IN THE SUPREME COURT OF GUAM

PORT TRANSPORTATION, STEVEDORE, AND TERMINAL EMPLOYEES,
Petitioners-Appellants,

v.

GUAM CIVIL SERVICE COMMISSION,
Respondent-Appellee,

and

PORT AUTHORITY OF GUAM,
Real Party in Interest-Appellee.

Supreme Court Case No.: CVA17-007
Superior Court Case No.: SP0164-15

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on November 22, 2017
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; JOSEPH N. CAMACHO, Justice *Pro Tempore*.

CARBULLIDO, J.:

[1] Petitioners-Appellants Port Transportation, Stevedore, and Terminal Employees (collectively, "Employees") appeal from a final judgment entered by the Superior Court. In the proceedings below, the Superior Court affirmed a Decision and Judgment entered by Respondent-Appellee Guam Civil Service Commission ("CSC"). The CSC's Decision and Judgment upheld a decision by Real Party in Interest-Appellee Port Authority of Guam ("Port") to deny the Employees' administrative grievance alleging that the Employees were owed overtime compensation. For the reasons discussed below, we affirm the Superior Court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The relevant facts are largely undisputed. The Employees filed a grievance with the Port claiming overtime pay for time worked in excess of eight hours per day, in reliance on the Port Authority of Guam Payroll Policy Memorandum No. 04-88 ("1988 Payroll Policy"). The 1988 Payroll Policy defined overtime work as "[a]uthorized and approved hours of work in excess of eight (8) hours in a day or in excess of forty (40) hours in a workweek to which employees are entitled for payment." Record on Appeal ("RA"), tab 14 at 346 (Cert. of Record, June 14, 2016) (1988 Payroll Policy § XV(A)). The Employees claimed that under this definition, they were entitled to overtime compensation for certain periods. The Port responded that the overtime provisions contained in the 2009 Port Personnel Rules and Regulations ("2009 PRR")—which were expressly adopted by the Legislature in Public Law 30-043—controlled the question of what constituted overtime. Section 8.402(E) of the 2009 PRR states, in relevant part, "Overtime

work will occur when an employee renders service . . . in excess of forty (40) straight time hours per workweek." 2009 PRR § 8.402(E)(1). Based on this regulation, Port management concluded the Employees were to be compensated for overtime work in excess of forty hours per workweek rather than eight hours per day. *See* RA, tab 14 at 179-81 (Cert. of Record) (Letters from Gen. Mgr. to Emps. of Terminal Div., Transp. Div., and Stevedoring Div., Apr. 10, 2014).

[3] The Employees appealed the Port's decision to the CSC, and the case worked its way through the grievance process. As part of this process, the Port General Manager appointed members to a Grievance Committee to review the grievance; the Committee ultimately recommended that only time in excess of forty hours per workweek qualified for overtime. The CSC then held a grievance hearing ("CSC Hearing"), at the conclusion of which all CSC Commissioners decided in favor of the Port. The CSC issued a decision and judgment ("CSC Decision") affirming the Port's interpretation of overtime. The Employees filed a Petition for Judicial Review with the Superior Court. In the proceedings below, the CSC filed a Certification of Record, containing "copies of documents filed with and issued by the [CSC] in the matter," RA, tab 14 at 1-2 (Cert. of Record), while the Employees supplemented the record with a transcript of the CSC Hearing, RA, tab 15 (Notice of Lodgement, June 13, 2016). After briefing and oral argument, the Superior Court issued a Decision and Order affirming the CSC Decision and entered final judgment. The Employees timely appealed.

II. JURISDICTION

[4] This court has jurisdiction over an appeal from a final order of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-231 (2018)); 7 GCA §§ 3107(b), 3108(a), 25102(a) (2005).

III. STANDARD OF REVIEW

[5] Agency actions are reviewed according to the Administrative Adjudication Law, 5 GCA § 9100 *et seq.* *See Fagan v. Dell'Isola*, 2006 Guam 11 ¶ 10. "Judicial review may be had of any agency decision by any party affected adversely by it." 5 GCA § 9240 (2005). The standard of review is: "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." *Id.*; *see also Fagan*, 2006 Guam 11 ¶ 10. "[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) (quoting *Alcala v. Dir., Office of Workers Comp. Programs*, 141 F.3d 942, 944 (9th Cir. 1998)). Questions of fact are reviewed under the substantial evidence standard, while questions of law are reviewed *de novo*. *Id.* ¶¶ 10-12 (citations omitted); *see also* 5 GCA § 9240.

