IN THE SUPREME COURT OF GUAM

IN THE MATTER OF:
GUAM MEMORIAL HOSPITAL AUTHORITY,
Petitioner-Appellee,

v.

CIVIL SERVICE COMMISSION,
Respondent,

and

EVANGELINE P. CHACO,
Real Party in Interest-Appellant.

Supreme Court Case No. CVA13-032
Superior Court Case No. SP0051-12

AMENDED OPINION ON REHEARING

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Appeal from the Superior Court of Guam
Argued and submitted on May 9, 2014
Hagåtña, Guam

Appearing for Real Party in Interest-Appellant:
William B. Pole, *Esq.*
Law Offices of Gumataotao & Pole
115 San Ramon St., Ste. 301
Hagåtña, GU 96910

Appearing for Petitioner-Appellee:
Minakshi V. Hemlani, *Esq.*
Fisher & Assocs.
De La Corte Bldg.
167 E. Marine Corps Dr., Ste. 101
Hagåtña, GU 96910

Appearing for Respondent:
Vanessa W. Ji, *Esq.*
The Law Office of Vanessa Ji, P.C.
BankPacific Bldg.
166 W. Marine Corps Dr., Ste. 102
Dededo, GU 96929

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

TORRES, C.J.:

[1] This Amended Opinion supersedes in its entirety the prior opinion of this court, *Guam Memorial Hospital Authority v. Civil Service Commission (Chaco)*, 2014 Guam 27. Real Party in Interest-Appellant Evangeline P. Chaco was employed at Guam Memorial Hospital Authority ("GMHA") as a mammography technologist and was terminated by GMHA for performing work outside her scope of practice and for ethical and confidentiality violations. Chaco appealed her termination to the Civil Service Commission ("CSC") which, pursuant to its authority under 4 GCA § 4406,[1] issued a decision and judgment that modified Chaco's adverse action from a termination to a 30-day suspension. GMHA filed a petition for judicial review with the Superior Court of Guam, which GMHA later amended. Chaco filed a response to the Amended Petition for Judicial Review that was stricken by the trial court because the court found that no answer was permitted under the special procedures for a writ of review and the court could issue a writ to the CSC without notice and without a hearing. The Superior Court subsequently found that the CSC failed to follow the standard set forth in 4 GCA § 4403(d)[2] and annulled the CSC's decision and reinstated Chaco's termination. On appeal, Chaco challenges both the Superior Court's ruling which annulled the CSC's decision and the Superior Court's order to strike Chaco's written response to the Amended Petition for Judicial Review.

[1] Title 4 GCA § 4406 provides in pertinent part that the CSC "may sustain, modify or revoke the [adverse] action taken. The decision of the Commission or appropriate entity shall be final, but subject to judicial review." 4 GCA § 4406 (2005).

[2] Title 4 GCA § 4403(d) authorizes the CSC to "investigate and set aside and declare null and void any personnel action of an employee in the classified service if the Commission finds after conducting the necessary investigation that the personnel action was taken in violation of personnel laws or rules. . . . " 4 GCA § 4403(d) (2005).

[2] For the reasons set forth below, we reverse the Superior Court's decision annulling the CSC's decision and judgment and reinstating Chaco's termination. We also reverse the Superior Court's order striking Chaco's written response to the Amended Petition for Judicial Review. We remand for a determination of the appropriate amount of attorney's fees to be awarded in this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Chaco was employed in the classified service as a mammography technologist with GMHA. In 2011, GMHA served Chaco a notice of proposed adverse action. Chaco met with the then GMHA interim administrator to orally respond to the charges. After considering Chaco's response, GMHA issued a final adverse action terminating Chaco's employment. As grounds for the adverse action, Chaco was cited for performing work outside the scope of practice, and for ethical and confidentiality violations. Specifically, Chaco was found to have accessed, on more than one occasion, the protected health information of a patient for whom Chaco had no such authorization. Although the patient was a blood relative of Chaco, Chaco had no reason in the ordinary course of her work to access that information or to enter the neo-natal intensive care unit, which Chaco did to visit the patient. Before her termination, Chaco had not been subject to prior discipline.

[4] Chaco appealed to the CSC and after a hearing on the merits, the CSC found by a unanimous vote that Chaco engaged in conduct outside of her described duties and in violation of hospital policy. The CSC also found that GMHA failed to utilize progressive discipline. Pursuant to its authority under 4 GCA § 4406, the CSC, by a vote of 4 to 2, modified Chaco's adverse action from termination to a 30-day suspension.

[5] GMHA filed a petition for judicial review with the trial court, which GMHA later amended following the trial court's order that the petition for judicial review had to be verified in accordance with 7 GCA § 31103. Chaco filed a Response to the Amended Petition for Judicial Review asserting that Chaco had not been properly served with the amended petition, but still requesting that the court uphold the decision of the CSC and award attorney fees and costs.

[6] Thereafter, the trial court, *sua sponte*, issued an order striking Chaco's Response to the Amended Petition for Judicial Review. The court found that the Guam Rules of Civil Procedure are inapplicable to a petition for a writ of review and a response may not be filed in a writ of review proceeding under Guam law unless specifically requested and permitted by the court. The court determined that the method by which review may be obtained was "solely governed by the statutory sections 7 GCA § 31101, *et. seq.*" and the court could issue the writ without notice and without a hearing. Record on Appeal ("RA"), tab 16 at 6 (Order, May 11, 2012). Only after the writ is issued and a return of the transcripts are made would the parties be entitled to a hearing. The court then issued a writ of review to the CSC, ordered the CSC to certify a transcript of the record and proceedings with the CSC,[3] and scheduled a hearing date after which the court would "determine judgment either affirming, annulling, or modifying the proceedings below, in accordance with 7 GCA §§ 31108 and 31109." *Id.* at 9.

[7] The CSC later filed for leave to request that the court reconsider that portion of its prior order requiring the CSC to provide certified copies of the adverse action proceedings, asking instead that GMHA provide the transcripts. Chaco also filed a motion asking the court to

[3] The trial court relied on 7 GCA § 31105 to "command" the CSC to certify a transcript of the record and proceedings even though 4 GCA § 4406, which governs adverse action appeals, explicitly provides that GMHA as the party who appealed the CSC's decision is responsible for providing certified transcripts of hearings and shall bear associated costs. RA, tab 16 at 8 (Order). The trial court's misplaced reliance on the statutory provisions governing writs of review is further discussed in IV.A below.

reconsider its prior order striking her response pursuant to Guam Rules of Civil Procedure ("GRCP") Rules 59(e) and 60(b)(6), and subsequently filed an amended motion. After a hearing, the trial court denied Chaco's amended motion for reconsideration.

[8] GMHA also sought instruction from the court regarding the preparation of the transcripts from the CSC proceedings because the poor audio quality of the recording prevented completion of the transcripts. At the hearing on the petition for judicial review, the trial court determined that the transcripts of the CSC proceedings were not necessary where the inquiry before the trial court was the CSC's conclusions of law—not its findings of fact.[4] After the hearing, the trial court issued its final decision and order on GMHA's petition for judicial review. The trial court held that the CSC failed to follow the standard set forth in 4 GCA § 4403(d) to set aside or declare null and void the action of GMHA, and the CSC was required by the CSC Hearing Procedures CSC-400(a)(2) and CSC-400(B)(2)[5] to review only for procedural compliance in effecting the adverse action and to sustain the adverse action if GMHA proved the charges against Chaco. The trial court also found that the CSC did not specify with sufficient detail the reasons for modification under CSC-400(4),[6] therefore, no modification was permitted, and the CSC was required to uphold the adverse action. Accordingly, the trial court annulled the CSC modification and reinstated Chaco's termination of employment.

[9] Chaco timely appealed.

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[4] The parties did not order any trial court transcripts of this hearing, but they do not dispute that the trial court decided, and at Oral Argument on appeal the parties agreed, that the court could proceed with its judicial review of the CSC decision without any transcripts of the CSC proceedings.

[5] The trial court cited to the CSC Rules of Procedure for Adverse Action Appeals before these rules were amended in March 1, 2010. The prior rules were not substantively different from the rules amended in 2010, but the correct citations should have been to CSC AA R.11.5.1 and 11.7.1.

[6] This citation should have been to CSC AA R.11.7.3.

II. JURISDICTION

[10] This court has jurisdiction over an appeal from a final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-163 (2014)) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[11] "Generally, where the standard of judicial review of an agency action is enunciated by regulation or statute, such standard of review will govern." *Fagan v. Dell'Isola*, 2006 Guam 11 ¶ 9. Title 4 GCA § 4407(a) provides that in an adverse action appeal to the CSC, "the burden of proof shall be upon the [GMHA] to show clearly and convincingly that the action of [GMHA] was correct." 4 GCA § 4407(a) (2005). The CSC may sustain, modify or revoke the adverse action taken, and its decision is "final, but subject to judicial review." 4 GCA § 4406. The standard for the judicial review of the CSC's decision, however, is not specified in the statute.

[12] GMHA asserts that the trial court is required to review *de novo* an administrative agency's conclusions of law and that the agency's findings of fact are reviewed under the substantial evidence standard. In her reply brief, Chaco, relying on the U.S. Supreme Court's decision in *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013), argues that because the Legislature did not state how the CSC should modify adverse actions, the CSC promulgated its own rules and regulations for adverse action appeals, and deference is owed to the CSC's decision to modify Chaco's adverse action based upon her employment record.

