IN THE SUPREME COURT OF GUAM

PORT AUTHORITY OF GUAM,
Petitioner-Appellant,

v.

CIVIL SERVICE COMMISSION,
Respondent-Appellee,

and

JOSE B. GUEVARA III,
Real Party in Interest-Appellee.

Supreme Court Case No.: CVA16-018
Superior Court Case No.: SP0125-13

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on June 2, 2017
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ALBERTO E. TOLENTINO, Justice *Pro Tempore*.

CARBULLIDO, J.:

[1] Petitioner-Appellant the Port Authority of Guam (the "Port") appeals from a final order entered by the Superior Court. In the special proceedings below, the Superior Court affirmed a Decision and Judgment entered by Respondent-Appellee Civil Service Commission (the "CSC") that voided the adverse action the Port took against Real Party in Interest-Appellee Jose B. Guevara III. For the reasons set forth below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Port Takes Adverse Action

[2] The Port hired Guevara for the position of Accountant I in 1997. On September 9, 2002, Guevara was elevated through a competitive hiring process to the position of Financial Affairs Controller and served in that position until his employment was terminated. In the weeks preceding his termination, the Port began an internal investigation regarding Guevara's certification, on October 16, 2012, that funds were available from the Port to pay a worker's compensation claim to former Port employee Bernadette Meno. On October 26, 2012, Guevara appeared before the Port's board to answer questions regarding the amounts certified for payment to Meno. Sixty-three days after Guevara certified Meno's worker's compensation claim, the Port served Guevara a Final Notice of Adverse Action dismissing him of his duties based on charges related to that certification. The Final Notice of Adverse Action advised Guevara of his right to appeal this decision.

B. Proceedings Before the CSC

[3] Guevara appealed his termination to the CSC. As part of those proceedings, Guevara filed a motion seeking to void the adverse action on the basis that the Port violated 4 GCA § 4406 by failing to notify him of the adverse action within 60 days from when management knew or should have known of the basis for such action. The Port argued in opposition that the 60-day window did not begin to run until October 26, the date Guevara appeared before the board.

[4] Following the scheduling deadline for the filing of pre-merits motions, Guevara sent the Port a "notice" bearing the caption of the CSC appeal that asserted the Port violated 4 GCA § 4406 by hiring Maria Taitano into the unclassified position of "controller" (hereinafter, the "Controller Notice"). Record on Appeal ("RA"), tab 27 (Suppl. Cert. of Record, Jan. 27, 2015); Excerpts of Record ("ER") at 553-54 (Jan. 9, 2017).[1] The Controller Notice stated in pertinent part: "Guevara was the Controller of the Port Authority as shown on the organizational chart provided by the port on its web site. The organizational chart shows there is not another controller's position other than the financial controller's position with the Port Authority." RA, tab 27 (Suppl. Cert. of Record); ER at 553-54 (citations omitted).

[5] In response to the Controller Notice, the Port filed a motion to dismiss Guevara's appeal to the CSC, arguing that the CSC lacked jurisdiction because Guevara was not a classified employee. The notice sent by Guevara's counsel was the only evidence relied upon by the Port in making its motion. Guevara opposed, arguing that the Port's motion should not be heard at all because it was filed after February 14, 2013, the deadline for pre-merits motions set by the CSC.

[1] The Certification of Record and Supplemental Certification of Record from the CSC to the Superior Court were not indexed. References to the Excerpts of Record are included to identify the specific page referenced in the Certification of Record or Supplemental Certification of Record.

Alternatively, Guevara argued that he was a classified employee, and he attached several documents to his submission to support this position, including: (i) a Notice of Rating for Financial Affairs Controller, Certification of Eligibles, and Notification of Personnel Action, which indicate that Guevara underwent a competitive hiring process to obtain the position of Financial Affairs Controller; (ii) several news articles in which Port representatives are quoted as stating that Guevara's position was classified; (iii) the approved budget for the finance division of the Port for FY2012 showing that no unclassified employees were employed in the finance division; and (iv) Guevara's periodic performance reviews, which unclassified employees are not required to undergo.

[6] The CSC held argument on both pending motions on June 6, 2013. Prior to this argument, the Port did not request to take live testimony at the motion hearing. The CSC first addressed the Port's motion regarding jurisdiction, finding that this motion was "submitted late" and, as a result, "based on our CSC Adverse Action Rule Number 9.2, Motion Filing Schedule and CSC Rule Number 10.1, Time for Submission of Documents," the Port's motion "would not be addressed." Transcript ("Tr.") at 6-8 (Hr'g, June 6, 2013). The Port argued at the motion hearing that it should be entitled to a second, separate hearing in which evidence would be formally taken—a request the CSC rejected. After hearing argument from both sides on Guevara's motion to void the adverse action, the CSC ruled 4-1 (with one abstention) in favor of Guevara.

