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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH UTILITIES CORPORATION,)	Civil Action No. 96-626
)	
Petitioner,)	
)	
v.)	ORDER RE CROSS MOTIONS FOR
)	SUMMARY JUDGMENT
CIVIL SERVICE COMMISSION and,)	
MARIA C. DELOS SANTOS,)	
)	
Respondents.)	

This matter came before the Court upon Petitioner Commonwealth Utilities Corporation's ("CUC") motion for summary judgment requesting the Court to set aside the Civil Service Commission Grievance Decision, CSC No. 95-0005, *In the Matter of the Grievance of Maria C. Delos Santos* (April 25, 1995) ("Decision 5"). Also before the Court is Respondent Civil Service Commission's ("the Commission") motion for partial summary judgment requesting a declaration that the Commission had authority to issue Decision 5. Respondent Maria Delos Santos joined the Commission's motion.

On June 12, 1997, the Court ordered the parties to brief the issue of whether CUC waived its right to challenge the Commission's authority to conduct a grievance hearing for a probationary employee by participating in the grievance hearing. All parties have submitted briefs on this issue, each concurring that CUC had not waived any rights to challenge the Commission's

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1 subject matter jurisdiction by participating in the grievance hearing.

2 The Court has considered the parties remaining arguments and now renders its decision.

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4 **I. FACTS**

5 Maria Delos Santos (“Ms. Delos Santos”) was a probationary period civil service employee
6 working as a Computer Specialist I for CUC. She began her civil service probationary period on
7 February 5, 1995. On July 31, 1995, while still on probation, Ms. Delos Santos received a letter from
8 CUC terminating her employment with CUC effective July 8, 1995 (“notice of termination”). The
9 notice of termination also stated that “. . . since you are still under probationary period, your
10 termination will be effective fourteen (14) days from the date of this letter . . . ” or August 14,
11 1995. As the basis for Ms. Delos Santos’ termination, CUC cited Ms. Delos Santos’ tardiness,
12 and her being absent for more than 500 hours during the six month probationary period.

13 On October 4, 1995, Ms. Delos Santos wrote to the Commission alleging that she had not
14 received proper notice of her termination and that CUC had mistreated her. In response, the
15 Commission conducted an employee grievance hearing. CUC participated fully in these
16 proceedings. Following the hearing, the Commission concluded that CUC had improperly
17 terminated Ms. Delos Santos. In addition, the Commission found that a substantial amount of
18 Ms. Delos Santos’ absence from work had been mischaracterized as “Absent without Leave”
19 days, as opposed to “Leave Without Pay” days. Accordingly, on April 22, 1996, the
20 Commission issued Decision 5, ordering CUC to rescind Ms. Delos Santos’ termination, to
21 recharacterize her attendance record, to provide her with back pay and benefits, and to grant her
22 an additional six month probationary period.

23 On May 28, 1996, CUC filed a petition for judicial review pursuant to the Administrative
24 Procedures Act (“APA”). *See* 1 CMC §9112. CUC now contends that the Commission had no
25 authority to issue Decision 5 because the Personnel Service System Rules and Regulations
26 (“PSSRR”) specifically exclude probationary employees from the right to a grievance hearing.
27 *See* PSSRR Part III.D(2(L)(3). In response, the Commission admits that Ms. Delos Santos was a
28

1 probationary employee, and that the PSSRR does not entitle probationary employees to a
2 grievance hearing. Nevertheless, the Commission contends that 1 CMC §§ 8111 et seq. (The
3 Commission’s enabling legislation), gives the Commission the authority to grant a grievance
4 hearing to a probationary employee even though such hearings are specifically excluded in the
5 PSSRR.

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7 **II. ISSUE**

8 Whether the Commission had the authority to provide a grievance hearing to a terminated
9 probationary employee where such hearings are specifically excluded in the PSSRR.