[13] In *City of Arlington*, the Supreme Court reiterated the standard for reviewing an agency's construction of a statute that it established in the seminal case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In reviewing an agency's construction of a statute, the court must reject those constructions that are contrary to clear congressional intent

or frustrate the policy that Congress sought to implement. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (establishing two-part test for reviewing an agency's interpretation of a statute). When a statute is silent or ambiguous on a particular point, the court may defer to the agency's interpretation. *See id.* at 843. Review is limited to whether the agency's conclusion is based on a permissible construction of the statute. *Id.* Thus, there may be deference to an agency's reasonable interpretation of a statutory provision where Congress has left open the question of the agency's discretion but no deference is owed to an agency when "Congress has directly spoken to the precise question at issue." *Id.* at 842.

[14] Here, the trial court is not reviewing the CSC's interpretation of an ambiguous statute left to it by the legislature. Title 4 GCA § 4406 expressly allows the CSC to sustain, modify or revoke adverse actions. GMHA also does not dispute that the CSC has authority to modify adverse actions but instead simply questions whether the CSC's modification of Chaco's adverse action was in accordance with law or supported by substantial evidence. Thus, the *Chevron* deference afforded to an agency's statutory interpretation does not apply to this case.

[15] Instead, the standard of review for an agency's factual findings is the substantial evidence standard. *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999) ("A reviewing court reviews an agency's reasoning to determine whether it is 'arbitrary' or 'capricious,' or, if bound up with a record-based factual conclusion, to determine whether it is supported by 'substantial evidence.'"); *see also MHC Operating Ltd. P'ship v. City of San Jose*, 130 Cal. Rptr. 2d 564, 573-75 (Ct. App. 2003); *Hagopian v. State*, 167 Cal. Rptr. 3d 221, 228 (Ct. App. 2014); *Toohey v. Nitze*, 429 F.2d 1332, 1334 (9th Cir. 1970); 5 GCA § 9240 (2005) ("Judicial review may be had of any agency decision by any party affected adversely by it. If the agency decision is not in accordance with law or not supported by substantial evidence, the court shall order the agency to

take action according to law or the evidence."). "Substantial evidence is more than a mere scintilla, but less than a preponderance." *NLRB v. Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1053-54 (9th Cir. 2003) (internal quotation marks omitted). It means such relevant evidence as "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1054 (internal quotation marks omitted).

[16] The substantial evidence standard requires the appellate court to review the administrative record as a whole, weighing both the evidence that supports the agency's determination as well as the evidence that detracts from it. *See Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001). The standard, however, is "extremely deferential," and a reviewing court must uphold the agency's findings "unless the evidence presented would *compel* a reasonable factfinder to reach a contrary result." *See Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir. 2003), *amended by* 339 F.3d 1012 (9th Cir. 2003) (citation and internal quotation marks omitted); *Krull v. SEC*, 248 F.3d 907, 911 (9th Cir. 2001) (noting court must "weigh pros and cons in the whole record with a deferential eye"). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the agency. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002); *see also Sule v. Guam Bd. of Dental Exam'rs*, 2008 Guam 20 ¶ 26 ("Under a substantial evidence standard of review . . . [a]n appellate court must not do its own weighing of the evidence or substitute its factual determinations for that of the lower court.").

[17] "The interpretation of a statute is a legal question subject to *de novo* review." *Data Mgmt. Res., LLC v. Office of Pub. Accountability*, 2013 Guam 27 ¶ 17 (quoting *Guerrero v. Santo Thomas*, 2010 Guam 11 ¶ 8).

IV. ANALYSIS

[18] During the course of the proceedings for judicial review of the CSC's decision modifying Chaco's termination, the trial court made two distinct rulings which Chaco appealed. First, the trial court struck Chaco's response to the petition for judicial review, ruling that the parties must follow the writ of review procedures found in 7 GCA § 31101 *et seq.* when filing a petition for judicial review and that no answer or response to the petition is permitted under those procedures. Second, the trial court annulled the CSC's decision modifying Chaco's termination because, *inter alia*, the CSC failed to follow the standard set forth in 4 GCA § 4403(d). We discuss each of these rulings in turn.

A. Procedures Applicable to Petitions for Judicial Review

[19] Before deciding whether the trial court erred in striking Chaco's response to GMHA's petition for judicial review of the CSC's decision, we must review the procedures which govern the proceedings when a petition for judicial review of a CSC adverse action decision is filed. In *Carlson v. Perez*, this court held "that the proper way for classified employees of the government of Guam or any of its instrumentalities, corporations or agencies to utilize the right of judicial review of CSC decisions is by filing a 'Petition for Judicial Review.'" 2007 Guam 6 ¶ 65; *see also Perez v. Judicial Council of Guam*, 2002 Guam 12 ¶ 12. We also stated in *Carlson* that "reliance on the procedures of the writ of mandate[7] is inappropriate because the extraordinary remedy of mandate is discretionary and carries a threshold of satisfying certain statutory

[7] "[Writ of Mandate] may be issued by any court, [except a commissioner's court or police court,] to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person." 7 GCA § 31202 (2005). The writ of mandamus may also be denominated a writ of review. 7 GCA § 31201 (2005).

requirements, while review of a CSC adverse action decision should be heard as a matter of right, not discretion." 2007 Guam 6 ¶ 66.