[6] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fagan*, 2006 Guam 11 ¶ 12 (quoting *Bondoc v. Worker's Comp. Comm'n*, 2000 Guam 6 ¶ 6). 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 (quoting *NLRB v. Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1053-54 (9th Cir. 2003)). "The interpretation of a statute is a question of law reviewed *de novo*." *Guam Fed'n of Teachers v. Gov't of Guam*, 2013 Guam 14 ¶ 24 (citations omitted). "In reviewing an agency's construction of a statute, the court must reject those constructions that are contrary to clear [legislative] intent or frustrate the policy that [the Legislature] sought to implement." *Id.* ¶ 25 (quoting *Blas v. Guam Customs & Quarantine Agency*, 2000 Guam 12 ¶ 12).

[7] The parties disagree regarding the standard of review that applies to the CSC's refusal to admit certain exhibits at the CSC Hearing, and the Superior Court's refusal to reverse the CSC on this point. *Compare* Appellants' Br. at 18-19 (July 26, 2017) (arguing for *de novo* review), *with* Respondent-Appellee's Br. at 5-6 (Aug. 25, 2017) (arguing for abuse of discretion review). We apply a *de novo* review to the CSC's denial of the exhibits. *See* 5 GCA § 9240. We discuss this standard further in Part IV.B.1 below.

IV. ANALYSIS

[8] The Employees present multiple arguments on appeal. First, the Employees claim their position is supported by the definition of "overtime" in the 1988 Payroll Policy, which they contend can be read harmoniously with the definition of "overtime" in the 2009 PRR. Appellants' Br. at 11-18. Second, the Employees assert the Superior Court committed error by affirming the CSC's denial of certain evidence at the CSC Hearing. *Id.* at 18-22. Third, the Employees attack the CSC Decision as "facially defective" because it incorrectly referenced findings of the Port Grievance Committee that had been superseded. *Id.* at 22-23.

A. The 2009 PRR's Overtime Provisions Supersede the Overtime Provisions in the 1988 Payroll Policy

[9] The 1988 Payroll Policy defines "overtime work" as "[a]uthorized and approved hours of work performed in excess of eight (8) hours in a day or in excess of forty (40) hours in a workweek to which employees are entitled for payment." RA, tab 14 at 346 (1988 Payroll Policy § XV(A)). The 1988 Payroll Policy also states that "[w]ork in excess of eight (8) hours in a workday shall be posted at overtime rate." *Id.* at 347 (1988 Payroll Policy § XV(D)(1)). By contrast, the 2009 PRR defines overtime as "[a]ctual hours worked in excess of 40 hours in an administrative work week. For classified employees whose normal work week schedule does not

consist of five working days and two days off in a work week, overtime shall mean only hours worked in excess of their administrative workweek." 2009 PRR, Glossary Entry for "Overtime." The 2009 PRR also states:

> Overtime work will occur when an employee renders service under any of the following conditions:
>
> 1. The employee renders service in excess of forty (40) straight time hours per workweek.
>
> 2. The employee renders service on the employee's scheduled day off and there has been no change, by mutual consent or by due prior notice, in the work schedule.

2009 PRR § 8.402(E). Under the 2009 PRR, the "administrative workweek" is defined as "40 hours of work or paid leave per workweek"; and the "workweek" is, in relevant part, a "regularly recurring period of seven consecutive 24-hour intervals." 2009 PRR, Glossary Entries for "Administrative Workweek" & "Workweek." The 2009 PRR also contain several other provisions that refer to a forty-hour workweek. *See* 2009 PRR §§ 8.001, 8.400(B), 8.402(B). 8.404(D).

[10] In construing these two competing definitions of overtime,

> "the plain language of a statute must be the starting point." In looking at the statute's language, the court's task is to determine whether or not the statutory language is "plain and unambiguous." "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."

Aguon v. Gutierrez, 2002 Guam 14 ¶ 6 (citations omitted).

[11] The language defining overtime in the 2009 PRR states that it consists of "[a]ctual hours worked in excess of 40 hours in an administrative work week," and that for classified employees—such as the Employees—who do not have a workweek consisting of five working days and two days off, "overtime *shall* mean *only* hours worked in excess of their administrative

