IN THE SUPREME COURT OF GUAM

BETH PEREZ,
Petitioner-Appellant,

v.

CIVIL SERVICE COMMISSION,
Respondent-Appellee,

and

GUAM DEPARTMENT OF EDUCATION,
Real Party in Interest-Appellee.

Supreme Court Case No.: CVA17-019
Superior Court Case No.: SP0012-16

OPINION

Cite as: 2018 Guam 25

Appeal from the Superior Court of Guam
Argued and submitted on February 21, 2018
Hagåtña, Guam

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

TORRES, J.:

[1] