	Annual Salary	Hourly Rate	Pay Grade /Step	Annual Salary	Hourly Rate	
10/13/2012	P-9A	\$107,957	\$51.90	P-8C	\$105,829	\$50.88	\$2,128
10/13/2013	P-10B	\$113,464	\$54.55	P-9B	\$109,036	\$52.42	\$4,428
10/13/2014	P-11C	\$119,251	\$57.33	P-10A	\$112,340	\$54.01	\$6,911
10/13/2015	P-12D	\$121,648	\$58.48	P-10D	\$115,744	\$55.65	\$5,904
10/13/2016	PP-8B	\$135,595	\$65.19	PP-5D	\$122,752	\$59.02	\$12,843
10/13/2017	PP-9C	\$142,512	\$68.52	PP-6C	\$126,472	\$60.80	\$16,040
9/16/2019	PP-11C	\$154,320	\$74.19	P-8A	\$134,252	\$64.54	\$20,068
Total		\$894,747			\$826,425		\$68,322
Overall Total		\$2,592,823			\$2,388,627		\$204,196

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

Although we acknowledge the Port's justification for consistently granting the five sub-step annual increments, we refer the discrepancies for Port management's review on the financial impact of such deviation from their PRR and moving forward should a similar situation occur.

Annual Increments Paid without Notifications of Personnel Actions (NPAs)

The Port's treatment for Employee E's annual increments during the termination period was handled differently in comparison to the other three employees. The increments for the seven years, amounting to \$40K, were granted without the required NPAs to be signed by the incumbent GM. In contrast, the other three employees were reinstated with NPAs for their salary increments.

In the Port management's response to the OPA inquiry in November 2021, no NPAs were provided to Employee E as both parties agreed to it, although not specifically stipulated in the SA. The agreement simply stated that the "Employee shall be reinstated to [his/her] position at the pay range level to which the Employee would be entitled at the time of reinstatement had the adverse action not been taken against the employee." The agreement further stipulated that Employee E's base pay range level as of July 1, 2020, would be no less than Pay Range PP-11C (hourly rate of \$74.19). Although Employee E was reinstated on July 1, 2020, at the rate stipulated in the SA, NPAs must be prepared to document the annual increments granted. Therefore, we recommend that Port management prepare the required NPAs to document the GM's authorization and approval of increments paid if the employee is considered never retired.

Back Wages Earned During the Retirement Period Paid to a Retired Employee

In September 2021, the OPA requested the OAG's opinion relative to the back wages for a terminated employee who retired from government service during the termination period and was later reinstated pursuant to the settlement agreement. In the Chief Deputy AG's response in May 2022, it was stated that *"no authority is provided that allows an employee to collect both a*

retirement annuity and employment compensation for the same period. It further stated that *the Port’s calculation of back wages may not include wages covering the period of time between the retirement and reinstatement for which [he/she] received an annuity.*” See Appendix 4 for the OAG’s response. The Port GM provided a copy of his response to the AG relative to the AG’s Opinion on June 21, 2022. See Appendix 5 for the Port GM’s response to the AG.

Further review of the matter disclosed that Employee E retired from the Port effective January 2, 2013, which was validated by GGRF and the Port’s records. Employee E received a retirement annuity effective such date until it was suspended on July 1, 2020, when the employee was reinstated to his/her position with the Port. From **January 2, 2013, to June 30, 2020**, the employee received retirement annuities totaling \$674.8K and annual Cost of Living Allowance (COLA) payments totaling \$13.8K for a collective amount of \$688.6K.

Based on the SA signed on July 23, 2020, Employee E was reinstated to his/her original position as Corporate Services Manager with a Pay Range of PP-11C at an hourly rate of \$74.19 (annual salary of \$154,320). The rate was calculated based on a consistent five sub-step annual increment from December 13, 2012 through September 16, 2019, inclusive of Port-wide pay adjustments. The annual increments were factored in the Port’s calculation of back wages even though the employee retired from the Port and was receiving a monthly annuity.

The Port-calculated back wages from October 13, 2012, through June 30, 2020, for a total of \$980K and was reduced (set-off) by the total retirement annuity of \$684K. This left a remaining balance of \$296K, which was fully paid in March 2021. Based on GGRF’s confirmation, the mitigated amount was not reimbursed by the Port to GGRF. Therefore, the retirement from January 2013 to June 2020 was fully effected. The matter could be treated by the Port as follows:

A. Employee E retired from January 2, 2013 through June 30, 2020

The effect would be:

- a. Employee E should not be entitled to the following:
 - Seven (7) year annual increments of 5% earned effective October 13, 2013 to October 13, 2019.
- b. Employee should only be entitled to:
 - In line with the AG’s opinion, the employee should only be entitled to \$5,515, earned during the period before his/her retirement effective January 2, 2013.

Inclusive - From	Period To	Rate/Increment per Hour	No. of Hours	Back Wages	Remarks
10/13/2012	12/18/2012	\$ 2.52	376	\$ 947	Port calculated
12/19/2012	01/02/2013	\$51.90	88	\$ 4,567	
Total				\$ 5,515	

- Since Employee E was given additional back wages of \$296K, he/she was **overpaid by \$290,567**:

Additional back wages paid	\$ 296,082
Back wages amount that should have been paid	<u>(\$5,515)</u>
Overpayment	\$ 290,567

- Employee E is entitled only to the Pay Range of P-9A as of October 13, 2012 (prior to termination) at annual salary of \$107,957 or \$51.90 per hour. His/her next salary increment would be July 1, 2021, one year after his/her reinstatement.
- Consequently, his/her reinstatement rate per hour of \$74.19 effective July 1, 2020 was over by \$22.29 per hour. Monthly salaries paid to Employee E from his/her reinstatement in July 1, 2020, until June 30, 2021, were potentially overstated by approximately \$46K (2,080 hours multiplied by \$22.29).

B. Employee E did not retire from January 2, 2013 through June 30, 2020

a. Employee E is entitled to:

- Back wages with minimal overpayment:

Port calculated back wages	\$ 980,118
Less: Mitigation-Total Annuity paid by GGRF	<u>\$ 688,603</u>
Net additional back wages	\$ 291,515
Less: Additional back wages paid	<u>\$ 296,082</u>
Overpayment	\$ 4,567
- The Port’s calculation of \$74.19 per hour effective July 1, 2020.

b. Impact per GGRF Response

- In a letter dated August 3, 2022, to the Public Auditor, the GGRF Director emphasized the following:

If the employee is paid retroactively to 12/18/2012, then GGRF is entitled to:

1. Reimbursement of retirement annuities and COLA totaling \$688.6K;
2. Employer and employee retirement contributions;
3. Applicable interest (at variable rates) and penalties of one (1%) per year.
4. Treated as never retired.

- If the Port does not reimburse GGRF, there is no impact to GGRF, but a loss of approximately \$25.4K annually for as long as the employee continues to receive retirement annuities.

See Appendix 8 for the GGRF Director’s letter responding to the Public Auditor’s request for clarification regarding Employee E.

We refer the matter for Port management’s review and decision. The OPA is not in the position to suggest how Port management decides on this issue. We merely recommend an appropriate

decision/action based on the Port management's treatment of employee's retirement, to determine his/her entitlement.

Deficiencies in Port Back Wages Calculation with Potential Overpayments

Unapproved Increments Prior to Employees' Terminations Included in the Paid Back Wages

B.R. No. 2020-04 ratified the gross back wages (net of mitigation) of the four employees based on the SAs. As per the Port's calculations, these included increments applicable to **periods prior to the employees' termination** on December 18, 2012, without approved performance evaluation reports. Based on the present Port management's explanation, the employees are entitled to these increments as these were not acted upon by the prior management. Our review of these back wages disclosed the following deficiencies. See Table 8 for a breakdown of back wages prior to termination.

Table 8: Breakdown of Back Wages Prior to Termination

Employee	Inclusive Period	No. of Hours	Rate / Hour	Overpayment	Remarks
X	10/13/12 to 12/18/12	376	From \$27.85 to \$30.43	\$966.32*	With restriction on inclusive period of back wages.
Z	10/13/11 to 12/18/12	2,472	From \$34.06 to \$37.62	\$4,989.36*	No restriction on inclusive period of back wages.
E	10/13/12 to 12/18/12	376	From \$49.38 to \$51.90	\$947.23	No restriction on inclusive period of back wages.
Total				\$6,902.91	

*Based on Port Calculations

Per the CSC's Decision and Judgment, Employees X and N shall be compensated for all the time following their December 2012 terminations, respectively until the dates they are reinstated. Employees Z and E did not carry this stipulation in any of their documents from the CSC. Since these prior year increments were included in the back wages ratified by the Board, and supported with NPAs signed by the current GM, the required performance evaluation reports must be complied. Therefore, we recommend that Port management prepare and/or approve the unapproved performance evaluation documents effective October 2011 and October 2012.

Inconsistencies in Performance Evaluation Documents not covered by Fire Loss Certification

In a certification dated June 2021, signed by a Port Personnel Specialist, Port employee performance evaluations and salary increments for FY 2010 and FY 2011 had been destroyed from a fire that occurred in June 2015 at the Human Resources office. Based on our review of the seven

employees' performance evaluation records, we noted that only selected employees' files were destroyed, while others were spared from the fire. In the auditors' calculation of three prior years (2010, 2011, 2012) average rating, we granted a maximum 5% rating for the 2010 and 2011 increments despite the absence of records to abide by the Port's assertion in the certification. See Table 9 for the documents that were provided by the Port.