workweek." 2009 PRR, Glossary Entry for "Overtime" (emphases added). This definition expressly states in plain language that overtime means "*only*" hours of work in excess of forty hours of work or paid leave per workweek. *See* 2009 PRR, Glossary Entries for "Overtime" and "Administrative Workweek." The word "only" signifies exclusivity. *See* Merriam-Webster's Ninth New Collegiate Dictionary, 825 (1984). This forecloses any contrary reading, including any reading that would base overtime on an eight-hour workday. Other provisions in the 2009 PRR discuss overtime in a manner that impliedly contemplate a forty-hour workweek. *See, e.g.*, 2009 PRR §§ 8.001 (describing the workweek), 8.400(B) (prescribing how to determine weekly hours worked), 8.402(B) (holding hours worked to a forty-hour per week standard), 8.404(D) (mentioning requirement that overtime must be paid after forty hours a week). Section 8.402(E) also provides that overtime work occurs when an employee renders service under specified conditions, including (1) "service in excess of forty (40) straight time hours per workweek" and (2) "service on the employee's scheduled day off and there has been no change, by mutual consent or by due prior notice, in the work schedule." 2009 PRR § 8.402(E). We need not reach the issue of whether these two conditions are non-exhaustive, as the Employees assert, *see* Appellants' Br. at 13-14, in order to recognize that the rules do not expressly list any other conditions and that the definition of "overtime" in the 2009 PRR Glossary was intended to be exclusive.

[12] The Employees urge the court to read the definition of overtime contained in the 2009 PRR harmoniously with the definition contained in the 1988 Payroll Policy, thereby allowing for overtime to be paid after *either* eight hours of work per day *or* forty hours of work per workweek. *See* Appellants' Br. at 8-18. While other provisions in the 2009 PRR may be read harmoniously with the overtime provision contained in the 1988 Payroll Policy, we cannot adopt

the Employees' approach, for the reason that the *definitions* are in direct conflict because the 2009 PRR states overtime "*shall* mean *only* hours worked in excess of their administrative workweek." *Compare* 2009 PRR, Glossary Entry for "Overtime," *with* RA, tab 14 at 346 (1988 Payroll Policy § XV(A)).

[13] We fail to see any clear legislative intent that would contradict the plain reading of overtime in the 2009 PRR. *See Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 17 ("Absent clear legislative intent to the contrary, the plain meaning prevails." (citation omitted)). Unlike the 1988 Payroll Policy, the Legislature specifically approved the 2009 PRR and memorialized the adoption of the 2009 PRR in a statute. *See* 12 GCA § 10114(a) (added by P.L. 30-043:2 (July 2, 2009)).

[14] The Employees mistakenly frame the 1988 Payroll Policy as having a measure of legislative authority comparable to the 2009 PRR. *See* Appellants' Br. at 15-18 (analogizing the 1988 Payroll Policy to States setting stronger wage and hour conditions than the minimum required by the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 201 *et seq.*); Appellants' Reply Br. at 3-6 (Sept. 22, 2017) (arguing for the rule against implied statutory repeal). As stated, the statutory analysis begins with the plain language of the 2009 PRR, not the 1988 Payroll Policy, because the 2009 PRR contains the only legislatively-adopted definition of overtime before this court. The 1988 Payroll Policy is an internal Port policy memorandum circulated by the Port General Manager at the time; there is nothing in the record showing it was expressly approved by the Legislature or approved as a publicly and properly promulgated agency regulation pursuant to the Administrative Adjudication Law. *See* Real Party in Interest-Appellee's Addendum Pamphlet, Addendum B at 1 (attaching 1988 Payroll Policy, which indicates it was "Approved By . . . [the] General Manager"). Consequently, the 1988 Payroll

Policy does not have express legislative approval attached to it, unlike the 2009 PRR. This crucial distinction explains the flaws behind the Employees' arguments that the 2009 PRR sets only a floor for overtime calculations, *see* Appellants' Br. at 15-18, and that the rule against implied statutory repeals applies, *see* Reply Br. at 3-6.

[15] The Employees assert the forty-hour workweek established under the 2009 PRR was modeled on the FLSA's overtime requirement. *See* Transcript ("Tr.") at 3 (Mot. Proceedings, Nov. 21, 2016); Appellants' Br. at 15-18; Reply Br. at 4; *see also* 29 U.S.C.A. § 207(a)(1). The 2009 PRR made explicit reference to the FLSA in a single sentence: "These provisions shall be in compliance with the Fair Labor Standards Act (FLSA)." 2009 PRR, Ch. 8, Statement of Policy. The Employees argue that there is "nothing inherently irreconcilable between" an eight-hour overtime policy and a forty-hour overtime policy, and that "[t]he plain text of the FLSA explicitly allows states to set stronger wage and hour regulations than those established in the FLSA." Appellants' Br. at 15; *see also* Reply Br. at 3.

[16] There is nothing in the record, however, indicating that the 1988 Payroll Policy was promulgated as an agency regulation pursuant to the Administrative Adjudication Law or filed with the Legislature. *See* Real Party in Interest-Appellee's Addendum Pamphlet, Addendum B. The 1988 Payroll Policy was an internally distributed document approved by the Port's General Manager at the time. *See id*. We agree that the Legislature can set overtime provisions that are more protective than FLSA minimum standards, but the 1988 Payroll Policy cannot be characterized as a declaration of the Legislature.

[17] The Employees also argue that we should avoid construing the 2009 PRR as an implied repeal of the 1988 Payroll Policy if the two provisions can be reconciled, because the law disfavors implied statutory repeals. *See* Reply Br. at 3-5 (citing *Sumitomo Constr.*, 2001 Guam

23 ¶ 16). This misconstrues the applicability of the doctrine. The 1988 Payroll Policy is not a statute; it is an internal memorandum that is at odds with the overtime definition of the legislatively-approved 2009 PRR. The rule of statutory construction quoted by the Employees makes this point: "The familiar rule against implied statutory repeal is based on the assumption that a legislature knows existing legislation and intends a continuity of policy except when it clearly and affirmatively indicates a change." Reply Br. at 5 (quoting 2B Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 56:2 (7th ed. 2002)). Here, the 1988 Payroll Policy is not existing legislation. It should not be granted any deference when juxtaposed with the 2009 PRR, because nothing in the record indicates it went through an agency rule-making process. *Cf. N.M. Dep't of Human Servs. v. Dep't of Health & Human Servs. Health Care Fin. Admin.*, 4 F.3d 882, 885 (10th Cir. 1993) ("[N]o deference [to an agency's interpretation] is warranted if the interpretation is inconsistent with the legislative intent reflected in the language and structure of the statute . . . ." (citations omitted)).

[18] The Employees also assert that section 8.001(A) of the 2009 PRR indicates the Legislature "explicitly recognized the existence of an overtime calculation policy—[the 1988] Payroll Policy []—that must not be evaded." Appellants' Br. at 13; *see also* Reply Br. at 3. Section 8.001(A) states, "The workweek may be changed, but only if the change is intended to be permanent and is not made to evade overtime requirements or policies." 2009 PRR § 8.001(A). From this single sentence, the Employees impute actual knowledge of the 1988 Payroll Policy's specific eight-hour overtime definition to the Legislature at the time Public Law 30-043 was enacted. The Employees extrapolate that the Legislature intended to allow the eight-hour overtime definition to continue in force. *See* Reply Br. at 3. This argument contains unsupported inferences that run contrary to the plain language of the overtime definition adopted

by the Legislature in the 2009 PRR. *See* P.L. 30-043; *see also* 2009 PRR, Glossary Entry for "Overtime." Contrary to the Employees' arguments, section 8.001(A) makes specific reference to the work*week* changing, *see* 2009 PRR § 8.001(A), but says nothing about a workday—suggesting that the Legislature intended to base overtime on a weekly, not daily, basis.

[19] An agency cannot create a policy or rules that would be inconsistent with the legislative scheme. *See Wade v. Taitano*, 2002 Guam 16 ¶ 7 (citations omitted). We hold that the 2009 PRR definition of "Overtime" plainly indicates it is to be based only off a forty-hour workweek, thereby foreclosing the reading proffered by the Employees. We further adopt the narrow holding that that the 2009 PRR supersedes the 1988 Payroll Policy, insofar as the definition of overtime is concerned. We need not reach the issue, raised by the Employees, *see* Appellants' Br. at 17, of whether other provisions in the 1988 Payroll Policy that are unrelated to overtime remain in effect, because those provisions are not properly before us. *See Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33.

B. The CSC's Decision Not to Admit Certain Evidence Was Not Improper

[20] At the outset of the CSC Hearing, the Employees attempted to introduce (1) a December 2013 letter from the Port General Manager to her staff (the "Internal Letter"), and (2) a Port tariff schedule purporting to show the overtime rates charged to ships (the "Tariff Schedule"). *See* RA, tab 15 at 4, 8 (Notice of Lodgement). The CSC Chairman queried why these were not submitted earlier, to which the Employees responded: "[T]he manager's [letter] came in this week." *Id.* at 5. The Employees did not answer as to why the Tariff Schedule was not submitted earlier. *See id.* The Port objected to the admission of these pieces of evidence as irrelevant to the issue before the CSC. *See id.* at 6. The Employees countered that the purpose of entering the Internal Letter into evidence was to show that the Port General Manager at the time referenced

the 1988 Payroll Policy, while the purpose of entering the Tariff Schedule into evidence was to show the Port charged ships daily overtime. *Id.* at 8. The CSC board unanimously decided not to accept these two documents into evidence. *Id.* at 10.

[21] The Superior Court affirmed the CSC's decision, on the basis that the attempted submission of this evidence was untimely, and, even if the CSC had committed error in denying admission of this evidence, it was not prejudicial because a "substantial record had already been developed regarding the grievance" and admission of these documents "would not have changed the position" of the court "in finding that the 2009 PRR abrogated portions of the 1988 Payroll Policy." RA, tab 27 at 6 (Corrected Dec. & Order, Mar. 14, 2017).