[7] The CSC subsequently issued a written Decision and Judgment resolving both motions. The Decision and Judgment contained a separate section entitled "Jurisdiction," which stated: "The jurisdiction of the Civil Service Commission is based on upon [sic] the Organic Act of

Guam and 4 [GCA] § 4401 [*et seq.*]" RA, tab 19 (Cert. of Record, July 10, 2014); ER at 49. The CSC did not otherwise address the jurisdictional issues raised by the Port. On Guevara's motion, the CSC adopted the position put forth by Guevara, holding that "[t]he date when Management [of the Port] knew or should have known facts which form the basis of the adverse action is October 16, 2012." RA, tab 19 (Cert. of Record); ER at 51. The Port therefore violated 4 GCA § 4406 and the adverse action was accordingly "null and void." *Id.*

C. Proceedings Before the Superior Court

[8] Following the Decision and Judgment, the Port filed a Petition for Judicial Review in the Superior Court of Guam seeking to establish that the CSC had exceeded its authority in vacating the Port's adverse action against Guevara. Both parties submitted briefing regarding the applicable procedures that the court should undertake in resolving the petition. A certification of record was filed on July 10, 2014. Based upon the parties' filings and this initial certification of record, the Superior Court issued a Decision and Order (hereinafter, the "November 2014 Order"). On the issue of the CSC's jurisdiction, the Superior Court found that "no evidence was adduced to establish the CSC's jurisdiction, and the Port's motion to dismiss for lack of jurisdiction was disregarded as untimely." RA, tab 21 at 9 (Dec. & Order, Nov. 26, 2014). The court stated that, for this reason, it was "compelled to vacate the CSC's judgment." *Id.* But, relying on our decision in *Department of Agriculture v. Civil Service Commission (Rojas)*, 2009 Guam 19 (hereinafter, "*Rojas I*"), the court alternatively permitted the CSC to show cause why "the nature of Guevara's employment . . . was not a bar" to the CSC's jurisdiction. *Id.* The court stated that, in responding to this order to show cause, "[i]f the CSC can demonstrate that Guevara

was a classified employee and that its jurisdiction was proper, the Court will entertain the merits of the CSC's judgment. If not, the Court will order that the CSC vacate its judgment." *Id.*

[9] In response to the November 2014 Order, the CSC filed a written response, which was supported by a Declaration from Marla P. Masnayon, the case manager at the CSC who oversaw Guevara's appeal. Throughout her declaration, Masnayon discusses various documents that were filed before the CSC and explains their importance with respect to determining whether the CSC had jurisdiction to hear Guevara's appeal. The CSC also submitted a Supplemental Certification of Record that contained additional documents that were in the case file of Guevara's CSC appeal but not submitted with the original certification of record.

[10] The Port filed what it termed a "reply" to the CSC's submission in which it argued that the commission staff could not make a submission to the court, as only the board had authority to do so, and that the creation of a classified comptroller position was forbidden under Guam law. RA, tab 31, 2-9 (Reply to Resp't CSC's Resp. to Order to Show Cause, Feb. 9, 2015). The Port submitted additional documents along with its reply, but none of these documents were part of the official CSC file. Both the CSC and Guevara argued that the Port's attempt to include additional documents in the record was improper and that the records should be struck.

[11] On July 2, 2015, the Superior Court issued a Decision and Order (the "July 2015 Order") in which it rejected the jurisdiction-related arguments put forth by the Port. In particular, the Superior Court found as follows:

> In filing its response to the Court's order to show cause, the CSC, through counsel, was not making a substantive determination of jurisdiction—the CSC stated that it had jurisdiction in its Decision and Judgment. The Court merely wanted to analyze the basis for such determination. The CSC sought to explicate such basis through its subsequent filings. The Court finds that the documents submitted, although belated, were part of the complete record before the CSC

> when it made its Judgment. Thus, it is unnecessary to remand this case back to the CSC to determine the jurisdiction issue. The documents attached to the Masnayon Declaration provide the basis for which the CSC's jurisdiction was established. Thus, the Court can review whether such basis adequately conferred jurisdiction upon the CSC.

RA, tab 40 (Dec. & Order, July 2, 2015). The fact that certain documents that were part of the official CSC record were not provided until the court ordered the CSC to show cause did not affect the court's determination because "[t]he CSC already ruled on jurisdiction and the Court simply ordered it to show cause as to why Guevara's employment was a [sic] not a bar to its jurisdiction. In other words, the Court sought the bases for the CSC's determination that it had jurisdiction." *Id.* at 7. The CSC provided that basis in responding to the show cause order. After resolving the jurisdictional issue, the court addressed the 60-day rule and found that the CSC's determination that Port management knew or should have known of the facts underlying the adverse action as of October 16, 2012, was supported by substantial evidence.

[12] Following some additional proceedings not relevant to this appeal, a final order was issued on September 30, 2016. The Port timely appealed from this final order.