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11 **III. ANALYSIS**

12 **A. Although The Commission Has Legislative Authority To Hear Grievances Of**
13 **Probationary Employees, The PSSRR Prohibits Such A Hearing.**

14 Article XX Section 1 of the CNMI Constitution provides that:

15 Civil Service: The legislature shall provide for a non-partisan and independent civil
16 service with the duty to establish and administer personnel policies for the
17 Commonwealth Government. . . . The commission’s authority shall extend to
18 positions other than those filled by election or by appointment of the governor in
19 the departments and agencies of the executive branch and in the administrative
20 staffs of the legislative and judicial branches.

21 In accordance with this Constitutional provision, the CNMI legislature created the
22 Commission and empowered it with the responsibility for assuring governmental compliance with
23 laws and regulations regarding government personnel. According to the Commission’s enabling
24 legislation, the Commission has the power to assure governmental compliance by “hear[ing] and
25 decid[ing] appeals of employees for . . . dismissals from the Civil Service.” 1 CMC § 8116(c).
26 This legislative authority does not differentiate between permanent and probationary employees.
27 Thus, the legislature granted the Commission the authority to hear appeals and render decisions
28 regarding *all classes* of government employees.

1 Although the legislature granted the Commission broad authority to hear employee
2 grievances, the civil service regulations existing at the time of this dispute, as set forth in the
3 PSSRR, demonstrate that the Commission differentiates between probationary employees and
4 permanent employees. Most important is the prohibition against granting probationary employee's
5 access to grievance procedures. This prohibition is set forth in three different places in the
6 PSSRR: Part III.B3A, Part III.D2L(3) and Part III.G4. With regard to dismissing employees
7 during the probation period, the PSSRR provides as follows:

8 L. Separation During Probation

- 9 (1) If it becomes evident during the probationary period that the
10 employee lacks the ability, attitude or desire to become an efficient
11 and productive employee in the position to which appointed, or there
12 is lack of funds or work to be done, that employee shall be separated
13 from the service.
- 14 (2) Appointing authorities who find it necessary to separate an employee
15 during probation shall provide the employee with not less than
16 fourteen (14) calendar days notice, in writing, specifying the reasons
17 for the separation. The employee shall be afforded the right to
18 discuss the situation with the management official next above the one
19 initiating the separation. If such management official does not make
20 a final decision known to the employee before the separation date,
21 the employee may seek the assistance of the Personnel Officer to
22 have the separation date extended for an additional fourteen (14)
23 calendar days. The Personnel Officer may reject such request for
24 good cause.
- 25 (3) *Grievance, adverse action or reduction-in-force procedures do not
26 apply to separations during probation.*

27 PSSRR Part III.D2L(1-3) (emphasis added).

28 Despite the PSSRR's prohibition against conducting grievance hearings for probationary
employees, the Commission granted a grievance hearing to Ms. Delos Santos. Following the
hearing the Commission issued Decision 5 in which it made the following finding:

Although a probationary employee has no right to challenge a termination through
either a grievance process or adverse process, the Commission has jurisdiction to
hear the grievance of Ms. Delos Santos. The Commission has the authority to
establish rules and regulations concerning terminations from the Civil Service. *See*
1 CMC § 8117(a) and (c). The Commission established regulations governing the
way probationary employees are to be terminated. The Commission also has the
power to "perform any other lawful acts . . . deemed by it to be necessary to carry

1 out its duties under [the Civil Service] Act.” 1 CMC § 8116(e). The power to
2 promulgate regulations must include the power to enforce the regulations.

3 Therefore, the Commission can hear the grievance of this probationary employee
4 who has presented some evidence that an agency, whose personnel policies are
prescribed by the Commission, violated Commission regulations in processing her
5 termination. Otherwise, the Commission would not be able to assure compliance
6 with regulations dealing with treatment of probationary employees.

7 Decision 5 at pp. 4-5. Thus, after admitting that Ms. Delos Santos had no right to a grievance
8 hearing, the Commission nevertheless conducted a grievance hearing.