[22] On appeal, the Employees suggest that the CSC's refusal to admit this evidence may "amount to a denial of due process," and that the CSC violated 5 GCA § 9241 by disregarding these two exhibits when the record was prepared.[1] *See* Appellants' Br. at 18-20; Reply Br. at 10. The CSC counters by asserting, among other things, (1) that the Employees did not timely submit the evidence under CSC Rules of Procedure for Adverse Action Appeals ("CSC AA Rules"), (2) the Employees took no action to introduce this evidence into the record to the trial court, (3) the Employees failed to justify the relevance of the exhibits, and (4) the exclusion of the evidence is harmless in any event. *See* Respondent-Appellee's Br. at 10-20.

[1] Title 5 GCA § 9241 states, in relevant part:

> Within thirty (30) days after request [for judicial review] and payment of the expenses of preparation and certification by the petition, the agency shall prepare and deliver to the petitioner the complete record of the proceedings or such parts of the record as are designated by the petitioner. *The complete record includes* the pleadings, all notices and orders issued by the agency, any proposed decisions by the hearing officer, the final decision, a transcript of all proceedings, *the exhibits admitted or rejected*, the written evidence and any other papers in the case.

5 GCA § 9241 (2005) (emphases added).

[23] Pursuant to 4 GCA § 4409, "[t]he rules of the [CSC] are subject to the Administrative Adjudication Law." Article III of the Administrative Adjudication Law permits an administrative agency, including the CSC, to promulgate rules to facilitate its statutory mandate. *See* 5 GCA § 9300 *et seq.* Under this authority, and its powers under 4 GCA §§ 4403, 4406 and 4409, the CSC promulgated the CSC AA Rules with the purpose of "creat[ing] a fair process with which to adjudicate Adverse Action Appeals." CSC AA R. 2.

[24] The CSC AA Rules are intended to apply a more lenient standard for admissibility of evidence than the standard applied in judicial proceedings. Rule 11.2.5 states: "The Rules of Evidence, Title 6 GCA, shall not apply. The only grounds for excluding any proffered evidence are that the evidence is irrelevant or unduly repetitious or is *filed untimely*." CSC AA R. 11.2.5 (2010) (emphasis added). Rule 10.1 states that "[n]o later than *twenty-eight (28) days* before a hearing on the merits . . . each party *shall submit to the CSC all documents it wishes the CSC to consider*." CSC AA R. 10.1 (emphases added). Rule 10.2 contains other requirements governing the form and number of copies of documents to be submitted to the CSC.[2] *See* CSC AA R. 10.2, 10.2.2, 10.2.3.

[25] First, the Employees suggest that the CSC's decision to exclude the proffered evidence was arbitrary and may amount to a denial of due process. *See* Appellants' Br. at 10-11; Reply Br. at 10. Second, they claim the CSC committed reversible error by arbitrarily failing to include the proffered evidence into the trial court record, on the basis that 5 GCA § 9241 requires including "the exhibits admitted or rejected." *See* Appellants' Br. at 18-20; Reply Br. at 10-12.

[2] Although the only specific CSC AA Rule that the parties make reference to in their briefing is Rule 10.1, *see* Respondent-Appellee's Br. at 15, this court may take judicial notice of the entire suite of CSC AA Rules pursuant to 5 GCA § 9306, which provides the CSC AA Rules "shall be judicially noticed by all courts and agencies" of Guam. 5 GCA § 9306 (2005).

Third, the Employees argue that this court should take judicial notice of the Tariff Schedule. Appellants' Br. at 21-22; Reply Br. at 9-10.

1. Denial of the proffered exhibits did not amount to a denial of due process.

[26] The Employees frame the denial of evidence as implicating due process, therefore necessitating *de novo* review. Appellants' Br. at 10-11 ("The question of whether an appellant '. . . was denied a fair hearing, and thus denied his due process rights, is a question of law reviewed *de novo*.'" (omission in original) (quoting *Sule v. Guam Bd. of Dental Exam'rs*, 2008 Guam 20 ¶ 13)).[3] The CSC frames the issue as similar to an evidentiary ruling in a civil proceeding, therefore requiring an abuse-of-discretion standard. Respondent-Appellee's Br. at 5 (citing *In re N.A.*, 2001 Guam 7 ¶ 19).

[27] We are persuaded that *de novo* review is appropriate, but not for the reasons suggested by the Employees. Neither party mentions 5 GCA § 9240, which sets out the standard for judicial review of agency decisions, and requires that "[i]f 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." 5 GCA § 9240. Where the standard of review is enunciated by statute, such standard will generally govern. *See Chaco*, 2015 Guam 18 ¶ 11 (citing *Fagan*, 2006 Guam 11 ¶ 9).