II. JURISDICTION

[13] Pursuant to 4 GCA § 4406, "[t]he decision of the [CSC] or appropriate entity [is] . . . subject to judicial review." 4 GCA § 4406 (as amended by Guam Pub. L. 30-112:3 (Mar. 12, 2010)); *see also Carlson v. Perez*, 2007 Guam 6 ¶ 65. The vehicle for obtaining this review is a Petition for Judicial Review filed in the Superior Court of Guam. *See Carlson*, 2007 Guam 6 ¶ 65; *see also* 7 GCA § 7117 (2005). This court has jurisdiction over appeals from a final order entered in the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-90 (2017)); 7 GCA §§ 3105, 3107(b), 3108(a), 25102(a) (2005).

III. STANDARD OF REVIEW

[14] Agency actions are reviewed according to the Administrative Adjudication Law, 5 GCA § 9100 *et seq*. *See Fagan v. Dell'Isola*, 2006 Guam 11 ¶ 10. Questions of fact are reviewed under a "substantial evidence" standard, while questions of law are reviewed *de novo*. *Id.* ¶¶ 10-11 (citations omitted); *see also* 5 GCA § 9240 (2005) ("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."). "[A] reviewing body 'may not substitute its views for those of the [agency], but instead must accept the [agency's] findings unless they are contrary to law, irrational, or unsupported by substantial evidence.'" *Fagan*, 2006 Guam 11 ¶ 11 (second and third alterations in original) (citation omitted). "[S]ubstantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Bondoc v. Worker's Comp. Comm'n*, 2000 Guam 6 ¶ 6 (citation omitted). It is "more than a mere scintilla, but less than a preponderance." *Guam Mem'l Hosp. Auth. v. Civil Serv. Comm'n (Chaco)*, 2015 Guam 18 ¶ 15 (citation omitted). The standard of review applied in this court "in effect mirrors the" proper standard of review in the trial court. *Fagan*, 2006 Guam 11 ¶ 12.

IV. ANALYSIS

[15] The Port raises two overarching issues for appellate review. First, the Port argues that the CSC did not have proper jurisdiction and that the Superior Court erred in upholding the CSC's jurisdiction without first vacating and remanding the case to the CSC. Second, the Port asserts that the CSC's determination that the 60-day rule was violated was not supported by substantial

evidence. With respect to each of these issues, the Port advances both procedural and substantive arguments.

A. The CSC Had Proper Jurisdiction Over Guevara's Appeal

[16] Under Guam law, the CSC has jurisdiction to hear appeals of adverse actions taken against classified employees, but it may not hear appeals from those in the unclassified service. 4 GCA § 4403(b) (as repealed and reenacted by P.L. 30-112:2 (Mar. 12, 2010); *see also Att'y Gen. of Guam v. Perez*, 2008 Guam 16 ¶ 5; *see also Carlson*, 2007 Guam 6 ¶ 34 n.15. The Port moved to dismiss Guevara's appeal to the CSC on the basis that Guevara was the "comptroller" of the Port. *See* RA, tab 27 (Suppl. Cert. of Record); ER at 578-81. Pursuant to 12 GCA § 10111(c), "the comptroller and assistant comptroller" of the Port are "within the unclassified service of the government of Guam . . . ." 12 GCA § 10111(c) (2005). Guevara opposed this motion both on the substance and on the basis that the motion was untimely. The CSC refused to hear the substance of the Port's motion, *see* Tr. at 6-8 (Hr'g, June 6, 2013), but in resolving the overall adverse action appeal stated that it had proper jurisdiction "based on upon [sic] the Organic Act of Guam and 4 [GCA] § 4401 [*et seq.*]," RA, tab 19 (Cert. of Record); ER at 49. Following CSC's response to the Superior Court's order to show cause, the Superior Court found that the CSC had proper jurisdiction. Upon a review of the record that was properly before the CSC, we agree.

1. The CSC Erred in Failing to Consider the Port's Motion to Dismiss for Lack of Jurisdiction

[17] As an initial matter, Guevara urges the court to find that the CSC was not required to hear the Port's motion because it was untimely filed. Under the CSC Rules of Procedure for Adverse Action Appeals ("CSC AA Rules") Rule 9, "[a]ll pre-hearing motions . . . must be filed and then

served on all other parties at the time designated by the Executive Director or his designee. No late filings shall be accepted." CSC AA R. 9. At the hearing on the Port's motion, the CSC noted that the motion was "submitted late" and, as a result, it "w[ould] not be addressed." Tr. at 6-10 (Hr'g, June 6, 2013). Failing to substantively address the Port's motion, however, was error.