[20] In *Data Management Resources*, this court further explained that although a petition for judicial review was developed in an ad hoc fashion, a writ is not synonymous with a petition for judicial review. 2013 Guam 27 ¶ 28 ("Petition for Judicial Review, coupled with a petition for an alternative writ of review, should not be equivocated with a writ or special proceeding standing alone.").

[21] The trial court found that GMHA's "Petition for Judicial Review primarily relies upon 4 GCA § 4406 as the statute conferring jurisdiction over a writ of review," and under *Carlson*, 7 GCA § 31101 *et seq.* "control[s] the Court's determination of this matter, procedurally, and therefore, the Court must follow the strictures set forth under the statutory scheme." RA, tab 16 at 3 (Order). Because the trial court determined that the method of review is governed solely by the statutory sections 7 GCA § 31101 *et seq.*, the court found that "the Guam Rules of Civil Procedure, which include requirements concerning answers, defenses, discovery, scheduling conferences, and trials (all of which are absurd in the context of judicial review) are not applicable." *Id.* at 6. The court further stated that notice to any of the parties was not required. We disagree.

[22] Although in *Carlson* we found that reliance on the procedures for a writ of mandate is inappropriate for a judicial review of a CSC adverse action decision, this finding does not require, as the trial court found, that the writ of review procedures should govern instead. *Carlson* explained that the extraordinary remedy of mandate is discretionary and carries a threshold of satisfying certain statutory requirements, while review of a CSC adverse action

decision should be heard as a matter of right, not discretion. 2007 Guam 6 ¶ 66. The same rationale applies to the procedures for writs of review.

[23] The grant of a writ of review[8] is discretionary, and there must not be an appeal or any plain, speedy, or adequate remedy. Judicial review of a CSC adverse action decision is a matter of right, not discretion. Moreover, 7 GCA § 31102 states that a "writ of review may be granted by any court, when an inferior tribunal . . . has exceed [sic] the jurisdiction of such tribunal." 7 GCA § 31102 (2005). Although the CSC is an inferior tribunal, the ability of the CSC to hear appeals of adverse action decisions taken to suspend, demote or dismiss an employee from the classified service is not in excess of its jurisdiction. The CSC is granted express statutory authority to hear and decide adverse action appeals. 4 GCA § 4406. Likewise, the CSC has the ability to sustain, modify or revoke the adverse action taken. *Id.* Because the CSC has not exceeded its statutorily granted jurisdiction, it would be inappropriate to issue a writ of review or rely on the writ of review procedures. The trial court erred in determining that the "method by which [petitions for judicial review] may be obtained is solely governed by the statutory sections 7 GCA § 31101, *et seq.*," applicable to a writ of review. RA, tab 16 at 6 (Order).

[24] We recognize that 4 GCA § 4406 confers jurisdiction on the trial court to review CSC decisions to sustain, modify or revoke adverse actions through a petition for judicial review, but that the procedural rules applicable to the exercise of this jurisdiction are not specifically pointed out by law or by rules of procedure adopted by this court. Nevertheless, 7 GCA § 7117 expressly states:

[8] "A writ of review may be granted by any court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceed [sic] the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." 7 GCA § 31102.

> When jurisdiction is by law conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of the proceeding be not specifically pointed out by law or by rules of procedure adopted by the Supreme Court, any suitable process or mode of proceedings may be adopted which may appear most conformable to the spirit of this Title.

7 GCA § 7117 (2005). The writ of review procedures were not suitable or appropriate for petitions of judicial review, and the trial court should have looked to other procedural rules for guidance.

[25] Turning to the specific question of whether the trial court should have struck Chaco's written response to the petition for judicial review, the trial court determined that the GRCP did not apply because the proceeding was governed solely by the writ of review procedures. RA, tab 16 at 6 (Order). The requirements concerning "answers, defenses, discovery, scheduling conferences, and trials (all of which are absurd in the context of judicial review)" were therefore, according to the trial court, not applicable. *Id.* The trial court continued by stating that no notice at all is required to be given to any of the parties prior to the issuance of the writ because a writ of review "merely issues to a lower tribunal to certify a transcript of the record to the reviewing Court" and "does not implicate any substantive or fundamental rights of the Real Party in Interest." *Id.* at 7. Accordingly, the trial court held that no answer to the amended petition would be permitted and struck Chaco's response. *Id.* at 8-9. This was in error.