[28] We have elaborated on the standard set out in 5 GCA § 9240 by stating that questions of law are reviewed *de novo*, and that a reviewing court "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 ¶¶ 10-11 (alterations

[3] Specifically, *Sule* stated that "[w]hether [an appellant] was denied a fair hearing, and thus denied his due process rights, is a question of law reviewed *de novo*," 2008 Guam 20 ¶ 13, but "the *factual* findings underlying this determination are reviewed for whether they are supported by *substantial evidence*," *id.* ¶ 11 (emphases added).

in original) (quoting *Alcala*, 141 F.3d at 944). Here, the decision by the CSC to exclude certain evidence was not a factual determination, but rather a decision based on the relevant CSC AA Rules, including Rule 10.1, which requires submission of evidence 28 days prior to the hearing on the merits. *See* CSC AA R. 10.1. As a result, the CSC's decision is properly framed as an agency's interpretation of the relevant procedural regulations governing the grievance process, therefore requiring *de novo* review.

[29] To be clear, we are not adopting *de novo* review because the procedural due process rights of the Employees were violated. It is well-settled that where a government employee has a constitutionally protected interest in continued employment, any adverse action triggers 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 Jud. Council of Guam*, No. 82-0192A, 1984 WL 55540, at *1 (D. Guam App. Div. Apr. 18, 1984); *see also Arnett v. Kennedy*, 416 U.S. 134, 185 (1974). But "[t]he judicial model of a full-blown evidentiary hearing is not always required." *Johnson v. Ala. Agric. & Mech. Univ.*, 481 So. 2d 336, 339 (Ala. 1985); *see also* 5 GCA § 9226 (2005) ("The hearing need not be conducted according to technical rules relating to evidence and witnesses."). Under the CSC AA Rules, "[t]he only grounds for excluding any proffered evidence are that the evidence is irrelevant or unduly repetitious or is filed *untimely*." CSC AA R. 11.2.5 (emphasis added).

[30] Here, there is nothing in the record indicating that the introduction of the evidence was brought to the attention of the CSC Commissioners or the Port prior to the CSC Hearing itself.[4]

[4] This fact distinguishes *B.M. Co. v. Avery*—a case the Employees rely on—from the present facts. 2001 Guam 27; *see also* Appellants' Br. at 20 ("[I]n the absence of an incurable prejudice to the opposing party, trial judges should err on the side of affording the parties the opportunity to fully present the case on the merits" (quoting *Avery*, 2001 Guam 27 ¶ 29)). In *Avery*, this court held that allowing expert witnesses to be called did not result in prejudice to the opposing party because, in part, there were still *two weeks* before trial. *See* 2001 Guam 27 ¶¶ 21,

The attempted submission of evidence did not comply with CSC AA Rule 10.1. Notably, the Employees do *not* challenge the constitutionality of the CSC AA Rules themselves; nor do they provide any persuasive reason why the CSC should depart from CSC AA Rule 10.1. *See* Appellants' Br. at 18-20. There is no indication that the CSC acted arbitrarily when it denied the evidence in accordance with CSC AA Rule 10.1. The cases relied on by the Employees do not persuasively demonstrate that the CSC acted arbitrarily. *See Russell-Newman Mfg. Co. v. NLRB*, 370 F.2d 980, 984 (5th Cir. 1966) ("[T]he liberty and property of citizens must be protected by fair and open hearing, that such a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party, and to meet those claims. Due process in an administrative hearing includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law."); *see also Nat'l Airlines, Inc. v. Civil Aeronautics Bd.*, 321 F.2d 380, 384-86 (D.C. Cir. 1963) (holding the petitioner was not denied a full administrative hearing even though certain evidence was denied). Here, the Employees received exactly what these cases require: an open and fair administrative hearing that complied with applicable procedural standards and provided a reasonable opportunity to meet opposing claims.

[31] Further, the CSC's denial of evidence did not give rise to a procedural due process violation under the test set out in *Carlson v. Perez*, 2007 Guam 6. Under *Carlson*, courts are required to consider three factors in determining whether requirements of procedural due process have been invoked:

28-29; *cf. Guam United Warehouse Corp. v. DeWitt Transp. Servs. of Guam, Inc.*, 2003 Guam 20 ¶¶ 47-50 (distinguishing *Avery* and holding it was an abuse of discretion to allow a previously undisclosed witness to testify when the opposing party had no notice until the very *day* of trial). Here, the Employees attempted to introduce new evidence *at the CSC Hearing*, affording no time for the CSC commissioners or the Port to meaningfully prepare. *See* RA, tab 15 at 4, 8 (Notice of Lodgement).