Table 9: Summary of Employees Performance Evaluation Records Not on File

Evaluation Documents	Employee Q	Employee S	Employee T	Employee X	Employee N	Employee Z	Employee E
2010							
EPER	On file	On file	On file	On file	None	None	On file
NRPER	On file	None	None	None	None	None	On file
2011							
EPER	On file	None	On file	None	None	None	On file
NRPER	On file	None	On file	None	None	None	On file

Other Matters

Although not directly related to our audit objectives, we became aware of other concerns that warrant the Port's attention. These findings were based on the OAG's November 2021 opinion and are reiterations of the findings included in OPA Report No. 21-09. These matters also affected the four employees covered in this report.

Potential Violation on Retroactive Pay Raises on Increments prior to Employees' Terminations

The Port prepared NPAs for the increments due to the four employees in October 2012 *prior to their terminations in December 2012*. For Employee Z, this included his/her annual increment due in October 2011. Whereas Employee E had no NPAs prepared and received back wages for his/her salary increment due in October 2012. These NPAs were prepared and signed by the current GM in July 2020. These were affected *retroactively in October 2011 or October 2012, which are eight (8) or seven (7) years after the increments were due*. According to Port management, these NPAs were processed as part of back wages because the former GM did not process them prior to the employees' terminations. See Table 10 for the NPAs with retroactive effect.

Table 10: NPAs with Retroactive Effect

NPA #	Effective Date	Date of NPA	Time Between Periods	Remarks
Employee X				
N/A	10/13/11			Documents lost by fire.
354-20 SI	10/13/12	7/6/2020	7 years 8 months	
Employee N				
N/A	10/13/11			Documents lost by fire.
361-20 SI	10/13/12	7/6/2020	7 years 8 months	

Employee Z				
368-20 SI	10/13/11	7/6/2020	8 years 8 months 23 days	
369-20 SI	10/13/12	7/6/2020	7 years 8 months 23 days	
Employee E				
N/A	10/13/12		7 years 8 months	No NPA prepared.

In the OAG’s November 2021 opinion, he cited the following references relative to retroactive pay raises:

- **4 GCA §2103.14 - Retroactive Pay**
No **unclassified employee** or officer of the Government of Guam may receive a retroactive pay increase **unless specifically authorized by statute**; and
- **4 GCA §6218.1 - Prohibition on Retroactive Pay Raises**
Whenever a *classified or unclassified employee* of the GovGuam including all departments, agencies, and instrumentalities *whether or not autonomous*, 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.*

In his conclusion, the AG stated that unless authorized by statute and regardless of justification, ***Government of Guam employees are prohibited from receiving salary increases that are paid retroactively from the date of authorization.*** Salary increments based upon performances can only be paid prospectively, upon authorization date and not retroactive from any date prior. Any retroactive payment is prohibited by Guam law. See Appendix 9 for the AG’s opinion on pay raises.

Pay Raise Granted Prior to End of Freeze Period Potentially Violated the Freeze Increment Mandate

Public Law (P.L.) 34-116, Chapter 13, Section 3 mandated a freeze on all salary increments, promotions, reclassifications, merit bonuses, and any other upward pay adjustments to take effect from October 1, 2018, through September 30, 2019. The law further specified that the payment of increments and merit bonuses ***must not be retroactively applied.***

Four days after the public law passed a pay raise freeze, on August 24, 2018, Port passed B.R. No. 2018-05 on August 28, 2018, to adopt an updated pay plan that would result in an agency-wide pay adjustment (pay raise). The updated pay schedule was implemented in FY 2018 (effective October 1, 2017). The employees received salary increments effective October 13, 2017, up to September 15, 2018. With the majority of Port employees at risk of not getting their annual salary increment, Port implemented an agency-wide pay adjustment to take effect **on September 16, 2018** – two weeks before the statutory freeze started on October 1, 2018.

One year after the agency-wide pay adjustment, Port gave the four employees salary increments to take effect on **September 16, 2019, during the freeze period** or two weeks before the statutory

freeze ended on **September 30, 2019**. To authorize this salary increment is an apparent violation of P.L. 34-116:13:3. This resulted in an overpayment of approximately \$912 to the four employees.

Per the OAG’s November 2021 opinion, he stated that because of the salary increment freeze imposed by **P.L. 34-116 throughout the entirety of FY 2019**, no pay increase **must be given for any reason**. See Appendix 9 for the OAG Opinion. See Figure 1 for a visual of what Port did following the pay raise freeze.

Figure 1: What Port Did Following the Pay Raise Freeze Mandate



Although these salary increments due during the employees’ termination period were granted in compliance with the SAs, the OAG’s opinion should have been considered in the back wages calculations.

Potential Agency-Wide Overpayment of Increments During Freeze Period

A total overpayment of \$912 from four employees may appear minimal. However, the cumulative financial impact of Port’s action of granting increments within the freeze period could be significant depending on the number of employees involved. *Calculating the potential amount of these overpayments to other employees is not covered in our audit scope.*

Overall, we recommend that the Port management request an Attorney General opinion on how to address the potential violation of retroactive increments and the pay raise freeze mandate for the affected employees.

Conclusion and Recommendations

This performance audit concludes our three-part audit series reviewing the Port's processes in complying with court judgments, orders, and payments of legal remedies for the seven reinstated employees. The Port is highly commended for generally adhering to the court orders and Settlement Agreements. The Port paid a total of \$4.5M in legal remedies for the seven reinstated employees. This comprised of back wages net of mitigation (\$2.9M), attorney's fees (\$708K), Port's share of employee retirement contributions (\$700K), interest (\$95K), and Medicare tax (\$65K). In B.R. No. 2020-04, it disclosed that the Port was able to mitigate \$1.5M, although mitigation for two employees totaling \$303K could not be validated due to lack of documentation.

In Series A, B, and C, there had been a consistent deviation from the Port's PRRs. This is relative to the calculation, processing and documentation of reinstated employees' annual increments, during the period prior to their terminations, and during the seven-year termination period. The Port consistently gave five incremental sub-steps to the seven employees based on the average three prior year ratings (2009, 2010, 2011) even though one or two performance evaluation documents effective October 2011, and/or October 2012, were not signed by the prior Port GMs. This resulted in an eligible rating of two or three incremental sub-steps or translated to a total of \$405K potential overpayment or lost savings. The potential overpayment will be realized as an actual overpayment if the unapproved appraisal evaluation reports will not be signed by the incumbent GM, who approved the NPAs authorizing the payments of the seven-year annual increments. In Series C, we found potential overpayments of \$212K with total financial impact of \$503K.

In this audit, we found deficiencies in required documentation for the annual increment process. One is the absence of performance evaluation reports to support the seven year increments during the termination period. This is specifically required in the existing PRR and the amendment to PRR in January 2022. Other deficiencies include a lack of NPAs, which is the actionable document to process an annual increment, conflicting hourly rates paid versus the NPAs, and a few undocumented errors in calculation.

In Part C, we also found a significant payment to a retired employee (net of GGRF annuity payments), which was calculated from the date of retirement until date of reinstatement. The calculated seven-year annual increments were without NPAs. The overpayment amount of \$5K or \$291K will depend upon how the Port will treat the employee's retirement status. We provided the Port management with an analysis on how the retirement could be treated based on the comment from the GGRF Director issued in August 2022 and OAG opinion issued in May 2022.

Other matters we noted, which affected the reinstated employees, were consistently related to the potential violations of retroactive pay raises and the pay raise freeze mandate based on an OAG opinion issued in November 2021.

We compliment the Port management and the Port Board of Directors for B.R. 2022-01 in regards to the settlements in line with OPA recommendations per OPA Report No. 21-03 and No. 21-09, ratifying the legal remedies of the seven employees. We further commend them for ratifying Board Policy No. 2022-01, which incorporated the salary increment process for reinstated employees. The amended policy still retained the existing requirement of performance evaluation reports duly-approved by the GM and all annual increments shall be supported with the NPAs. It added that in the absence of the GM's approval signature and the GM's letter of rejection, the incumbent GM shall accept the performance evaluation for purposes of reconstructing the back wages.

Since the incumbent Port GM approved the employees' Notifications of Personnel Action to authorize the payments of annual increments due prior to and during the termination periods, the Port management needs to comply with the documentary requirements specified in its PRR. This new provision in the PRR took effect in January 2022, thus back wages calculations of the seven employees were governed by the existing PRR approved in October 2010.

This audit report emphasized that, in the implementation processes and execution of legal remedies for reinstated employees, the Port also needs to comply with the policies embodied in its PRR, specifically on performance-based annual increments for all employees. Port management needs to ensure proper implementation of its policies and control procedures for good governance.

We recommend the following to the Port Management/Port General Manager:

1. Since the incumbent Port GM approved the employees Notifications of Personnel Action to authorize and approve the payment of annual increments, then the GM should comply with the documentary requirements specified in its Personnel Rules & Regulations in processing annual increments as follows:
 - a. Rectify the discrepancies in the NPA hourly rates versus the actual hourly rates used in the back wages calculation, whichever management deems accurate.
 - b. Prepare and /or approve the unapproved Employee Performance Evaluation Report (EPER) and Notification of Results of Performance Evaluation Report (NRPER) for all increments effective October 2011 and/or October 2012, to justify the average three prior years "Outstanding" rating.
 - c. Prepare and approve the required performance evaluation documents, such as EPER and NRPER to support the GM's authorization and approval of all increments paid prior to and during the employees' termination periods.
 - d. Prepare the required Notification of Personnel Action for Employee E to document the GM's authorization and approval of all increments paid if the employee is considered never retired.
2. Render an appropriate decision/action based on Port management's treatment of the employee's retirement, to determine his/her entitlement.
3. Request an Attorney General opinion on how to address the potential violation of retroactive increments and the pay raise freeze mandate for the affected employees.

Classification of Monetary Amounts

	Finding Description	Questioned Costs	Potential Savings	Unrealized Revenues	Other Financial Impacts	Total Financial Impacts
1.	Inconsistencies and deficiencies in Board Resolution, Settlement Agreements and Port execution of legal remedies	\$ -	\$ -	\$ -	\$ -	\$ -
2.	Terms of Settlement Agreements were implemented prior to the Civil Service Commission's (CSC) Judgment of Dismissal	\$ -	\$ -	\$ -	\$ -	\$ -
3.	Deviations from Certain Provisions of the Port's Personnel Rules and Regulations (PRR):					
	a. Average three prior year's "Outstanding" ratings were partly based on performance evaluation reports not approved by any GM	\$ -	\$ -	\$ -	\$ -	\$ -
	b. Seven-year increments with highest sub-steps granted without performance evaluations reports approved by any GM	\$ -	\$ -	\$ -	\$ -	\$ -

Classification of Monetary Amounts

	Finding Description	Questioned Costs	Potential Savings	Unrealized Revenues	Other Financial Impacts	Total Financial Impacts
	c. Potential overpayment or savings in using the "Satisfactory" ("3" sub-steps) rating as opposed to "Outstanding" ("5" sub-steps) rating	\$204,196	\$ -	\$ -	\$ -	\$204,196
	d. Annual increments without Notification of Personnel Action (NPAs)	\$ -	\$ -	\$ -	\$ -	\$ -
4.	Back wages earned during the retirement period paid to a retired employee	\$ -	\$ -	\$ -	\$290,567	\$290,567
5.	Deficiencies in Port back wages calculations with potential overpayments:	\$ -	\$ -	\$ -	\$ -	\$ -
	a. Unapproved increments prior to employees' terminations included in the paid back wages	\$ 6,903	\$ -	\$ -	\$ -	\$ 6,903
6.	Inconsistencies in the performance evaluation documents not covered by fire loss certification	\$ -	\$ -	\$ -	\$ -	\$ -

Classification of Monetary Amounts

	Finding Description	Questioned Costs	Potential Savings	Unrealized Revenues	Other Financial Impacts	Total Financial Impacts
7.	Other Matters:					
	a. Potential violation on retroactive pay raises on the increments prior to employee terminations	\$ -	\$ -	\$ -	\$ -	\$ -
	b. Pay raise granted prior to end of freeze period potentially violated the freeze increment mandate	\$ -	\$ -	\$ -	\$ -	\$ -
	c. Potential agency-wide overpayment of increments during freeze period	\$ 912	\$ -	\$ -	\$ -	\$ 912
	Total	\$212,011	\$0	\$0	\$290,567	\$502,578

Management Response and OPA Reply

In June of 2022, the Office of Public Accountability (OPA) electronically provided the Port General Manager (GM) with a draft report encompassing our preliminary audit findings and recommendations. Although our transmittal letter requested a discussion, we received no response.

In August 2022, our office conducted a virtual meeting with the Port GM to discuss the Port Authority of Guam Back Wages Part C preliminary findings. The Port GM generally disagreed with our audit findings, more specifically relative to the back wages earned during the retirement period and paid to a retired employee. We provided Port management with two alternatives on how to treat the back wages or the retirement annuities paid to the retired employee, based on the opinions rendered by the Office of the Attorney General and the Government of Guam Retirement Fund Director. For all other findings, the audit recommended compliance with applicable provisions of the Port Personnel Rules and Regulations governing back wages to resolve the issues of potential overpayments, performance evaluations, and increment documentation deficiencies.

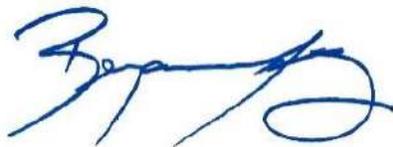
In September 2022, we provided the Port with the final audit report with an official management response due on October 5, 2022, and suggested holding an exit conference. The Port GM expressed his intention not to participate.

On October 10, 2022, our office made the final request for an official management response for input to the final report before its release to the public. Until this date, we received no official response from Port management.

We greatly appreciate the assistance and cooperation extended to us by the Port's staff and management during the entire period of this audit.

The legislation creating the Office of Public Accountability requires agencies to prepare a corrective action plan to implement audit recommendations, to document the progress of implementing the recommendation, and to endeavor to complete implementation of the recommendations no later than the beginning of the next fiscal year. We will contact the Port Authority of Guam to provide the target date and title of the official(s) responsible for implementing the recommendations.

OFFICE OF PUBLIC ACCOUNTABILITY



Benjamin J.F. Cruz
Public Auditor

Appendix 1:**Objective, Scope, & Methodology**

Objective

To determine whether Port's settlements, or legal remedies, with reinstated employees were properly accounted for and paid in accordance with applicable laws, regulations, and administrative and judicial review judgments.

Scope

This audit series focuses on the audit results of four of the seven reinstated employees – “Employee X,” “Employee N,” “Employee Z,” and “Employee E”. Our audit scope covered court orders and judgments, Port documents, and other relevant documents and evidence that supported Port's calculations and payments to Employees X, N, Z, and E's legal remedies. The audit period covered for this audit engagement is from October 2010 through July 2022.

Methodology

To accomplish our objective, we performed the following:

- Identified, analyzed, and determined compliance with applicable CSC and other court orders and judgments, laws, Port rules and regulations, and internal policies.
- Identified and compiled prior audits.
- Sent questions and clarification on the Port's reinstatement processes, back wages calculation method and other relevant issues on performance evaluations, and salary increments to determine the consistency of application for the four employees covered in this audit.
- Identified and analyzed all documents relevant to Port's calculations and payments.
- Reviewed the Port's calculations and payments and verified against supporting documents and other evidence. In our review, we did not include the following:
 - Calculations of annual leave and sick leave credits restored or paid to the employees.
 - Potential overstatement of retired employee's salaries after reinstatement.
- Virtually met with Port management to discuss and clarify responses to audit preliminary questions and updated the audit findings.
- Evaluated, validated, and incorporated Port management's verbal responses relevant to preliminary draft report.

We conducted this performance audit in accordance with generally accepted government auditing standards issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Prior Audit Coverage

OPA Report No. 21-03, Port Authority of Guam Back Wages Series, Part A

Our performance audit of the back wages of the first of nine reinstated Port Authority of Guam (Port) employees – “Employee Q” – found significant deficiencies in the basis of Port’s calculations for back wages, Medicare tax, retirement contribution, and interest charge that resulted in overpayments of at least \$96 thousand (K) in back wages and \$18K in interest for a total of \$114K. While Port’s legal remedies with Employee Q were generally made in accordance with administrative and judicial review judgments and orders, we found instances of potential noncompliance with applicable laws, regulations, and internal policies, as well as lapses in Port’s internal processes.

Specifically, we found:

- Port adhered to certain terms and conditions of Employee Q’s that were not required by the Civil Service Commission (CSC) or the courts’ judgments, such that:
 - The highest number of incremental sub-steps were granted based partly on two (2) prior years’ “Outstanding” performance evaluation ratings that were not approved by the former (or any) General Manager (GM); and
 - A 6% interest charge was paid to Employee Q without any court order requirement, negotiated terms, and proper calculation.
- Successor management approved salary increments that their predecessors did not approve of themselves;
- Legal remedies were executed without seeking the Board of Directors’ (Board) ratification by resolution and without a formal agreement and liability release until after the final payment in May 2020; and
- Different legal opinions resulted in delay and certain unorganized remedial actions.

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 existing employees’ anniversary dates and no caps on Port’s salary increments. As a result of our audit, we recommended the following:

- The GM and the Board standardize a salary increment process for back wages to include a required performance evaluation report (of the sort) accountable to the incumbent GM who approves the number of sub-steps on the personnel action forms.
- The GM seek the Board’s ratification, via board resolution, specifying the composition of total back wages and interest paid to Employee Q.
- 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.

Prior Audit Coverage

- The GM and the Board reconsider their practice of unifying employees' increment anniversary dates moving forward.
- The Board comply with Guam Code and provide parity to ratepayers and taxpayers by incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202.

OPA Report No. 21-03, Port Authority of Guam Back Wages Series, Part B

Our performance audit of the back wages of two reinstated Port employees found that Port's reinstatements of Employee S & Employee T were generally made in accordance with administrative and judicial review judgments and orders. The legal remedies stipulated in the Agreement to Satisfy Judgment and Settlement Agreement were likewise generally complied by the Port. The Port paid a total of \$1.0 million (M) for back wages, Medicare tax, retirement contribution, and attorney's fees, and legal costs for the two employees.

However, in the Port's reinstatement processes and execution of legal remedies, we found some lapses such as: a) deficiencies in documentation b) deviations from certain provisions of Port PRR and internal policies, c) non-adherence with Ports Personnel Rules and Regulation, d) deficiencies in calculations resulting to discrepancies of \$105K and overpayments of \$22K, e) conflicting NPAs, and f) non-deduction of withholding tax on paid back wages. We also found other matters which we need to bring to Port management's attention relative to retroactive pay raises, pay raise during increment freeze period, and appearance of conflict of interest.

Based on Civil Service Commission Decision and Judgment, Employees S and T have to be reinstated and be fully compensated to include salaries and all benefits, under the Guam law, for all the time following their 2012 termination until the date they are reinstated. We acknowledged and commend the Port's adherence to the CSC decision with the intention "to make the employee whole" and processed salaries and benefits as if there was no work interruption. However, in the implementation processes and execution of legal remedies, Port also needs to comply with its Personnel Rules and Regulations specifically on performance-based annual increments. Certain deviations from PRR and other internal policies resulted in discrepancies of approximately \$105K and potential overpayments of \$22K, which could have potential financial impact on the Port.