[26] To the trial court's credit, it acknowledged that the GRCP expressly states that there is one form of civil action which includes special proceedings and that the GRCP would seem to apply to petitions for judicial review.[9] However, the court found that the specific statutory

[9] The trial court cited GRCP 1 and 2. GRCP 1 states in pertinent part: "These rules govern the procedure in all suits of a civil nature, including civil actions, domestic actions, special proceedings and criminal matters of which the court has jurisdiction. . . . They shall be construed and administered to secure a just, speedy, and inexpensive determination of every action." Guam R. Civ. P. 1. GRCP 2 states: "There shall be one form of action

procedures governing writs set forth in the Guam Code were applicable to petitions for judicial review and "trump the general civil rules for two reasons: first, statutes enacted by the legislature cannot be overruled by non-legislatively promulgated rules; and second, there is an important distinction between the Federal Rules of Civil Procedure" in that most of the extraordinary writs have been abolished by the Federal Rules of Civil Procedure, while Guam has retained all of its special writ statutes under the label "Civil Special Proceedings." *Id.* at 3-4.

[27] We have already explained why the procedural requirements governing a writ of review were not appropriate to apply to a petition for judicial review and why the trial court erred in so holding. Consequently, the trial court's perceived impediments to applying the GRCP disappear. Moreover, in contrast to the trial court's ruling, Chaco's substantive rights were implicated in the judicial review. On review, the trial court annulled the CSC's modification and reinstated Chaco's termination. The merits of the case were decided without Chaco being afforded the opportunity to defend the appeal via a written response, which Chaco asserts violates due process. Clearly Chaco should have been afforded a right to notice and the ability to file a response. *See, e.g.*, Guam R. Civ. P. 5, 7.

[28] Ordinarily, the violation of such a right alone would not only constitute error but require that the matter be remanded to allow Chaco the opportunity to file an answer to the petition. However, Chaco was given the opportunity to answer and present oral argument supporting the CSC's decision at the hearing on the petition. In addition, the parties stipulated to the CSC's findings of fact. Although Chaco had a right to file a written response, she does not demonstrate any prejudice she may have suffered as a consequence of the court striking a written response.

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to be known as 'civil action.' Within the category of 'civil action' there are the following kinds of cases: civil cases, domestic cases, and special proceedings." Guam R. Civ. P. 2.

This is not surprising considering she was permitted to answer the petition and be heard during oral argument and the facts were not in dispute. Thus, although we find the trial court erred in applying the writ of review procedures to a petition for judicial review and reverse its decision to strike Chaco's response, we do not need to remand. In the interest of providing guidance to the trial court and to the practicing bar, and until rules of procedure are adopted by the Supreme Court, in future cases involving petitions for judicial review of CSC decisions, the trial court should utilize applicable provisions of the Guam Rules of Civil Procedure "which may appear most conformable to the spirit of . . . Title [7]." 7 GCA § 7117.

[29] We will now review the trial court's order annulling the CSC's modification of Chaco's termination.

B. Trial Court's Annulment of the Civil Service Commission's Decision

1. Applicability of 4 GCA § 4403(d)

[30] The trial court determined that pursuant to 4 GCA § 4403(d), the CSC may investigate and set aside and declare null and void any personnel action of an employee in the classified service if the CSC finds after conducting the necessary investigation that the personnel action was taken in violation of personnel laws or rules. The court held that there was no requirement in GMHA's personnel regulations that GMHA use progressive discipline and the CSC failed to follow the standard set forth in 4 GCA § 4403(d). In its decision and order, the trial court did not mention 4 GCA § 4403(b), which provides that the CSC *shall* hear appeals from the adverse actions taken to suspend, demote or dismiss an employee from the classified service *if* such right of appeal to the CSC is established in the personnel rules governing the employee. *See* 4 GCA § 4403(b).

[31] Chaco argues the trial court erred in analyzing Chaco's appeal under the standard set forth in 4 GCA § 4403(d). Appellant's Br. at 9 (Dec. 31, 2013). Chaco contends that a plain reading of section 4403(b) confers authority to the CSC over adverse actions of classified employees, while section 4403(d) confers authority to the CSC over all other personnel actions. *Id.* She further points out that section 4403(d) states that it "shall not be deemed to permit appeals by employees from adverse actions not covered in Subsection (b) above," denoting that an adverse action under section 4403(b) is clearly distinct from a personnel action described in section 4403(d). *Id.* Moreover Chaco asserts that it is obvious sections 4403(d) and 4403(b) are independent sections and not meant to be read together, because under section 4403(d) the CSC "may investigate . . . any personnel action," while section 4403(b) requires that the CSC "shall hear appeals from the adverse actions."

[32] In *Guam Federation of Teachers v. Government of Guam*, this court reiterated that an adverse action is one in which an agency demotes, suspends or dismisses a classified employee, while a personnel action lies outside of those parameters. 2013 Guam 14 ¶¶ 52-56; *see also Santos v. Gov't of Guam*, 2012 Guam 9 ¶¶ 7-10. A plain reading of 4 GCA § 4403 reflects that the CSC has the power, duty and responsibility to hear appeals from adverse actions taken to suspend, demote or dismiss an employee from the classified service pursuant to section 4403(b), while section 4403(d) gives the CSC the discretion to investigate and set aside other personnel actions. It is undisputed that Chaco, a classified employee, was dismissed by the adverse action of GMHA. Therefore, the adverse action by GMHA is properly governed by 4 GCA § 4403(b), not section 4403(d).