[18] While this court has never directly stated that the CSC is obligated to hear all challenges to its jurisdiction whenever such a challenge is raised, we have repeatedly stated—even in the context of agency administrative proceedings—that "the question of subject matter jurisdiction may be raised at any time." *Rojas I*, 2009 Guam 19 ¶ 21 (citing *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1538 (9th Cir. 1994)); *Port Auth. of Guam v. Civil Serv. Comm'n (Susuico)*, 2015 Guam 14 ¶ 15 n.6 (addressing 4 GCA § 4403(d) as basis for jurisdiction even though issue was not raised in Superior Court or on appeal). By failing to substantively address the Port's motion, the CSC in effect determined that the Port had waived the argument that Guevara was an unclassified employee by not timely asserting it. The subject matter jurisdiction of an administrative agency, however, may not be created through consent or waiver. *See, e.g.*, *Brunsvold v. State*, 864 P.2d 34, 36 (Wyo. 1993); *Gov't of the Virgin Islands v. Trafton*, 14 V.I. 192, 206 (1977). The question of jurisdiction goes to an adjudicative body's very ability and authority to act. Accordingly, questions of subject matter jurisdiction should always be considered "when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009). Indeed, the rules of the CSC specifically provide a mechanism by which "[a]ny Commissioner may, at any time, raise issues not raised" by the parties, including questions of subject matter jurisdiction. CSC AA R. 9.1.1.

[19] In *Rojas I*, we held "that where the CSC exercises its" jurisdiction "without articulating in its decision a reasoned basis for doing so, the exercise is inherently arbitrary and capricious. Consequently, a judgment made pursuant to such an arbitrary exercise of power is reversible as an abuse of discretion." 2009 Guam 19 ¶ 31. We then "admonish[ed] the CSC to include a reasoned analysis of its jurisdictional basis in the future" so as to "facilitate judicial review, should a judgment be appealed to the Superior Court via the petition for judicial review afforded by 4 GCA § 4406." *Id.* We are compelled today to once again admonish the CSC that questions of jurisdiction must always be addressed, and resolution of jurisdictional questions should always be adequately explained in order to facilitate judicial review. The CSC's failure to do so in this case was error.

2. The Superior Court Adopted an Appropriate Procedure to Resolve the Petition for Judicial Review

[20] In addressing the issue of jurisdiction, the Superior Court held that the CSC erred in refusing to consider the Port's motion, but it gave the CSC an opportunity to show cause why it had proper jurisdiction over Guevara's adverse action appeal. In doing so, the Superior Court specifically relied upon our decision in *Rojas I*. RA, tab 21 (Dec. & Order). The Port argues on appeal that this was improper and that the Superior Court was obligated to vacate the CSC's Decision and Judgment. We disagree.

[21] This court recently addressed in *Chaco* the question of what procedures are appropriate for the Superior Court to adopt in addressing a petition seeking judicial review of an administrative adjudicatory action. In resolving this question, we noted that "a petition for judicial review was developed in an ad hoc fashion." *Chaco*, 2015 Guam 18 ¶ 20 (citing *Data Mgmt. Res., LLC v. Office of Pub. Accountability*, 2013 Guam 27 ¶ 28). Accordingly, we held

that "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].'" *Id.* ¶ 28 (alteration in original) (quoting 7 GCA § 7117).

[22] Generally, as we stated in *Rojas I*, "[i]f the CSC judgment is void for lack of a reasoned basis for asserting jurisdiction, the Superior Court's jurisdiction is limited to reversing the CSC's void act." 2009 Guam 19 ¶ 32. Nevertheless, an order to show cause is a firmly entrenched procedural tool that the Superior Court may employ to enforce its own jurisdiction and orders. *See, e.g.*, *Bautista v. San Agustin*, 2015 Guam 23 ¶ 5; *see also* 7 GCA § 7117 (2005) ("When jurisdiction is by law conferred on a court or judicial officer, all the means necessary to carry it into effect are also given . . . ."). Thus, in *Rojas I*, we mandated that the Superior Court "order the CSC to vacate its judgment," or alternatively, "to show cause why" the issue raised below but not considered by the CSC "was not a bar" to its jurisdiction. 2009 Guam 19 ¶ 33.

[23] Issuing an order to show cause may not be appropriate in every case, but the Superior Court did not err in this case. Like in *Rojas I*, an order to show cause was an appropriate mechanism to use on the facts presented here, in part, because "we have not before expressly required" of the CSC what we require today—i.e., that the CSC consider every challenge to its jurisdiction regardless of the timing of that challenge. *Id.* Practical considerations based on the unique facts of this case also support the appropriateness of the Superior Court's decision to issue an order to show cause rather than remand to the CSC. The Port's motion to dismiss for lack of jurisdiction was fully briefed before the CSC and the documentation supporting each of

the parties' respective positions was in the CSC's official record,[2] meaning that a complete and adequate record exists to facilitate appropriate judicial review. Moreover, as discussed further below, the facts here weigh strongly in favor of finding that the CSC had proper jurisdiction; remanding this case to the Superior Court to then remand to the CSC in order to address the Port's motion in the first instance would be a vast waste of judicial resources. Accordingly, the Superior Court did not err because it adopted the procedure that was "most conformable to the spirit of" resolving a petition for judicial review. *Chaco*, 2015 Guam 18 ¶ 28; *see also* 7 GCA § 7117.

3. Guevara Was a Classified Employee

[24] On the substance of the Port's jurisdictional challenge, the parties dispute whether Guevara was a classified employee. In support of its position, the Port relies upon the Controller Notice sent by Guevara and an argument that Financial Affairs Controller and "comptroller" are synonymous. The CSC and Guevara, on the other hand, rely on numerous documents that Guevara submitted in opposition to the Port's original motion seeking to dismiss Guevara's appeal.