In the absence of any provision in the PRR relative to the processing of annual increments for reinstated employees, it is prudent for the management to seek Board's advice on the appropriate course of action relative to annual increments or seek the Attorney General's opinion. Moving forward Port management and the Board should decide on how this PRR requirement on annual increments of reinstated employees be satisfactorily complied.

Prior Audit Coverage

As a result of our audit, we recommended the Port GM, management, and/or board:

- 1) Consistently seek Board's ratification via a Resolution specifying the legal remedies such as: composition of the total back wages, interest, and legal fees and costs.
- 2) Ensure the execution of formal & comprehensive settlement agreements disclosing therein the legal remedies such as amount and terms of gross and net back wages, mitigation, other benefits, interest charges, legal costs, and a liability release provision.
- 3) Standardize a salary increment process for reinstated employees to include a performance evaluation report to be signed by the incumbent GM.
- 4) If recommendation #3 is not feasible, we recommend that moving forward Port management and the Board should decide on how this PRR requirement on annual increments for reinstated employees be satisfactorily complied by seeking the Attorney General's opinion.
- 5) Adhere to the restrictions on retroactive pay raises on performance-based increments.
- 6) Review the following:
 - a) Port actions in granting increments during the freeze increment period;
 - b) Port policy on conflict of interest.

PAG Board Resolution 2022-01

BOARD OF DIRECTORS [Redacted] <i>Chairman</i> [Redacted] <i>Vice Chairman</i> [Redacted] <i>Board Secretary</i> [Redacted] <i>Member</i> [Redacted] <i>Member</i>	
Resolution No. 2022-01	
<p>RELATIVE TO ADOPTING THE RECOMMENDATIONS MADE BY THE OFFICE OF PUBLIC ACCOUNTABILITY (OPA) IN ITS PERFORMANCE AUDITS (OPA REPORT NO. 21-03 AND OPA REPORT NO. 21-09), SPECIFICALLY THE RATIFICATION OF BACK WAGES PROVIDED FOR SEVEN RECENTLY REINSTATED PORT EMPLOYEES, AS RECOMMENDED BY THE OPA, AND RATIFYING SUCH ACTION SPECIFYING LEGAL REMEDIES; I.E, COMPENSATION OF THE TOTAL BACK WAGES, INTEREST, AND LEGAL FEES AND COSTS, AND TO FURTHER PROVIDING HEREIN A STRUCTURE ESTABLISHING UNIFORMITY AND CONSISTENCY IN HOW PORT MANAGEMENT WILL PROSPECTIVELY ADDRESS THESE PERSONNEL MATTERS.</p>	
<p>BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE PORT AUTHORITY OF GUAM:</p>	
<p>WHEREAS, during December 2019, February 2020, June 2020, and July 2020, the Port Authority of Guam, as directed by its Board of Directors, entered into settlements to satisfy judgments and orders, involving seven wrongfully terminated Port employees; and</p>	
<p>WHEREAS, after years of costly litigation, the Supreme Court of Guam and the Guam Civil Service Commission ultimately determined that these seven Port employees were wrongfully terminated; and</p>	
<p>WHEREAS, the former General Manager as well as former Port legal counsel, continued to pursue repeated appeals of these cases, which led to significant financial damage to the Port, to wit: millions of dollars paid to satisfy attorney's fees to former Port legal counsel and other legal counsels, court costs, and payouts ordered by the Guam Supreme Court and the Civil Service Commission, that which continued to accumulate interest thereby substantially consuming both ratepayer money and the Port's time and resources; and</p>	
<p>WHEREAS, the former in-house Port Staff Attorney, through Board direction, as well as the current Deputy General Manager for Administration and Finance also through Board direction, entered into settlement agreements with these seven wrongfully terminated employees which allowed the Port and these Port employees to agree upon a payment plan for back wages spreading over a year or two-year period. These settlement agreements benefitted the Port by avoiding negative impacts to cash flow avoiding immediate, one-time payments and by mitigating the actual back wages that resulted in a significant cost savings to the Port; and</p>	
<p>WHEREAS, because the Port was successfully able to negotiate and mitigate these settlements, we were able to realize a total savings to the Port of more than \$1.5 MILLION; and</p>	
<p>WHEREAS, in doing so, this also brought justice to these seven wrongfully terminated employees who endured almost eight years of tiring and costly litigation resulting in both personal and financial hardships; and</p>	
<p>WHEREAS, through the efforts of the Port's current management, and at the direction of its Board, the Port acted diligently to honor the judgments and orders by the Guam Civil Service Commission, Superior Court of Guam, and the Guam Supreme Court; and</p>	
<p>WHEREAS, in the interest of transparency and accountability, the Board of Directors directed management in Board Resolution No. 2020-04 to transmit the finalized and signed settlement agreements to the Honorable Benjamin J.F. Cruz, Guam Public Auditor, for his review; and</p>	
<p>WHEREAS, the Guam Office of Public Accountability then released two audits regarding their review of the first three settlements, and those audits are identified as OPA Report No. 21-03 and OPA Report No. 21-09; and</p>	
<p>WHEREAS, the Board of Directors are grateful for the OPA's acknowledgment of how the Port handled these very complicated settlement agreements regarding the wrongful terminations of these employees and is pleased with the report relative to the issuance of back wages and appreciates the acknowledgment by the OPA that the Port handled the appeals of these employees properly; and</p>	
<p>WHEREAS, the most recent audit states in its conclusion, "Our performance audit of the back wages of two reinstated Port employees found that the Port's reinstatements of Employee S & Employee T were generally made in accordance with administrative and judicial review judgments and orders. The legal remedies stipulated in the Agreement to Satisfy Judgment and Settlement Agreement were likewise generally complied with by the Port;" and</p>	
<p>WHEREAS, when the analysis was conducted on the methodology the Port utilized for the reconstruction of these back wages, it was determined that the Port had in fact underpaid two reinstated employees and, as such, this means there was no overpayment made, so far as to any of such audits conducted; and</p>	

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WHEREAS, the OPA found the following in its 21-03 report the following:

- Port adhered to certain terms and conditions of Employee Q's that were not required by the Civil Service Commission (CSC) or the courts' judgments, such that:
 - The highest number of incremental sub-steps were granted based partly on two (2) prior years' "Outstanding" performance evaluation ratings that were not approved by the former (or any) General Manager (GM); and
 - A 6% interest charge was paid to Employee Q without any court order requirement, negotiated terms, and proper calculation.
- Successor management approved salary increments that their predecessors did not approve of themselves;
- Legal remedies were executed without seeking the Board of Directors (Board) ratification by resolution and without a formal agreement and liability release until after the final payment in May 2020;
- Different legal opinions resulted in delay and certain unorganized remedial actions; and

WHEREAS, the OPA found the following in its 21-09 report the following:

- Legal remedies paid (satisfied) without board ratification by a resolution; and
- Inconsistencies and deficiencies in the Agreement to Satisfy Judgment and Settlement Agreement; and
- Deviations from certain provisions of Port's Personnel Rules and Regulations; and
- Highest number of incremental sub-steps granted annually without the required performance evaluations approved by the former General Manager (GM); and
- Annual salary increments based partly on three prior years' "Outstanding" or "Highly Satisfactory" rating not approved by any GM; and
- Discrepancies in using the "Outstanding" and "Highly SAT" ratings instead of eligible "Marginal Satisfactory" rating due to the absence of or NRPER not approved by former GM; and
- Conflicting Notifications of Personnel Actions; and
- Deficiencies in Port back wages calculations resulting to potential overpayments due to:
 - Unapproved increments due prior to employees' terminations included in paid back wages; and
 - Questionable and unaccounted back wages paid.
- Income Tax withholding not deducted from paid back wages; and
- Other Matters:
 - Potential violation prohibition on retroactive pay raises; and
 - Pay raise prior to end of freeze period potentially violated the freeze increment mandate; and
 - Appearance of conflict of interest; and

WHEREAS, Port management responded to both OPA Audits 21-03 and 21-09 and both responses are attached as a part of this resolution for recorded purposes; and

WHEREAS, despite the Port management's response, the OPA made recommendations for OPA Report No. 21-03 and OPA Report No. 21-09; and

WHEREAS, for OPA Audit 21-03 the following recommendations are made:

- The GM and the Board standardize a salary increment process for back wages to include a required performance evaluation report (of the sort) accountable to the incumbent GM who approves the number of sub-steps on the personnel action forms; and
- The GM seek the Board's ratification, via board resolution, specifying the composition of total back wages and interest paid to Employee Q; and
- 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; and
- The GM and the Board reconsider their practice of unifying employees' increment anniversary dates moving forward; and
- The Board comply with Guam Code and provide parity to ratepayers and taxpayers by incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202; and

WHEREAS, for OPA Audit 21-09 the following recommendations are made:

- Consistently seek Board's ratification via a Resolution specifying the legal remedies such as: composition of the total back wages, interest, and legal fees and costs; and
- Ensure the execution of formal & comprehensive settlement agreements disclosing therein the legal remedies such as amount and terms of gross and net back wages, mitigation, other benefits, interest charges, legal costs, and a liability release provision; and
- Standardize a salary increment process for reinstated employees to include a performance evaluation report to be signed by the incumbent GM; and

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- If recommendation #3 is not feasible, we recommend that moving forward Port management and the Board should decide on how this PRR requirement on annual increments for reinstated employees be satisfactorily complied by seeking the Attorney General's opinion; and
- Adhere to the restrictions on retroactive pay raises on performance-based increments; and
- Review the following:
 - o Port actions in granting increments during the freeze increment period; and
 - o Port policy on conflict of interest; and

WHEREAS, as a result of the OPA's findings and recommendations for corrective actions cited in OPA Audit Report No. 21-03 and 21-09, this Board Resolution is intended to resolve and affirm the agency's actions in regards to the settlements in line with the OPA recommendations and ratifies via this Board Resolution the specific legal remedies such as the composition of the total back wages, interest, and legal fees and costs; now therefore be it