[33] The trial court erroneously relied on section 4403(d) when it held that the CSC failed to follow the standard set forth in section 4403(d) and GMHA's action may only be set aside if

taken in violation of GMHA's personnel laws or rules. The trial court should have instead looked to section 4403(b), which does not have the same limiting language found in section 4403(d). Section 4403(d) did not apply to Chaco's adverse action appeal, and the CSC was not limited in its ability to sustain, modify or revoke GMHA's adverse action by the standard found in section 4403(d). Indeed, 4 GCA § 4406, which governs adverse action appeals to the CSC, expressly gives the CSC the authority to sustain, modify or revoke any adverse action taken. We now will examine the trial court's decision annulling the CSC's modification of the adverse action taken by GMHA and reinstating Chaco's termination.

2. Civil Service Commission's Modification of Chaco's Adverse Action

[34] CSC Rule 11.7.3 allows for the modification of adverse actions if the CSC finds the modification is warranted based on the employee's past record, gravity of the offense or circumstances of the case.[10] AA R. 11.7.3; *see also* CSC-400(B)(4). Importantly, the CSC may modify the adverse action even if management proves the charges. AA R. 11.7.3. Thus, Rule 11.7.3 conveys the CSC with broad powers to modify with the exception that the CSC may not modify an adverse action to the employee's detriment.

[35] In its decision modifying Chaco's termination, the CSC ruled that "Chaco engaged in a course of conduct outside her prescribed duties and in violation of hospital policy, it also finds

[10] Rule 11.7.3 provides:

> If Management proves the charges, but the CSC finds, that because of the Employee's past record or the gravity of the offense, or the facts and circumstances of the case, that the adverse action should be modified, it may modify the adverse action accordingly. The reasons for such modification shall be stated in the decision of the CSC.
>
> Any compensation or benefits due as a result of the modification shall be restored to the Employee. The CSC may not modify an adverse action to the Employee's detriment. In the event the CSC modifies the adverse action taken by Management, the CSC shall make a separate determination as to whether the Employee has prevailed for purposes of awarding attorney fees to the Employee.

AA R. 11.7.3.

Management failed to utilize progressive discipline." RA, tab 2 at Ex. A (Pet. for Judicial Review, Apr. 5, 2012). The trial court held that the CSC erroneously ruled GMHA was required to utilize progressive discipline. RA, tab 38 at 2 (Dec. & Order, Oct. 2, 2013). According to the trial court, the CSC did not cite any laws, rules or personnel policies of GMHA that make progressive discipline mandatory. *Id.* Because GMHA was empowered to terminate Chaco and her termination did not violate GMHA's personnel rules, the trial court ruled that the CSC failed to follow the standard set forth in 4 GCA § 4403(d) when it modified the termination. *Id.* at 3. The trial court further ruled that the CSC was required to uphold the adverse action because the CSC did not conduct a review of Chaco's record, gravity of offense, or sufficiently detail the reasons for modification under CSC-400(4). *Id.*

[36] GMHA echoes the trial court's decision by explaining its ability to terminate Chaco's employment without the utilization of progressive discipline. Appellee's Br. at 8 (Jan. 30, 2014). GMHA points out that Chaco was unanimously found by the CSC to have violated GMHA Policies No. 6420-1 and 6420-15 of the GMHA HIPAA Policy and Procedures Manual ("HIPAA Policy"). The purpose of HIPAA Policy 6420-1 is to establish clear expectations regarding all aspects of confidentiality pertaining to protected health information. HIPAA Policy 6420-1 makes clear that any breach of these confidentiality rules is considered extremely serious and may result in the immediate termination of the violator. HIPAA Policy 6420-1 at 9. HIPAA Policy 6420-15 applies to access to electronic protected health information, and failure to comply with this Policy will result in disciplinary actions as per the sanctions found in Policy 6420-8. HIPAA Policy 6420-8 relating to sanctions states that the violator will be disciplined in accordance with the gravity of the violation, and the sanctions may include, but are not limited to, re-training, verbal and written warnings, and immediate dismissal from employment. HIPAA

Policy 6420-8 at 2. GMHA argues that these policies allow for the immediate termination of an employee and do not require progressive discipline.

[37] Although it is true that no policy requires GMHA to utilize progressive discipline before terminating an employee for violation of GMHA Policies No. 6420-1 or 6420-15, the trial court fundamentally fails to recognize the CSC's express power to modify adverse actions and misreads the CSC's decision. The CSC acted in accordance with both its statutory powers to modify adverse actions and CSC Rule 11.7.3, which states that the CSC may modify an adverse action even if management proves the charges. AA R. 11.7.3. Contrary to the trial court's statement, the CSC did not find that GMHA was required to use progressive discipline before terminating Chaco, only finding that GMHA failed to utilize progressive discipline. The CSC also found Chaco had not been subject to prior discipline.