[2] The court is troubled that the CSC failed to adequately place the entire record of its proceedings before the Superior Court in the initial Certification of Record. That is especially true in this case, where the CSC was under direct order from the Superior Court to "*certify fully* to [the Superior Court] . . . a transcript of the record and proceedings, *to include [the CSC's] complete file* and a transcript of all hearings . . . to be reviewed by this Court." RA, tab 8 (Writ of Review, Oct. 16, 2013) (emphasis added). We have also previously stated on multiple occasions that review of agency administrative actions require the Superior Court, and our own 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." *Chaco*, 2015 Guam 18 ¶ 16 (emphasis added) (citation omitted). Transmitting the official record is an administrative function; it should not be viewed as an opportunity to advance one's litigation position. Neither the CSC nor the appealing party should pick and choose what documents from the official CSC record are included or excluded in the certification of record to the Superior Court when a petition for judicial review is filed. The entire record must be transferred, without commentary, to facilitate appropriate judicial review.

[25] "Under Guam's merit system, if one is hired by competing with other eligible persons for the position, that person has been hired as a classified employee, (unless hired in the excepted service as specified in 4 GCA § 4102)." *Carlson*, 2007 Guam 6 ¶ 32; *see also Susuico*, 2015 Guam 14 ¶ 19 (same). In *Susuico*, this court held that an accountant at the Port was a classified employee where: (i) "[a]t the time of [the employee's] initial hiring, his employment was administered through the competitive hiring process, and subsequently, he purportedly became a classified employee"; (ii) the position obtained "was formally announced"; (iii) the employee "submitted an application for that position"; (iv) the employee "was selected from a certification of eligibles after being rated and ranked"; (v) the employee "was formally offered the Accountant II position and was hired"; and (vi) the employee received "performance evaluation report[s]." 2015 Guam 14 ¶ 20. Each of these facts is present in this case as well. Moreover, the Port treated Guevara as a classified employee throughout his tenure as evidenced by its publicly available budget documents, by stating that Guevara had a right to appeal to the CSC in the Final Notice of Adverse Action, and in correspondence with the CSC prior to Guevara's dismissal.

[26] This court has previously rejected a syntactic argument similar to that put forward by the Port on appeal. In *Perez*, the court rejected the argument that "Administrative Counsel," a classified position, was identical to the unclassified position of "legal counsel" in part because petitioner "submitted no evidence below, apart from its own pleadings and arguments, that the two positions cannot lawfully co-exist, or that they are in fact the same position." 2008 Guam 16 ¶¶ 15-19. Similarly here, the Port failed to provide any evidence to support its position other than the Controller Notice. This document, however, does not actually support the contention

that the "Financial Affairs Controller" position is the same as the unclassified "comptroller" position referenced in 12 GCA § 10111(c).

[27] The Controller Notice does contain various statements that on their face suggest that Guevara thought of himself as the "controller"—a synonym for "comptroller," the term used in 12 GCA § 10111(c). Nevertheless, when read as a whole, the Controller Notice suggests only that Guevara believed naming someone to the unclassified position of comptroller was an attempted end-run around the prohibitions of hiring someone in Guevara's position while his CSC appeal was pending. Furthermore, the Controller Notice was based upon a provision in 4 GCA § 4406, which by its own terms applies only to classified employees. *See* 4 GCA § 4406. It would be illogical for this court to consider the Controller Notice itself as an admission that Guevara was an unclassified employee when the entire premise of the Controller Notice rests on the fact that Guevara was a classified employee.

[28] Under the Organic Act, "[t]he government cannot exempt a position from the merit system simply for some legitimate governmental purpose, but only if it is 'impracticable' to include the position within the merit system. If it is 'practicable' to include the position within the merit system, the position must be included in the merit system." *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1157 (9th Cir. 1996) (citations and internal quotation marks omitted). We see no reason why it would be impractical for the position of Financial Affairs Controller to be included in the classified service.

[29] The court reaches this conclusion relying upon only those documents contained in the official CSC record and without consideration of the Masnayon Declaration. In responding to the Superior Court's order to show cause, we agree with the Port that consideration of a

substantive affidavit was inappropriate, particularly in the absence of a full evidentiary hearing in the Superior Court.[3] *Cf. Davis v. State*, 998 So. 2d 1196 (Fla. Dist. Ct. App. 2009) (per curium) (explained by *Davis v. Sec'y, Fla. Dep't of Corr.*, No. 3:10-cv-273-J-34TEM, 2012 WL 5878085 (M.D. Fla. Nov. 21, 2012)). In reviewing an administrative action, the Superior Court should generally limit its review to only that record properly submitted as part of the administrative action proceedings. Except in rare circumstances, of which this is not one, a petition for judicial review is not an opportunity for the parties to present new evidence not considered by the administrative agency. While we are troubled by the fact that the entire CSC record was not transferred to the Superior Court as part of the initial certification of record, those documents submitted with the supplemental certification of record were nonetheless part of the official CSC record and thus properly considered by the Superior Court, as well as part of our own review.