RESOLVED, that the Board of Directors hereby ratifies Port management's methodology to reconstruct the salaries for the reinstated employees covered in the OPA Audit Report No. 21-03 and 21-09 as well as employees covered under PAG Board of Directors Resolution 2020-04; and be it further

RESOLVED, that the Board of Directors hereby ratifies and accepts management's submissions of the formal agreements that included the purpose, amounts, and terms of what the Port paid for these seven reinstated employees, to include back wages, benefits, attorney fees, and interest, and directs management to inquire of the OPA on whether any further documents are required for his review; and be it further

RESOLVED, that the Board of Directors hereby ratifies and accepts management's submissions of the liability release provisions signed by all seven reinstated port employees, to include the signatures of the relevant parties and witnesses; and be it further

RESOLVED, that the Board of Directors hereby accepts and ratifies the General Manager's submission (to be filed as Board Policy 2022-01, adopted herein), which establishes and standardizes a salary increment process for back wages of reinstated employees to include a performance evaluation report to be signed by the incumbent General Manager who approves the number of sub-steps on the personnel action forms; and be it further

RESOLVED, that the Board of Directors hereby directs the General Manager to include in the process that the General Manager shall seek the Board's ratification, via board resolution, specifying the composition of total back wages and interest paid to all future reinstated employees; and be it further

RESOLVED, that the Board of Directors directs Port management to implement and adhere to Public Law 34-145 authored by Senator [REDACTED] "AN ACT TO AMEND §§ 4406 AND 4406.2 OF ARTICLE 4, CHAPTER 4, TITLE 4, GUAM CODE ANNOTATED, RELATIVE TO ENHANCING PROCEDURAL PROTECTIONS WITHIN THE CIVIL SERVICE COMMISSION IN FAVOR OF INCREASING TIMELINESS, EFFICIENCY, AND DUE PROCESS FOR CLASSIFIED EMPLOYEES OF THE GOVERNMENT OF GUAM;" in order to prevent similar situations from reoccurring; and be it further

RESOLVED, that the Board of Directors, directs that the General Manager willfully adhere to Public Law 34-145 whenever duly ordered by the Civil Service Commission; and be it further

RESOLVED, the Chairman certify to, and the Secretary attest to, the adoption hereof and that copies of the same be transmitted to Governor [REDACTED]; Lt. Governor [REDACTED]; Speaker [REDACTED] of the 36th Guam Legislature; Port's Legislative Oversight Chairperson Senator [REDACTED] of the 36th Guam Legislature; the 36th Guam Legislature; and the Honorable [REDACTED], Guam Public Auditor.

PASSED AND ADOPTED UNANIMOUSLY BY THE BOARD OF DIRECTORS THIS 20th DAY OF JANUARY, 2022.


 CHAIRMAN, BOARD OF DIRECTORS
PORT AUTHORITY OF GUAM


 SECRETARY, BOARD OF DIRECTORS
PORT AUTHORITY OF GUAM



OAG Response - May 31, 2022



Office of the Attorney General of Guam

590 S. Marine Corps Drive, Suite 901 ♦ Tamuning, GU 96911

Phone 671.475.3324 extension 5015 ♦ Fax 671.477-4703 ♦ Email ag@oagguam.org

Hon. Leevin Taitano Camacho
Attorney General of Guam

RECEIVED
 DATE: 6/9/2022
 TIME: 2:40
 EMAIL:

May 31, 2022

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

Ref. OPA 21-0548

SUBJECT: Calculation of Back Wages for Reinstated Port Authority of
Guam Employee who Retired During Termination Period

Dear Public Auditor Cruz:

This is in response to your inquiry regarding the calculation of back wages for a terminated Port Authority of Guam (Port) employee who retired from government service during the termination period and was later reinstated pursuant to a settlement agreement.

BACKGROUND

The Public Auditor is conducting a performance audit of seven Port employees who were terminated from their positions following an administrative adverse action taken against each of them in 2012. The employees appealed their terminations to the Civil Service Commission (CSC).

During the period of termination, one of the employees retired. As a retiree, the employee was paid a monthly annuity that began from the date of her retirement.

Subsequently, and while her adverse action appeal was pending before the CSC, the employee and the Port entered into a written settlement agreement to void the adverse action and reinstate the employee to the position she held prior to

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termination.¹ In addition to reinstatement, the terms of the settlement agreement also provided that the employee be paid all compensation, benefits, and other remuneration that she would have been entitled to receive had the adverse action not been taken against her. Several months later, the CSC incorporated the settlement agreement into a *Stipulated Judgment of Settlement and Dismissal* (Stipulated Judgment) that fully resolved and rescinded the underlying adverse action appeal. The Stipulated Judgment was signed by the Civil Service Commission on February 9, 2021.

QUESTIONS AND SHORT ANSWER

1. When paying the employee pursuant to the settlement agreement, could the Port include in its calculation of back wages (inclusive of annual salary increments) amounts that would have been earned between the date when the employee retired and began receiving her monthly annuities until the date of reinstatement to her original position at the Port?

2. Can the Port reinstate an employee prior to: (a) execution of the Settlement Agreement; and (b) promulgation of the CSC Judgment of Dismissal signed by the CSC Commissioners?

The answer to both questions above is no.

DISCUSSION

1. Income That Would Have Been Earned Between The Date Of Retirement Until The Date Of Reinstatement Cannot Be Included In The Port's Calculation Of Back Wages Owed.

Pursuant to Title 4 GCA Section 8121(a)(1), a retired Government of Guam employee who is subsequently rehired shall have her retirement annuity suspended for the duration of the employment.² Regardless of the circumstances surrounding

¹ Although the settlement agreement states that it is to remain undisclosed, Guam law provides that all out-of-court settlement records with the government of Guam are matters of public record. 5 GCA § 10102(d); 5 GCA 6210(e); ATTY. GEN. OP. NO. OPA 20-0143 (July 20, 2020). The settlement agreements for the terminated employees have been publicly posted on the Port of Guam's website.

² 4 GCA § 8121(a)(1) ("A retired member who subsequently becomes an employee eligible for membership under § 8106 of this Title on or after January 1, 1999 shall, *upon becoming so employed,*

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the employee's rehiring, and whether it be in the form of back wages or current pay, no authority is provided that allows an employee to collect both a retirement annuity and employment compensation for the same period of time.

The only exceptions are for those positions that have been expressly exempted from this prohibition by statute. These exempted positions include health care professionals, school bus drivers and automotive mechanics, certain police officers, employees of the Office of the Governor and Lt. Governor, heads of autonomous agencies, University of Guam and Guam Community College faculty, the elected Attorney General, the elected Public Auditor, and others.³

Because the reinstated Port employee's position does not fall into any of the exempted categories, the Port's calculation of any back wages may not include wages covering the period of time between her retirement and reinstatement for which she received an annuity. Moreover, the calculation must also consider the value of any non-wage benefits such as accrued annual leave and sick leave hours that may have been cashed out and paid to the employee upon her retirement.

Finally, the calculation of back wages should also consider that in an adverse action appeal where an employee is entitled to an award for back pay, "that employee is under a duty to mitigate damages." *Haeuser v. Dept. of Law and CSC*, 1999 Guam 12 at ¶ 11 (*Haeuser I*); *Haeuser v. Dept. of Law and CSC*, 2002 Guam 8 (*Haeuser II*) ("[T]he general rule [is] that a party entitled to recover back pay to a

have that member's right to receive payment of that member's annuity suspended for the duration of that member's employment, and shall be ineligible for readmission to the Defined Benefit Plan, but all other rights pertaining to that member's annuity provided by this Article, including automatic increases therein, shall be retained by that member; except, that the retired member shall forfeit any enhanced benefits for which that member was eligible pursuant to the early retirement provisions of § 8121.1.")

³ 4 GCA § 8121(a)(2)-(3), (f). Other temporary exemptions are often included in the government's General Appropriations Act for specific fiscal years. For example, in the General Appropriations Act of 2022, exemptions have been made for the temporary employment of teachers, social workers, corrections officers, police officers, firefighters, customs and quarantine officers, certain DRT and DPW workers, and government attorneys. See Pub.L.No. 36-54:XII:3-11.

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wrongful termination from employment must undertake to mitigate his or her damages during the period of unemployment.”).

2. A CSC Judgment Is Not Effective Until It Has Been Signed By A Majority of Commission Members At A Public Meeting.

The Terms and Conditions of the settlement agreement between the Port and the retired employee state that, among other things, the Port will void the adverse action, reinstate the employee to her prior position, and that a written “Stipulated Judgment of Settlement” will be submitted to the CSC:

1. Management shall and does hereby rescind, void, and expunge the adverse action taken against Employee and shall reinstate the Employee to the position of Corporate Services Manager at the Port’s Corporate Service Department

. . . .

10. Upon execution of this Agreement, Employee and Management shall jointly inform the Civil Service Commission that this matter has settled, and the parties shall execute a *Stipulated Judgment of Settlement* which is to be submitted by the parties to the Civil Service Commission

Pursuant to Rule 11.7.5 of the CSC’s Rules of Procedure for Adverse Action Appeals, a *“judgment”* is the “final administrative adjudication of the Commission.” A CSC judgment does not become effective until it is entered, that is, signed by a majority of Commission members at a publicly advertised meeting:

CSC AA Rule 11.7.5. Judgment.

A judgment is the final administrative adjudication of the Commission on a case presented before the Commission. A Judgment shall be in writing and the caption shall state it is a “judgment.”

. . . .

A judgment is entered, that is, becomes final and effective on the date a majority of commissioners sign the judgment at a Commission meeting attended by a sufficient number of Commissioners to constitute a quorum. Notice that a proposed judgment is before the

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Commission for signing shall be served on the parties to the action and shall be publicly advertised as required by the Open Government Law. (Emphasis added.)