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the *procedures* used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Carlson, 2007 Guam 6 ¶ 35 (emphasis added) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). In *Carlson*, we ruled that due process requirements were satisfied under this three-part test where the Guam Economic Development and Commerce Authority "borrowed" the Department of Administration's ("DOA") Personnel Rules and Regulations for certain purposes. *See* 2007 Guam 6 ¶¶ 37-39. Particularly, we noted that there was no risk of erroneous deprivation of a property interest given "[t]he DOA Rules contain[ed] a panoply of rights for employees." *Id.* ¶ 37. We found no risk of erroneous deprivation of a property interest in light of the duties and responsibilities of the CSC set forth in the Guam Code Annotated and the DOA rules, as well as the procedural safeguards provided by the CSC AA Rules. *Id.* We also held the application of any additional safeguards "would likely not be of significant value given the breadth and detail of the existing DOA Rules and CSC [AA] Rules." *Id.* Finally, we found that "[t]he fiscal and administrative burden entailed with adopting substitute or additional procedures" weighed in favor of finding due process satisfied. *Id.*

[32] The logic from *Carlson* is instructive, because even if we were to assume the denial of the two exhibits proffered by the Employees rose to the level of a "deprivation" of a "property interest"—an argument the Employees do not fully develop—unlawful deprivation did not occur because the Employees' due process rights were already protected by a number of statutory and rule-based provisions. *See* 4 GCA §§ 4403(c)-(d) (amended by P.L. 34-058:6 (Nov. 1, 2017)), 4406 (amended by P.L. 30-112:3 (Mar. 12, 2010)), 4407(b) (2005), 4409 (2005); 5 GCA § 9200

et seq. (2005); 2009 PRR, Ch. 11 (Adverse Action Procedures), Ch. 12 (Grievance Procedures); CSC AA R. 6, 7, 10, 11.2.2, 11.2.6. And, unlike in *Carlson*, none of these provisions were "borrowed" from another agency. All parties were on notice of the applicable procedural requirements in advance of the CSC Hearing.[5] The CSC AA Rules and 2009 PRR contain specific procedural safeguards protecting evidentiary rights. *See* 2009 PRR § 12.702 *et seq.*; CSC AA R. 6, 7, 10. It is unclear what value additional procedural safeguards would have provided in the present case. In actuality, adopting the Employees' position could very well *undermine* these protective provisions because their argument advocates *disregarding* procedural safeguards by allowing a party to introduce untimely evidence contrary to the CSC AA Rules and with no prior notice to the CSC or the opposing party. Consequently, we do not find that the CSC's decision to deny the admission of the Internal Letter or the Tariff Schedule was improper.

2. We decline to address the CSC's failure to include the denied exhibits in the certification of record submitted to the Superior Court.

[33] The Employees argue that the CSC committed reversible error when it failed to include the denied exhibits in the record submitted to the Superior Court. Appellants' Br. at 18-20, Reply Br. at 10-12. Title 5 GCA § 9241 states:

> Within thirty (30) days after request [for judicial review] and payment of the expenses of preparation and certification by the petition, the agency shall prepare and deliver to the petitioner the complete record of the proceedings or such parts of the record as are designated by the petitioner. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decisions by the hearing officer, the final decision, *a transcript of all proceedings, the exhibits admitted or rejected*, the written evidence and any other papers in the case.

[5] The Employees do not make the argument that they did not know of the applicable procedural requirements.

5 GCA § 9241 (emphasis added). The Superior Court is entitled to view "the administrative record as a whole," not just a partial record submitted by the agency. *See Chaco*, 2015 Guam 18 ¶ 16. Yet, after having updated the Superior Court record to include missing transcripts, *see* RA, tab 14 (Cert. of Record); RA, tab 15 at 1 (Notice of Lodgment), the Employees did not otherwise object or make any further motion before the Superior Court to expand the record. Likewise, the Employees' trial briefs did not make any allusion to the trial record being incomplete. *See* RA, tab 17 (Appellants' Opening Br., Sept. 16, 2016); RA, tab 19 (Appellants' Reply, Nov. 4, 2016).

[34] Because this court will not normally entertain new arguments on appeal, *e.g.*, *Taitano v. Lujan*, 2005 Guam 26 ¶ 15, we decline to address the CSC's failure to include the denied exhibits in the record submitted to the trial court, *see, e.g.*, *Tanaguchi-Ruth + Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 82.

3. It was not reversible error for the Superior Court and the CSC to disregard the Tariff Schedule proffered by the Employees.

[35] The Tariff Schedule purports to show that ships are charged overtime for any employees who work in excess of eight hours a day. RA, tab 15 at 14 (Notice of Lodgement); *see also* Appellants' Br. at 22. The Employees claimed that the Tariff Schedule is relevant because "the Port's getting the overtime money the ship pays; but the Port's not passing it on to the employees." RA, tab 15 at 14-15 (Notice of Lodgement).