[30] For these reasons, reviewing only the record properly part of the CSC's official record, the evidence overwhelmingly favors a finding that Guevara is a classified employee. The CSC's determination that it had jurisdiction was not in error.

B. The CSC's Determination that the 60-day Rule Was Violated Was Supported by Substantial Evidence

[31] The Port also raises both procedural and substantive arguments regarding the CSC's resolution of Guevara's motion to vacate the adverse action based upon the Port's failure to

[3] Although the court agrees that it was inappropriate to consider the Masnayon Declaration, we reject the further argument by the Port that the CSC was not entitled to act in response to the Superior Court's order to show cause in the absence of an official remand. Specifically, the Port argues that CSC "staff further lack authority after a case is completed to formulate arguments . . . on appeal except when presenting duly constituted findings of fact to the Commission itself composed of seven (7) Commissioners." Appellant's Br. at 15 (Jan. 9, 2017). Taking the Port's position to its logical conclusion would mean that any time any litigation decision is made, a fully constituted board of the CSC would have to convene and approve the proposed actions and arguments of its attorney. Such a system would be unworkable, and the Port provides no support in the law for this notion. The CSC, similar to any other litigant, may properly act through their attorneys in formulating arguments, responding to court orders, etc.

abide by the 60-day notice rule of 4 GCA § 4406. This statute provides that "[i]n no event may an employee in the classified service be given notice and statement of the charges required by this Section after the sixtieth (60th) day after management knew or should have known the facts or events which form the alleged basis for such action." 4 GCA § 4406. Procedurally, the Port argues that the CSC committed legal error in failing to conduct an evidentiary hearing, thereby making any findings or conclusions on Guevara's motion inherently arbitrary and not in accordance with the law. Appellant's Br. at 16-17 (Jan. 9, 2017). Substantively, the Port asserts that the CSC's determination was not supported by substantial evidence. *Id.* at 22, 25. In opposition, the CSC argues that the Port had an opportunity to put competent evidence in front of the Commissioners but failed to do so. *See* CSC's Br. at 22 (Feb. 8, 2017). Guevara similarly argues that the CSC AA Rules provide the appropriate procedure for the CSC to follow, those rules were followed in resolving Guevara's motion, and those rules provided the Port an opportunity that it failed to take advantage of to present evidence to the commission. Guevara Br. at 15-17 (Feb. 8, 2017). For the reasons set forth below, we conclude that the Port had an opportunity to place competent evidence before the CSC but failed to take advantage of the applicable procedures. Based upon the evidence that was properly considered, the CSC's determination was substantially supported in the record.

1. The Port Was Provided Sufficient Opportunity Under the CSC AA Rules to Present Evidence and Testimony to the CSC and It Was Not Entitled to a Separate Evidentiary Hearing That It Only Belatedly Requested

[32] Pursuant to 4 GCA § 4409, "the rules of the Commission are subject to the Administrative Adjudication Law," found at 5 GCA § 9100, *et seq.* 4 GCA § 4409 (2005). Article III of the Administrative Adjudication Law permits an administrative agency, including

the CSC, to promulgate various rules to facilitate its statutory mandate. *See* 5 GCA § 9300, *et seq.* (2005). Under this authority, as well as its authority under 4 GCA §§ 4403, 4406, and 4409, the CSC promulgated the CSC AA Rules, *see* CSC AA R. 1, with the purpose "to create a fair process with which to adjudicate Adverse Action Appeals."[4] CSC AA R. 2.

[33] In *Guam Housing Corp. v. Civil Service Commission (Potter)*, we held that under these rules the CSC may "dismiss an adverse action for non-compliance" with 4 GCA § 4406 prior to holding a full hearing on the merits. 2015 Guam 22 ¶ 22. When a party files a pre-merits motion, "[t]he legal and factual bases of such motion[] must be sufficiently set forth in the motion and supporting affidavits." CSC AA R. 9.5. Prior to a "motion hearing . . . each party shall submit to the CSC all documents it wishes the CSC to consider." CSC AA R. 10.1. If a party objects to the CSC considering a document as part of a motion hearing, it must file "a written objection to that document, along with the reason and other documents supporting the exclusion . . . ." CSC AA R. 10.3.