The settlement agreement between the Port and the retired employee was submitted together with the Stipulated Judgment of Settlement and Dismissal to the CSC on August 13, 2020. The Stipulated Judgment expressly states that the settlement agreement is incorporated into it. The CSC signed the Stipulated Judgment on February 9, 2021. On the same date, the CSC also signed a separate but similar document called "Judgment of Dismissal". Under Rule 11.7.5, neither the Stipulated Judgment nor the Judgment of Dismissal became effective until each was signed on February 9, 2021. Until the judgments became effective on February 9, 2021, the settlement agreement that was expressly incorporated into them likewise did not become effective until that date. *See e.g., Nall v. Mal-Motels, Inc.*, 723 F.3d 1304, 1308 (11th Cir. 2013) (settlement agreement for federal overtime wages "is valid only if the district court entered a 'stipulated judgment' approving it.").

Nearly six months passed between the time the settlement agreement was submitted to the CSC on August 13, 2020 and when the Stipulated Judgment and the Judgment of Dismissal were signed on February 9, 2021. According to the CSC's Standard Operating Procedures (SOP) governing the handling of settlement agreements, the decision to dismiss an adverse action appeal when a settlement has been received is made only after consultation with the CSC's Administrative Law Judge (ALJ) who advises on what disposition to take.⁴ This is because putting aside any delays due to the global pandemic, the CSC's review and approval of a settlement (even one that is stipulated) is not perfunctory. The CSC has a responsibility to scrutinize the settlement and decide whether it is fair to the agency and the employee.

Because of the ongoing pendency of the adverse action, the mere outside execution of the settlement agreement between Port and the employee was not

⁴ *Receiving a Settlement Agreement, Withdrawal of Appeal, or Proposed Judgment* at § 2.1. CSC STANDARD PROCEDURE (SOP) DOC NO. LEG/PMA-1001 (Mar. 8, 2019) ("After the administrative counsel has reviewed the document and has made any necessary changes, he will then advise the legal secretary what disposition to take.").

OAG Response - May 31, 2022

Hon. Benjamin J. Cruz
Ref. No. OPA 21-0584
Re: Calculation of Back Wages for Reinstated Port Authority of Guam Employees
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enough to make it legally effective. At all times, the CSC “has the authority to accept, modify, or reject the ALJ’s decision [to recommend approval or disapproval] in whole or in part.”⁵ “On the day of the scheduled hearing [to consider the settlement], the Commission shall then approve or disapprove the signing [of the proposed decision or judgment].”⁶

Thus, until the CSC’s judgment was approved and entered at the February 9, 2021 public meeting pursuant to the Open Government Law,⁷ neither the judgment nor its incorporated settlement agreement was “final and effective” pursuant to Rule 11.7.5. Any action to implement and advance the terms of the settlement agreement, including reinstatement of the employee, that was taken before the CSC’s judgment was issued would have been premature.

CONCLUSION

Guam law prohibits the collection of retirement annuities and employment wages for the same time period unless the employee’s position is expressly exempted by 4 GCA § 8121(a)(2)-(3), § 8121(f), or any other law. Further, under CSC AA Rule 11.7.5 and the CSC’s SOP governing the submission of settlement agreements, a judgment must be entered and signed by a majority of Commissioners before it, and any settlement agreement incorporated into the judgment, are effective and actionable.

⁵ The ALJ makes written recommendations to the Commission. CSC SOP FOR ADMINISTRATIVE COUNSEL §2.8 (Mar. 8, 2019): “The ALJ’s recommendation is not the final decision, but must be adopted, modified or rejected by the CSC.” CSC ALJ RULE § 221; 4 GCA § 4405(c) (“All decisions by the ALJ shall be forwarded to the Commission, which will have the authority to accept, modify, or reject the ALJ’s decision in whole or in part.”).

⁶ *Receiving a Settlement Agreement, Withdrawal of Appeal, or Proposed Judgment* at § 4.1. CSC STANDARD PROCEDURE (SOP) DOC NO. LEG/PMA-1001.

⁷ 5 GCA § 8107; *Receiving a Settlement Agreement, Withdrawal of Appeal, or Proposed Judgment* at § 3.1, § 4.1. CSC STANDARD PROCEDURE (SOP) DOC NO. LEG/PMA-1001 (CSC board secretary places settlement agreement on calendar in compliance with Open Government Law for Commission to approve or disapprove on the day of the scheduled hearing.).

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We trust that this letter is responsive to your inquiry. For further information concerning this matter, please use the reference number shown above.

Sincerely,



SHANNON J. TAITANO
Chief Deputy Attorney General

cc: General Manager, Port Authority of Guam

PAG Response – June 21, 2022



PORT OF GUAM
ATURIDAT I PUETTON GUAHAN
Jose D. Leon Guerrero Commercial Port
1026 Cabras Highway, Suite 201, Piti, Guam 96925
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Website: www.portguam.com



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

June 21, 2022

The Honorable Leevin T. Camacho
Attorney General of Guam
Office of the Attorney General of Guam
287 West O'Brien Drive
Hagatna, Guam 96910

RE: Response to OPA 21-0548; Calculation of Back Wages for Reinstated Port Authority of Guam Employee Who Retired During Termination Period

Dear Attorney General Camacho:

The Port Authority of Guam (“PAG” or “Port”) received a copy of an AG opinion written by Chief Deputy AG Shannon Taitano dated May 31, 2022. This AG Opinion was addressed to the Honorable Benjamin J. Cruz, Public Auditor, and is in response to the Public Auditor’s inquiry regarding the calculation of back wages for a terminated PAG employee who retired from government service during the termination period and was later reinstated pursuant to a settlement agreement (Ref. OPA 21-0548).

The Public Auditor posed the following questions:

- 1) When paying the employee pursuant to the settlement agreement, could the Port include in its calculation of back wages (inclusive of annual salary increments) amounts that would have been earned between the date when the employee retired and began receiving her monthly annuities until the date of reinstatement to her original position at the Port?
- 2) Can the Port reinstate an employee prior to: (a) execution of the Settlement Agreement; and (b) promulgation of the CSC Judgment of Dismissal signed by the CSC Commissioners?

While we do not dispute the applicable law, we do, however, dispute the application of facts (or lack thereof) to the law as set forth in your opinion letter. Thus, in the spirit of transparency, and in an effort to once again make clear the record surrounding this longstanding issue, the PAG provides the following response:

I. The Port did not consider income that would have been earned between the date of retirement until reinstatement in the calculation of back wages owed.

In 2012, the PAG issued final notices of adverse action to seven PAG employees resulting in their termination. The employees appealed their terminations to the Civil Service Commission (“CSC”). Subsequent to their termination, and while the adverse action appeals were ongoing, one of

PAG Response – June 21, 2022

Letter to Hon. Leevin T. Camacho
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the employees retired. From 2013 to her reinstatement, the employee received monthly annuities from the date of her retirement.

Title 4 G.C.A. § 8121(a)(1) provides: “A retired member who subsequently becomes an employee eligible for member under § 8106 of this Title on or after January 1, 1999, *shall*, upon becoming so employed, have that member’s right to receive payment of that member’s annuities suspended for the duration of the member’s employment, but all other rights pertaining to that member’s annuity provided by the Article, including automatic increases therein, *shall* be retained by that member.”

Here, the PAG would like to clarify that it **did not** include wages for the period of time between the employee’s retirement and reinstatement for which she received annuities in the calculation of back wages owed to her. In fact, the PAG **mandated mitigation** in all settlement negotiations, including the retired employee’s settlement terms. The PAG presented to its Board of Directors (“BOD”) the following calculations in order to illustrate what it would have cost the PAG had it not mandated mitigation:

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.

On June 25, 2020, the PAG BOD found that it was in the best interest of the PAG to explore and offer settlement terms that **included mitigation**, which ultimately saved the PAG a minimum of **\$1,056,553.84 in total**. For this employee, the PAG BOD approved the following terms, wherein the employee paid back all retirement annuities received as part of her duty to mitigate:

- Back wages (*net gross pay after mitigation*): **\$296,915.42**
- A payment schedule plan favorable to the Port;
- Reinstatement of sick leave hours and annual leave hours owed;
- Reasonable legal fees; and
- Remit to Retirement Fund retirement benefits owed to employee.

See PAG BOD Resolution No. 2020-04.

Accordingly, although Title 4 G.C.A. § 8121(a)(1) is clear, your opinion letter as written does not accurately illustrate the actions the PAG and its BOD took to follow and apply the law. As written, the PAG is once again put in a position to clear the record as there is nothing in your opinion letter that addresses nor acknowledges the PAG’s efforts to mandate mitigation of the back wages owed to the retired employee upon her reinstatement. As a result of the PAG’s and the employee’s mitigation efforts, **the PAG realized a savings of approximately \$684,036.00.**

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II. The Civil Service Commission incorporated the terms of the Settlement Agreement into the Stipulated Judgment of Settlement and Dismissal.

The PAG does not contest the fact that the CSC approved and entered the Stipulated Judgment of Settlement and Dismissal (“Stipulated Judgment”) in this instant case on February 9, 2021. Nor does the PAG contest CSC Rule 11.7.5, which states that a “judgment is the final administrative adjudication of the Commission.” Consequently, the PAG agrees that a CSC judgment does not become effective until it is entered and signed by a majority of Commission members at a publicly advertised meeting. Further, the PAG acknowledges the CSC’s Standard Operating Procedure (“SOP”) governing the handling of settlement agreements which provides for the CSC’s Administrative Law Judge’s (“ALJ”) review and advisement on what disposition the Commission should take upon receiving a proposed judgment of settlement and dismissal. Again, the PAG does not dispute the applicable law or procedural rules. However, we dispute the factual application as your letter does not illustrate the complete picture.