[36] Notwithstanding the absence of the Tariff Schedule, the Superior Court found that a substantial record had already been developed during the grievance process. *See* RA, tab 27 at 6 (Corrected Dec. & Order). The Superior Court refused to address the Tariff Schedule for three additional reasons: "(1) the CSC did not consider this issue and refused to admit related evidence, (2) the Court received limited briefing on this topic, and (3) the Tariff Schedule is

ultimately approved by a different agency, the Public Utilities Commission." *Id.* at 6 n.3. The trial court concluded that the admission of the Tariff Schedule would not have changed its position. *Id.* at 6. While the court can appropriately take judicial notice of the Tariff Schedule pursuant to Guam Rule of Evidence 201, *see* Reply Br. at 9-10; *see also* Guam R. Evid. 201, we agree with the Superior Court that the Tariff Schedule would not change the outcome of this case.

[37] First, the Superior Court correctly noted—and the Employees concede—the Tariff Schedule must be approved by the Guam Public Utilities Commission, not the Port. Appellants' Br. at 21; *see also* RA, tab 27 at 6 n.3 (Corrected Dec. & Order); *see also* 12 GCA § 12116(a), (g) (as amended by P.L. 30-052:7 (July 14, 2009)). The Tariff Schedule is unable to speak to the Legislature's intent regarding the definition of overtime in the 2009 PRR, which is the specific issue before us. The 2009 PRR is devoid of any provisions that would indicate that the Legislature expressly intended overtime compensation to be correlated to the overtime rates paid by ships. *See* P.L. 30-043. Second, the attempt to introduce the Tariff Schedule at the CSC Hearing was untimely and not properly briefed by the parties. As discussed above with respect to the Internal Letter, the attempted submission of the Tariff Schedule likewise did not comply with CSC AA Rule 10.1, and for the same reasons, we do not find the refusal to consider the Tariff Schedule requires reversal. *See* 5 GCA § 9240; CSC AA R. 10.1; *see also Nat'l Airlines*, 321 F.2d at 384-86 (finding petitioner was not denied a full administrative hearing even though the agency denied the admission of certain evidence); *Fagan*, 2006 Guam 11 ¶ 11.

C. The CSC Decision is Not Facially Defective

[38] The Employees also assert that the Superior Court "committed error by failing to recognize the CSC Decision was based on an incorrect set of management findings."

Appellants' Br. at 22. The Employees argue the CSC Decision is "facially" defective because it erroneously incorporated the Port management's findings and recommendations issued on January 2, 2014, which were superseded by subsequent findings and recommendations issued by the Port Grievance Committee on September 9, 2014. *Id.* at 22-23. *Compare* RA, tab 14 at 32 (CSC Decision) ("The [CSC] agrees with and incorporates Management's January 2, 2014 Findings and Recommendations . . . ."), *with* RA, tab 14 at 130-32 (Cert. of Record) (Grievance Comm. Mem. to Gen. Mgr., Sept. 9, 2014). The January 2, 2014 findings and recommendations merely pointed out certain procedural flaws that needed to be cured for the grievance to proceed. *See* RA, tab 14 at 20 (Cert. of Record) (Mem. from Grievance Comm. Chairman to Gen. Mgr., Jan. 2, 2014). The September 9, 2014 findings and recommendations ultimately concluded that only time in excess of forty hours per workweek qualified for overtime. *Id.* at 130-32 (Grievance Comm. Mem. to Gen. Mgr.)

[39] Both the January 2, 2014 and the September 9, 2014 findings and recommendations issued by the Port Grievance Committee were part of the Certification of Record before the Superior Court and are also in the record before this court. *See* 5 GCA § 9241. The September 9, 2014 findings ultimately concluded in favor of the Port, stating that "the Grievance Committee has determined that the occurrence of overtime work . . . did not exist as the services rendered during the week period did not exceed 40 straight time hours." RA, tab 14 at 132 (Cert. of Record) (Grievance Comm. Mem. to Gen. Mgr.). Therefore, even if the CSC Decision had referred to the Grievance Committee findings from September 9, 2014, the CSC's decision would not have been undermined because those findings and recommendations concluded in favor of the Port in any event. While the CSC must be more mindful of accuracy in issuing

future decisions, the Employees have failed to show that the error caused any prejudice or harm warranting reversal.

V. CONCLUSION

[40] For the foregoing reasons, we **AFFIRM** the Superior Court's Judgment dated March 13, 2017.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
JOSEPH N. CAMACHO
Justice *Pro Tempore*

/s/
KATHERINE A. MARAMAN
Chief Justice