[38] More importantly, the trial court is required to sustain the CSC's decision if supported by substantial evidence. *See Dickinson*, 527 U.S. at 164; *MHC Operating Ltd. P'ship*, 130 Cal. Rptr. 2d 564; *Hagopian*, 167 Cal. Rptr. 3d 221.

[39] In considering the circumstances of this case, the CSC found that Chaco engaged in a course of conduct outside of her prescribed duties and in violation of hospital policy. RA, tab 2 at Ex. A (Pet. for Judicial Review). Specifically, the CSC found that Chaco engaged in confidentiality violations and entered a unit for the purpose of visiting her blood relative despite knowing the hospital policy restricting her access, but had no previous disciplinary history. *Id.* at 2-3. In accordance with these findings, the CSC stated that progressive discipline was not utilized and modified Chaco's adverse action from termination to a 30-day suspension.

[40] We disagree with the trial court's ruling that the CSC did not conduct a review of Chaco's past record, the gravity of the offense, the particular facts and circumstances, nor

specify with sufficient detail the reasons for modification set forth under CSC-400(4). The CSC held a hearing on the merits over a period of six days and issued a decision and judgment which included its findings of fact and discussion of its decision. The CSC found that Chaco engaged in conduct outside of her duties and in violation of hospital policy. The CSC also found that Chaco's unauthorized presence in the neo-natal intensive care unit was to visit a blood relative and that Chaco had not been subject to prior discipline. Pursuant to its authority under 4 GCA § 4406, the CSC decided to modify the adverse action from termination to a suspension of 30 days—the second harshest penalty only to that of termination. Clearly the CSC's decision was within its power under section 4406, in accordance with Rule 11.7.3, and supported by substantial evidence. Although the trial judge may have expected the CSC to provide additional reasons beyond those stated in its decision for modification of the adverse action taken by GMHA, the CSC satisfied its obligations under the rules of procedure for adverse actions. Nevertheless, in order to avoid future challenges to CSC modifications of adverse actions for the CSC's failure to state the reasons for such modification, it may behoove the CSC to be more specific about the reasons for modification.

C. Attorney's Fees

[41] Chaco's opening brief on appeal included a Guam Rules of Appellate Procedure ("GRAP") Rule 13(k) request for attorney's fees pursuant to 4 GCA § 4406.1 and 7 GCA § 26603. Pet. Reh'g, Ex. 1 (Rule 13(k) Req. for Att'y's Fees, Dec. 31, 2013). We overlooked the request for attorney's fees in our earlier Opinion and granted the Petition for Rehearing under GRAP 30 to address whether Chaco should be awarded attorney's fees under either statute. *See Guam Mem'l Hosp. Auth. v. Civil Serv. Comm'n*, 2014 Guam 27; *Guam Mem'l Hosp. Auth. v. Civil Serv. Comm'n*, CVA13-032 (Order (Mar. 13, 2015)). Whether or not an award of

attorney's fees is appropriate in this case is an issue of statutory interpretation reviewed *de novo* because the issue has not yet been addressed by either the CSC or the Superior Court. *Data Mgmt. Res.*, 2013 Guam 27 ¶ 17 (quoting *Guerrero*, 2010 Guam 11 ¶ 8).

[42] Because this request was made during an appeal of an adverse action, the applicable statute to determine whether attorney's fees are recoverable is 4 GCA § 4406.1. Title 4 GCA § 4406.1 provides, in pertinent part:

> If an employee in the classified service retains an attorney to represent him or her before the Civil Service Commission or other applicable administrative body to challenge an adverse action brought against the employee, and the employee prevails in whole or in part before the Civil Service Commission or other applicable administrative body or a withdrawal of the adverse action by the department, agency or instrumentality that brought the adverse action, the employee shall be awarded and paid costs, if any, and reasonable attorney's fees because of such attorney representation from funds of the department, agency, or instrumentality in which the employee was employed.

4 GCA § 4406.1 (2005).

[43] GMHA initially argues that this statute only allows award of attorney's fees incurred during representation of an appeal before the CSC and does not extend the award to fees incurred before the Superior or Supreme Court. Appellee's Br. for Reh'g at 3 (Apr. 23, 2015). Furthermore, GMHA maintains that because Chaco did not have representation at her appeal hearing before the CSC, she is not entitled to an award for fees incurred after that stage of the appeal. *Id.*

[44] Previously this court interpreted this statute to apply when the employee's claim is an appeal from an adverse action from which the employee ultimately prevails. *Blas v. Guam Customs & Quarantine Agency*, 2000 Guam 12 ¶ 38. In that case, we held that Blas was entitled to the attorney's fees ordered by the lower court and 4 GCA § 4406.1 did not bar his recovery of attorney's fees at stages following the CSC's review. *Id.* When an employee challenges an

adverse action through an appeal to the CSC, and, any subsequent judicial review, if the employee ultimately prevails in whole or in part after judicial review, that employee should recover attorney's fees. Chaco represented herself in front of the CSC, which led to a favorable modification of the adverse action, restoring her employment with GMHA. *Guam Mem'l Hosp.*, 2014 Guam 27 ¶ 4. GMHA then sought judicial review of the CSC's decision. *Id.* ¶ 5. Although the language of section 4406.1 for the recovery of attorney's fees seems restricted to representation before the CSC or another administrative body, we interpret the language of the statute more broadly to include the challenge of an adverse action brought against the employee until the matter is concluded. This includes any judicial review by the Superior Court of the decision of the CSC or any appeal of the Superior Court's decision.