In your letter, you acknowledged that the Stipulated Judgment expressly states that the Settlement Agreement was incorporated therein. You also quoted part of the terms of the agreement including that, among other things, the PAG would void the adverse action, reinstate the employee to her prior position, and that a written Stipulated Judgment would be submitted to the CSC. However, your legal opinion did not mention that the Settlement Agreement expressly states that the employee shall be reinstated to her position at the PAG with an *effective date of July 1, 2020*. Further, assuming *arguendo* that the Settlement Agreement was not final and effective until entered and signed by a majority of Commissioners, the Stipulated Judgment signed by the CSC incorporated the terms of the parties’ written Settlement Agreement, fully and finally resolving the respective adverse action appeal, and thereby ratifying the PAG’s actions honoring the terms of the Settlement Agreement. Thus, the PAG’s decision to reinstate the employee on the effective date of July 1, 2020, pursuant to the terms of the Settlement Agreement approved by the PAG BOD, reviewed by the ALJ, and later signed and approved by the CSC, was at most, harmless error and in the best interest of the agency and the public.

Finally, in your letter, you recognized that the PAG submitted the Stipulated Judgment to the CSC on August 13, 2020 – approximately six (6) months before the CSC actually signed and entered the Judgment on the record. In order to avoid further fees and costs, including accrued interest, the PAG acted pursuant to the terms of the Settlement Agreement, thereby reducing further financial liabilities that may have resulted between the time the Stipulated Judgment was filed with the CSC and when it was actually signed and entered by the majority of the Commissioners. Nonetheless, when applied, the conclusions reached in your letter neither increase nor decrease the back wages owed to any of the wrongfully terminated employees.

General, I hope that the foregoing dispels any misunderstandings and clarifies for you, the Public Auditor, relevant stakeholders, and the general public in that no illegal payments were made or that the PAG needed a signed CSC judgment to execute the settlement. Moreover, it is alarming that your office would issue an opinion letter without a complete analysis and application of the pertinent facts surrounding the question being presented. Further, those requesting a legal opinion should act responsibly by providing your office with all relevant facts to accompany their request for an AG opinion. In this case, to do otherwise is reckless and perpetuates a suspicion that these audits are not being done to provide any meaningful corrective actions, but instead prolongs the trauma experienced by these wrongfully terminated employees.

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Letter to Hon. Leevin T. Camacho
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Consequently, while we are certain that is not Chief Deputy AG Taitano's intent, this AG opinion misrepresents how the wages of these reinstated Port employees were reconstructed and only furthers a decade-old conspiracy theory that seven individuals conspired to defraud the PAG. Please note that when the PAG applied the legal conclusions set forth in this legal opinion, the PAG would not owe any of these wrongfully terminated employees any more or less in damages. What has been lacking in the Public Auditor's audits is that the PAG SAVED more than a million dollars as a result of mandatory mitigation and favorable negotiations in the interest of the PAG and our ratepayers.

What has also been obviously missing from the Public Auditor's audits on the back wages of these wrongfully terminated employees is the abuse of power, and the many errors of omission, on the part of the past PAG General Manager, as well as the blatant disregard for the Rule of Law, PAG's Personnel Rules and Regulations, and even court orders from the Supreme Court of Guam, Superior Court of Guam and the Civil Service Commission. The many years of this litigation resulted in millions spent on attorney fees, yet the Public Auditor fails to recant the genesis of this travesty.

We believe that our island community will be better served if Chief Deputy AG Taitano applies the facts surrounding the Public Auditor's questions and re-issues a qualified AG opinion determining if the PAG violated any laws concerning the Public Auditor's claims thereof. Enclosed and officially transmitted is a signed copy of PAG BOD Resolution No. 2020-04 for your records.

Respectfully,



Rory J. Respicio
General Manager

Attachments (1)

Cc: Hon. Lourdes A. Leon Guerrero, Governor of Guam
Hon. Joshua F. Tenorio, Lt. Governor of Guam
PAG Board Chairperson & Board of Directors

PAG Board Resolution 2020-04

BOARD OF DIRECTORS

Francisco G. Santos, Chairman
Nathan T. Taimanglo, Vice Chairman
Isa Marie C. Koki, Board Secretary
María D.R. Taitano, Member
Anthony P. Chargualof, Jr., Member


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.

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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

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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	\$980,951.42
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

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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



PAG Board Policy Memorandum 2022-01

BOARD POLICY MEMORANDUM NO. 2022-01

To: Division Heads	Subject: Salary Increment Process for Reinstated Employees
Effective Date: January 20, 2022	Revision Date:
Approved by: FRANCISCO G. SANTOS, Chairman, Board of Directors	

I. REFERENCES:

- A. Public Law 29-24 authorizes the Port to establish pay scales for certified, technical and professional positions subject to the provisions of the Administrative Adjudication Act.
- B. Public Law 30-43 approved the Personnel Rules and Regulations for maritime related positions unique to Port operations and certified, technical and professional positions.
- C. A classified worker’s entitlement to an anniversary increment is a statutory mandate that cannot be annulled in the event that a performance evaluation or increment certification is somehow delayed. See OPA 20-0375, p. 4 (citing 4 GCA § 6202).

II. PURPOSE: To establish and standardize a salary increment process for back wages of reinstated employees to include a performance evaluation report to be signed by the incumbent General Manager who approves the number of sub-steps on the personnel action forms.

III. GENERAL INFORMATION

- A. It is the policy of the General Manager to provide a uniformed pay administration to facilitate pay actions, while ensuring the proper compensation of employees occupying maritime positions unique to Port operations and certified, technical and professional positions and to provide the opportunity for the Port to carry out its mission.
- B. Salary increment increases shall be granted as authorized in the Personnel Rules and Regulations.

PAG Board Policy Memorandum 2022-01

Board Policy Memorandum No. 2022-01
Subject: Salary Increment Process for Reinstated Employees
Page 2 of 2

- C. A performance appraisal or evaluation encourages efficiency and productivity among employees and the orderly and constructive relationships between management and employees in the interest of effective personnel management, and the efficient operation of the Port.

IV. PROCEDURE

- A. The General Manager shall be responsible for the effective implementation and administration of the performance appraisal system within the Port. He shall approve all performance rating made for all Port employees and shall ensure that supervisory personnel receive adequate training in the performance evaluation system. He shall ensure that performance appraisal and reports are completed and submitted on a timely basis.
- B. The salary increment of all Maritime Positions Unique to Port Operations and Certified, Technical and Professional Positions shall be based on an annual review of performance. As part of the appraisal process an individual's performance will be assessed against a performance range of zero (0) to six (6) sub-steps. As sub-steps (within the pay schedule) increase by one (1%) the performance (and resulting salary increment) range from zero (0), or a nil increase, through up to six percent (6%). All salary increments will require the approval by the General Manager.
- C. The salary increment for back wages of reinstated employees found to be wrongfully terminated in a judgement or order from the Guam Civil Service Commission or the courts of Guam shall be based on the average ratings of the employee's last three (3) years' employment at the Port. If for whatever reason the employee's performance evaluation or increment certification was unsigned or somehow delayed, and a letter from the General Manager rejecting the performance evaluation or increment certification was NOT submitted at the time the employee's performance evaluation was submitted to Human Resources, then the incumbent General Manager shall so accept such submission of the performance evaluation for purposes of reconstructing the employee's back wages.
- D. All salary increments and performance appraisals for reinstated employees shall be approved by the incumbent General Manager who approves the corresponding personnel action.

V. ENTIRE POLICY

All prior policies or memorandum in conflict with this policy are hereby rescinded.

GGRF Re: July 29, 2022 Letter for Employee E



GOVERNMENT OF GUAM
RETIREMENT FUND
 STABILITY · SECURITY · REWARDS

Lourdes A. Leon Guerrero
Governor

Joshua F. Tancio
Lieutenant Governor

Paula M. Blas
Director

August 3, 2022

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

Re: July 29, 2022 Letter – Port Back Wages for [REDACTED]

Dear Public Auditor Cruz:

Responses to your July 29, 2022 Inquiries regarding Port Back Wages for [REDACTED] are reflected below:

- a. If the employee was treated as not terminated and received all the benefits of an eligible employee, was not GGRF entitled to reimbursement by the Port for the retirement annuities and COLA paid to [REDACTED] from January 2, 2013, thru June 30, 2020 (within the termination period) totaling \$688,502.60?

The Port withheld the mitigated retirement annuities of \$684,036 (Port declared amount) as its savings. In addition, in your letter response, you confirmed that the Port did not reimburse you any.

GGRF Response:

If [REDACTED] was reinstated as an active employee effective December 18, 2012 (her date of termination) and she was paid retroactively to 12/18/2012 then GGRF will be entitled to:

1. Reimbursement of Retirement annuities and COLA, totaling \$688,502.60, which were paid to her for the period from 12/19/2012 thru June 30, 2020.
2. Employee and Employer Retirement Contributions for the respective pay periods.
3. Applicable Interest and penalties which are assessed as follows:
 - a. Penalties are assessed at one percent (1%) per year.
 - b. Interest is computed as reflected below:

$$\text{“Total Contributions (per pay period) } \times \text{ Interest Rate / 365 } \times \text{ Number of Days Late ”}$$

Contributions are due ten working days after issuance of payroll checks. The employee and employer contribution rates, and the interest rate for fiscal years 2012 to 2020, are as follows:

FY	2012	2013	2014	2015	2016	2017	2018	2019	2020
EMP. RATE	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%
GOV'T RATE	28.30%	30.09%	30.03%	29.85%	28.16%	27.41%	27.83%	26.56%	26.28%
INT. RATE	0.00%	20.10%	14.36%	10.00%	0.83%	9.53%	11.88%	5.75%	3.17%

Trustees:

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Katherine T.E. Taitano
Secretary
Chair, Members and Benefits Committee

Artemio R.A. Hernandez, Ph.D.
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Chair, Investment Committee

Thomas H. San Agustin
Trustee

David N. Sanford
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George A. Santos
Trustee

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GGRF Re: July 29, 2022 Letter for Employee E

Benjamin J.F. Cruz
August 3, 2022
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b. In your response, you also stated that if the Port reimbursed GGRF for the retirement benefits received by [REDACTED] the total back wages would be subjected to retirement contributions. Can you provide us with an estimate of the amount Port needs to remit back on the following?