9 In order for the Commission to amend its rules and regulations it must follow specific
10 statutory guidelines. According to Section 9102 of the APA, the Registrar of Corporations has an
11 obligation to publish: “(2) Newly adopted rules other than regulations.” The APA underscores
12 the importance of publishing newly adopted rules and regulations to satisfy fundamental rights of
13 notice and due process:

14 No agency rule, order, or decision is valid or effective against any person or party
15 nor may it be invoked by the agency until the rule, order, or decision has been
16 published [in the Commonwealth Register] and has been filed with the Registrar of
17 Corporations and the Governor. This provision is not applicable in favor of any
18 person or party who has actual knowledge thereof.

19 1 CMC § 9102 (emphasis added).

20 An agency’s obligation to follow the APA in adopting new rules which are contrary to its
21 established written rules is exemplified by *National Family Planning v. Sullivan*, 979 F.2d
22 227(D.C.Cir. 1992), which was cited by CUC. In *National Family*, the Court was asked to
23 determine whether an agency could alter its rules without following the public notice requirements
24 of the APA. The *National Family* court made the following determination:

25 When an agency promulgates a legislative regulation by notice and comment
26 directly affecting the conduct of both agency personnel and members of the public,
27 whose meaning the agency announces as clear and definitive to the public . . . it
28 may not subsequently repudiate that announced meaning and substitute for it a
totally different meaning without proceeding through the notice and comment
rulemaking normally required for amendments of a rule. To sanction any other
course would render the requirements of [notice] basically superfluous in legislative
rulemaking by permitting agencies to alter their requirements for affected public
members at will through the ingenious device of “reinterpreting” their own rule.

National Family at 231-32. (emphasis added.) The *National Family* court further explains:

1 “Similarly, an agency issuing a legislative rule is itself bound by the rule until that rule is
2 amended or revoked.” *National Family* at 234 (cites omitted.)

3 The Commission is thus prohibited from adopting rules which are contrary to the PSSRR
4 without first following the rule making procedure established in the APA. If the Commission
5 decides that probationary employees should have the right to a grievance hearing, it must amend
6 its own rules and regulations to eliminate the prohibition against grievance hearings for
7 probationary employees.

8 Finally, the Court rejects Ms. Delos Santos’ argument that CUC was required to give her
9 notice of termination 15 days prior to the end of her six month probationary period.^{1/} Ms. Delos
10 Santos’ argument on notice would effectively convert her six month probationary period to a five
11 and one half month probationary period (six months minus 15 days notice). To do so would
12 violate the express language of PSSRR Part III.B3A, which requires that “the appointee shall
13 serve a period of six (6) months from the beginning of the probationary appointment” The
14 Court finds that CUC’s notice of termination was timely in that it was given to Ms. Delos Santos
15 during her six month probationary period.

16 IV. CONCLUSION

17 For the Foregoing reasons, the Court **Denies** the Commission’s motion for summary
18 judgment, and **Grants** Petitioner Commonwealth Utilities Corporation motion for summary
19 judgment to set aside the Civil Service Commission Grievance Decision, CSC No. 95-0005, *In the*
20 *Matter of the Grievance of Maria C. Delos Santos* (April 25, 1995) (“Decision 5”). In doing so,
21 the Court finds that the Commission acted beyond its discretionary authority and in direct
22 contravention to the PSSRR when it conducted a grievance hearing for Ms. Delos Santos, a
23 probationary employee. Until the PSSRR is amended, a probationary employee’s opportunity to
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25 ^{1/} According to Ms. Delos Santos, she automatically became a permanent employee on August 5,
26 1995, the day after her probationary period ended. Ms. Delos Santos received the termination letter
27 on July 31, 1995. Pursuant to PSSRR Part III.D2(L)(2), CUC was required to give Ms. Delos Santos
28 15 days notice prior to termination. Consequently, her termination would become effective on August
14, 1995.

1 formally challenge a dismissal from a governmental agency is limited to filing an action in the
2 Superior Court.

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So ORDERED this 2nd day of July, 1997.



ALEXANDRO C. CASTRO, Presiding Judge