[45] GMHA next argues that Chaco should not receive attorney's fees under 4 GCA § 4406.1 because the statute requires that the employee prevail in whole or in part in the appeal, and GMHA maintains that Chaco did not ultimately prevail in her appeal because she was still found in violation of her duties. Appellee's Br. for Reh'g at 3. GMHA argues that because the CSC found that GMHA prevailed on the merits in proving that Chaco violated her duties and hospital policies, the CSC would have decided against awarding attorney's fees. *Id.* Chaco insists that only a partial victory is required by statute and because the proposed action was modified by the CSC, entitling her to keep her job, she at least, partially prevailed by obtaining a favorable judgment. Appellant's Br. for Reh'g at 8 (Apr. 2, 2015).

[46] Making the determination of whether a party prevailed "requires the trial court to look at the lawsuit as a whole to determine which party, if any, prevailed." *Rahmani v. Park*, 2011 Guam 7 ¶ 64. "Generally, the prevailing party to a suit, for purposes of entitlement to recovery of costs in a contested case, ordinarily means the party achieving a favorable judgment." 20 Am.

Jur. 2d *Costs* § 8 (citing *Waxman v. Waxman*, 995 N.E.2d 1138 (Mass. App. Ct. 2013), *review denied*, 998 N.E.2d 343 (2013)). The statute requires only that the employee prevails in whole or in part, to be awarded reasonable attorney's fees and costs. *See* 4 GCA § 4406.1.

[47] GMHA distinguishes this case from *Blas*, where this court found an award of attorney's fees for the employee appropriate, because the employee in that case "did not violate employment policies," whereas in the present case, Chaco was still found to have violated her duties and hospital policies. Appellee's Br. for Reh'g at 4. Instead, GMHA points to an adverse action appeal case in which the CSC did not award attorney's fees where an employer had satisfied its burden on the merits, arguing that this case is more similar to that situation. *Id.* at 3 (citing *Quinene v. Guam Mem'l Hosp. Auth.*, Adverse Action Appeal Case No. 09-AA40D (Dec. & J., Feb. 26, 2013)). However, these arguments fail to consider that Chaco's adverse action appeal to the CSC resulted in modification of the adverse action from termination to a 30-day suspension.

[48] The Superior Court decision to annul the CSC's modification and uphold Chaco's termination by GMHA was ultimately reversed. This court reinstated the CSC's modification of the adverse action from termination to a suspension for a period of 30 days. Accordingly, Chaco prevailed in part and is entitled to her attorney's fees and costs that she incurred while prosecuting this appeal under section 4406.1 both at the Superior Court and Supreme Court. Furthermore, because the request for attorney's fees are recoverable under section 4406.1, we need not address the applicability of 7 GCA § 26603.

V. CONCLUSION

[49] Chaco should have been afforded an opportunity to file a written response to the petition for judicial review because the statutory provisions governing writs of review do not apply to a

petition for judicial review. Ordinarily, the violation of such a right would constitute the need for a remand, but Chaco was given the opportunity to answer and present oral argument supporting the CSC's decision at the hearing on the petition. Moreover, the parties stipulated to the CSC's findings of fact. Although Chaco had a right to file a written response, she did not demonstrate any prejudice she may have suffered as a consequence of the court striking her written response. Therefore, we find the trial court erred in applying the writ of review procedures to a petition for judicial review and reverse its decision to strike Chaco's response, but we do not need to remand on this issue.

[50] The trial court also erroneously relied on 4 GCA § 4403(d) when it held that the CSC failed to follow the standard set forth in section 4403(d) and GMHA's action may only be set aside if taken in violation of GMHA's personnel laws or rules. Section 4403(d) did not apply to Chaco's adverse action appeal, and the CSC was not limited in its ability to sustain, modify or revoke GMHA's adverse action by the standard found in section 4403(d). Furthermore, the CSC has authority to modify adverse actions based on 4 GCA § 4406 and Rule 11.7.3, and its decision was supported by substantial evidence. Accordingly, we **REVERSE, VACATE** the judgment, and reinstate the CSC's modification of the adverse action from termination to a suspension for a period of 30 days. We **REMAND** on the sole issue of determining the award of attorney's fees appropriate in this case.

Original Signed By: **F. Philip Carbullido**

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**

ROBERT J. TORRES
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam.

JUN 24 2015

By: Charlene T. Santos
Deputy Clerk
Supreme Court of Guam