- Retirement-related annuities and benefits received by [REDACTED] and
- Employee and Port's share of retirement contributions.

GGRF RESPONSE: Refer to response #1 to 3 on page 1.

c. In your response, you also stated that if back wages and related contributions and interest were paid, the annuity would be recomputed based on her three highest annual salaries.

- Would this mean that no retirement took place and upon retirement, [REDACTED] will receive her annuity under the DB plan?

GGRF RESPONSE:

Yes, if the Port re-instated [REDACTED] and determined and remitted all employee and employer contributions, interest and penalties due to the Fund, and the Fund is reimbursed the \$688,602.60 in retirement annuities and COLA paid to her --- It would be treated as if she never retired.

As such, when she decides to subsequently re-retire the Fund will re-compute her Annuity based on her maximum 36 years of credited service and her re-computed Average Annual Salary (AAS) based on her three highest annual salaries.

Although, the Fund was not provided a breakdown by year for the \$980,118.04 in total back wages (computed by the Port) --- we estimated her new AAS to be approximately \$135,000 (this is likely to be higher).

Based on the above, her re-computed Annuity is estimated to be \$114,750. This compared to her \$89,360 Annuity when she retired on 12/19/2012 --- represents a \$25,390 increase.

- What would be the coverage period of the interest and what is the interest rate?

GGRF RESPONSE: Refer to response #3 on first page.

d. What is the effect if the Port does not reimburse GGRF for the retirement-related annuities/benefits received by [REDACTED]?

GGRF RESPONSE:

If the Port does not reimburse GGRF the impact is as follows:

1. No impact to GGRF: When she decides to re-retire in the DB Plan her annuity will be based on her initial annuity of \$89,360.
2. For [REDACTED] A loss of approximately \$25,390 annually for as long as she continues to receive retirement annuities.

Sincerely,

Beula M. Blas
Director

Excerpts of OAG Response – November 1, 2021



Office of the Attorney General of Guam

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Hon. Leevin Taitano Camacho
Attorney General of Guam

November 1, 2021

OPINION MEMORANDUM

Ref: OPA 20-0375

TO: Chairman, GHURA Board of Commissioners
FROM: Attorney General
SUBJECT: Pay Raises Granted to Former and Current GHURA Executive Directors and Deputy Directors

This Opinion Memorandum is provided in response to a request from Public Auditor Benjamin J.F. Cruz received on September 23, 2020, to review pay increase adjustments given between 2013 and 2019 to the former and current Executive Directors and Deputy Directors of the Guam Housing and Urban Renewal Authority (GHURA).

QUESTION AND SHORT ANSWER

Were the upward pay adjustments received by the former and current GHURA Executive Directors and Deputy Directors after 2013 made in compliance with applicable laws and regulations?

Yes. However, board action is needed to ensure the proposed pay increments for the Executive Director and Deputy Director for the period between January 11, 2019 to January 10, 2020 is effective no earlier than September 11, 2020.

DISCUSSION

Guam law prohibits retroactive pay unless expressly authorized by statute. Based on our review, the authority for a salary increment under the GHURA Personnel Rules and Regulations is the certification of a satisfactory performance evaluation. There is, however, no statutory authority for the Executive Director or Deputy Director of GHURA to receive a retroactive pay increase. As set forth below, any

Excerpts of OAG Response – November 1, 2021

Opinion Memorandum
Re: Pay Raises Granted to Former and Current GHURA
Executive Directors and Deputy Directors
Ref: OPA 20-0375
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salary increment for the Executive Director and Deputy Director can only be paid prospectively from the date that the Board certifies a satisfactory performance evaluation.

1. Guam Law Prohibits Retroactive Payments to Employees.

Unless authorized by statute, and regardless of the justification, government of Guam employees are prohibited from receiving salary increases that are paid retroactively from the date of authorization.

4 GCA § 2103.14. Retroactive Pay. No unclassified employee or officer of the government of Guam may receive a retroactive pay increase unless specifically authorized by statute.

and

4 GCA § 6218.1. Prohibition on Retroactive Pay Raise. Whenever a classified or unclassified employee of the Government of Guam, including all departments, agencies and instrumentalities, whether or not autonomous, 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. Any person who authorizes a pay raise which is retroactive in violation of this Section shall be guilty of a misdemeanor.

2. The salary increments received by the Executive Director and Deputy Director in September 2020 cannot be paid retroactively from the date of authorization.

On May 28, 2019, the Office of Public Accountability (OPA) received a request from the Office of the Attorney General (OAG) to review potential violations of the Open Government Law in relation to unclassified employee compensation within the government's autonomous agencies. In September 2020, the OPA issued Report No. 20-05 setting forth its findings of a performance audit conducted on upward pay adjustment raises given to GHURA's unclassified employees, specifically the Executive Directors (ED) and the Deputy Directors (DD).¹ Because it was beyond the original scope of the audit, the OPA did not perform any audit procedures with respect to whether the salary raises violate the laws prohibiting retroactive

¹ In addition to GHURA, the OPA also reviewed and issued performance audits on Guam Power Authority and Guam Waterworks Authority (OPA Report No. 19-09) and on the Port Authority of Guam (OPA Report No. 20-04).

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the pay shift can be applied retroactively to any date before September 30, 2019. Assuming that the second pay adjustment was paid from the date of the personnel action form on December 23, 2019, then the pay adjustment would not violate the laws against retroactive compensation.

CONCLUSION

Unless authorized by statute, and regardless of the justification, government of Guam employees are prohibited from receiving salary increases that are paid retroactively from the date of authorization.

Salary increments for the current Executive Director and Deputy Director based upon their performances between January 2019 and January 2020 can only be paid prospectively from the authorization date of September 11, 2020 and not retroactive from any date prior. Any retroactive payment is prohibited by Guam law.

The upward salary adjustments given to the GHURA former Executive Director and Deputy Director between 2013 and 2018 were justified by performance evaluations as required by GHURA PRR 6.302. Although not formally ratified by the GHURA BOC, the adjustments do not violate any laws as long as they were paid forward from the date of authorization as shown on the relevant personnel action forms.

Finally, because of the salary increment freeze imposed by P.L. 34-116 throughout the entirety of FY2019, no pay increases may be given for any reason to the current ED or DD that would upwardly compensate them for services performed between the time of their appointment in January 2019 to the end of the freeze on September 30, 2019.

We request confirmation that any payments of the proposed salary increments for the current Executive Director and Deputy Director for the period between January 2019 and January 2020 were made in compliance with this opinion and Guam law.


LEEVIN TATTANO CAMACHO
Attorney General

Status of Audit Recommendations

No.	Addressee	Audit Recommendation	Status	Actions Required
1.		Since the incumbent Port GM approved the employees Notifications of Personnel Action to authorize and approve the payment of annual increments, then the GM should comply with the documentary requirements specified in its Personnel Rules & Regulations in processing annual increments as follows:		
	Port GM	a. Rectify the discrepancies in the NPA hourly rates versus the actual hourly rates used in the back wages calculation, whichever management deems accurate.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
	Port GM	b. Prepare and/ or approve the unapproved Employee Performance Evaluation Report (EPER) and Notification of Results of Performance Evaluation Report (NRPER effective October 2011 and/or October 2012, to justify the average three prior years "Outstanding" rating.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
	Port GM	c. Prepare and approve the required performance evaluation documents, such as EPER and NRPER to support the GM's authorization and approval of all increments paid prior to and during the employees' termination periods.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.

Status of Audit Recommendations

No.	Addressee	Audit Recommendation	Status	Actions Required
	Port GM	d. Prepare the required Notification of Personnel Action for Employee E to document GM's authorization and approval of all increments paid, if the employee is considered never retired.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
2.	Port GM	Render an appropriate decision/action based on the Port's management treatment of the employee's retirement, to determine his/her entitlement.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
3.	Port GM	Request an Attorney General opinion on how to address the potential violation of retroactive increments and the pay raise freeze mandate for the affected employees.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.

PORT AUTHORITY OF GUAM BACK WAGES SERIES, PART C Report No. 22-05, November 2022

ACKNOWLEDGEMENTS

Key contributions to this report were made by:

Maria Thyrza Bagana, Audit Supervisor
Thomas Eladio Battung, Auditor-in-Charge Trainee
Kayleen Concepcion, Audit Staff
Benjamin J.F. Cruz, Public Auditor

MISSION STATEMENT

To ensure public trust and good governance in the Government of Guam, we conduct audits and administer procurement appeals with objectivity, professionalism and accountability.

VISION

The Government of Guam is a model for good governance with OPA leading by example as a model robust audit office.

CORE VALUES

Objectivity

To have an independent and impartial mind.

Professionalism

To adhere to ethical and professional standards.

Accountability

To be responsible and transparent in our actions.

REPORTING FRAUD, WASTE, AND ABUSE

- Call our HOTLINE at 47AUDIT(472.8348)
- Visit our website at www.opaguam.org
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- Or visit us at Suite 401 DNA Building in Hagåtña

All information will be held in strict confidence.



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