[34] "It is well settled . . . that where a government employee holds a position from which he or she is removable only for cause, he or she has a constitutionally recognized property interest in continued employment; any adverse action automatically triggers traditional due process protections," which include "procedural guarantees . . . [of] notice and a hearing at a meaningful time, in a meaningful way." *Superales v. Appeals Bd. of Judicial Council of Guam*, DCA No. 82-0192A, 1984 WL 55540, at *1 (D. Guam App. Div. Apr. 18, 1984) (citing *Arnett v. Kennedy*, 416 U.S. 134 (1974)). But, factual challenges to a deliberative body's jurisdiction may at times

[4] Under 5 GCA § 9306, these rules "shall be judicially noticed by all courts and agencies of this Territory," and the "determination and construction of such rules and regulations in all actions except criminal actions shall be made by the court as a matter of law . . . ." 5 GCA § 9306 (2005).

be decided "without convening an evidentiary hearing." *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 364 (1st Cir. 2001) (citation omitted); *Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1170 (11th Cir. 2011) (holding trial court did not abuse its discretion in deciding disputed jurisdictional facts on record before it instead of holding full evidentiary hearing); *Johnson v. Ala. A&M Univ.*, 481 So. 2d 336, 339 (Ala. 1985) ("The judicial model of a full-blown evidentiary hearing is not always required" to comply with due process). "The key considerations" in deciding whether an evidentiary hearing was required "are whether the parties have had a full and fair opportunity to present relevant facts and arguments, and whether either party seasonably requested an evidentiary hearing." *Valentin*, 254 F.3d at 364 (citation omitted). On appeal, the Port does not present a challenge to the constitutionality of the CSC AA Rules. Under those Rules, the Port was offered an opportunity to present documentary evidence or testimonial evidence by way of affidavit (and object to any of Guevara's evidence) prior to the CSC's motion hearing. The Port, however, failed to take advantage of the applicable procedures.

[35] In particular, the Port argues on appeal that it should have been granted the opportunity to present live testimony. Under the CSC AA Rules, on a pre-merits motion, a party is entitled to submit affidavits, but "no live testimony shall be taken at a motion hearing unless the Commission approves a request beforehand for live testimony to assist in a determination of the motion." CSC AA R. 9.2. The Port did not request to take live testimony at the motion hearing prior to the actual hearing date in accordance with the applicable rules. Indeed, the Port did not even seek to take live testimony during that actual motion hearing. Rather, the Port argued at the motion hearing that it should be entitled to a second, separate hearing in which evidence would

be formally taken. Nothing in the applicable rules entitled the Port to such a separate proceeding.

[36] To support its position, the Port cites to a number of Superior Court decisions that suggest an evidentiary hearing is required when, like here, the relevant question turns on when the agency knew or should have known of the alleged incident. *See* Appellant's Br. at 18-19 (citing *Dep't of Pub. Works v. Castro*, SP0099-09 at 4-6 (Bordallo, J., July 10, 2012)); *see also* Appellant's Br. at 21 (citing *Tyndzik v. Univ. of Guam*, SP0231/0241-91 at 3-4 (Weeks, J., May 20, 1994)). These cases, of course, are not binding upon this court. To the extent these cases are persuasive authority, their rationale for reaching the conclusion that each reached has been abrogated by this court's subsequent decisions.[5]

[37] The Port had the opportunity to both submit documentary and testimonial evidence (by way of affidavit), as well as request live testimony prior to the motion hearing. The Port, however, failed to take advantage of the available procedure. Accordingly, we hold that under

[5] In *Castro*, the Superior Court held that the failure of the CSC to hold an evidentiary hearing was error. *Dep't of Pub. Works v. Castro*, SP0099-09 at 5 (Bordallo, J., July 10, 2012). In reaching this decision, the Superior Court relied entirely upon 4 GCA § 4407 to support its reasoning, but this provision is applicable only to a hearing on the merits. *See id.* at 5 (quoting 4 GCA § 4407). Subsequent to *Castro* we made clear in *Potter* that a pre-merits motion based upon a procedural defect—including failure to abide by 4 GCA § 4406—may be heard prior to a full merits hearing. *See Potter*, 2015 Guam 22 ¶¶ 21-25. Contrary to the more truncated procedure applicable to pre-merits motions, under both the CSC AA Rules and the Administrative Adjudication Law, a fuller evidentiary hearing is required when hearing the merits. *Compare* CSC AA R. 9.1, *and* CSC AA R. 9, *with* CSC AA R. 11.2.6, CSC AA R. 11.3, *and* 5 GCA § 9225. The Superior Court's rationale for requiring a full evidentiary hearing in *Castro* is therefore no longer applicable in light of the court's subsequent decision in *Potter*.

In *Tyndzik*, a judgment from the CSC was presented to the Superior Court for review pursuant to a writ of mandate. *See Tyndzik v. Univ. of Guam*, SP0231-91 and SP0241-91, at 4 (Weeks, J., May 20, 1994). The Superior Court held that a full evidentiary hearing was necessary to determine whether the employer had violated the 60-day rule of 4 GCA § 4406 based upon a provision of the then-current Guam Rules of Civil Procedure applicable "in the Court before which the Writ is pending . . . ." *Id.* at 5-6 (quoting Guam R. Civ. P. § 1090). This court subsequently held in *Carlson*, however, that in resolving a petition for judicial review, "reliance on the procedures of the writ of mandate is inappropriate . . . ." 2007 Guam 6 ¶ 66. Thus, much like *Castro*, the rationale for the Superior Court's holding in *Tyndzik* has been abrogated by a subsequent decision of this court.

the applicable CSC AA Rules, the CSC considered the evidence that was properly before it and the Port was not entitled to a separate evidentiary hearing that it only belated requested.

2. The CSC's Decision and Judgment Was Supported by Substantial Evidence

[38] Under a substantial evidence standard, the court must "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." *Chaco*, 2015 Guam 18 ¶ 16 (citation omitted); *cf. Odyssey Marine Expl.*, 657 F.3d at 1170 (standard for reviewing trial court's factual determinations remained the same even where lower court decided disputed jurisdictional facts without evidentiary hearing).[6] "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.'" *Chaco*, 2015 Guam 18 ¶ 16 (quoting *Monjaraz-Munoz v. I.N.S.*, 327 F.3d 892, 895 (9th Cir. 2003), *amended by* 339 F.3d 1012 (9th Cir. 2003)). In other words, "[i]f the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the agency." *Id.* (citations omitted).

[39] In reaching its decision that the 60-day rule of 4 GCA § 4406 had been violated, the CSC relied specifically upon the following documents: (i) "a document entitled 'Finding of Facts and Conclusions of Law 12/4/12' prepared by the Port's legal counsel"; (ii) "the Final Adverse

[6] The Port argues that "the [CSC] failed to apply the legislatively mandated 'substantial evidence' burden of proof of [sic] as prescribed by 4 [GCA] § 4407(c) and the [CSC's] Rule 11." Appellant's Br. at 29. While it is unclear from the Port's briefing, the Port apparently argues that this standard should have been used by the CSC in deciding Guevara's motion (as opposed to the merits). This, however, is not correct. As the Port itself noted in its Petition, "Under CSC AA [Rule] 9 . . . , *the moving party bears the burden of proof* with regard to all motions by a *preponderance of the evidence*." RA, tab 1 ¶ 56 (Pet.) (emphasis added). In any event, "[s]ubstantial evidence is more than a mere scintilla, but less than a preponderance." *Chaco*, 2015 Guam 18 ¶ 15 (citation omitted). As Guevara correctly points out, "[t]he argument of the [Port] that a lower burden of proof should have been applied to the factual determination would have simply benefited [Guevara]," and therefore, "reducing the evidentiary requirement for [Guevara] would have had no impact on the CSC's factual finding" in Guevara's favor. Guevara Br. at 24.

Action Exhibit 36"; and (iii) "the Travel Request Authorization and Routing Sheet for the Travel Request showing the document had been received and signed by the General Manager on October 16, 2012." RA, tab 19 (Cert. of Record); ER at 48-52.[7] Each of these documents was submitted to the CSC in ruling on Guevara's motion. There is no record that the Port objected to the consideration of any of these documents. *See* CSC AA R. 10.3.

[40] In the Final Notice of Adverse Action, the Port stated that Guevara "knowingly signed off that funds were available for Mrs. Meno[] . . . when [Guevara] knew this was not the case . . . because [he] [him]self . . . told Mr. Roberto that [he] w[as] cutting [the workers' compensation budget] down to only $30,000.00 per year . . . ." RA, tab 19 (Cert. of Record); ER at 175. Moreover, as noted in the Findings of Fact and Conclusions of Law prepared by the Port, the Port's General Manager "admitted . . . that she routinely disregarded the Port's self-imposed budget of $30,000 per year for worker's compensation," and other than this, "the Port has no legal basis by which to expend travel, medical care, or other expenses on worker's compensation claims." *See* RA, tab 19 (Cert. of Record); ER 183; *see also* RA, tab 6, Ex. 1 at 3 (Pet'r's Br. re: Applicable Procedure). In other words, according to the Port's own investigation, both Guevara and Management knew that certifying the availability of more than $30,000 was improper prior to October 16 when Meno's worker's compensation claim was certified. Exhibit 36 of the Final Adverse Action and the Routing Slip relied upon by the CSC, along with other contemporaneous evidence, establishes that Management was aware of Guevara's purportedly improper certification on October 16.

[7] The Port argues that the briefing on Guevara's motion to dismiss were never submitted to the trial court, Appellant's Br. at 26-27, and therefore the trial court was unable to determine whether the CSC's determination was supported by substantial evidence. There is no indication, however, that reviewing this briefing is necessary to resolve the petition. *Cf.* Guam R. App. P. 15(d).

[41] Upon a review of the record as a whole and under the "extremely deferential" standard this court uses in reviewing administrative fact-findings, these documents provide substantial evidence that "[t]he date when Management knew or should have known facts which form the basis of the adverse action is October 16, 2012." RA, tab 19 (Cert. of Record); ER at 51. The final notice of adverse action was thus untimely under 4 GCA § 4406.

V. CONCLUSION

[42] For the reasons discussed above, the Superior Court's Orders dated November 26, 2014, and July 2, 2015, are **AFFIRMED**.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ALBERTO E. TOLENTINO
Justice *Pro Tempore*

/s/
KATHERINE A. MARAMAN
Chief Justice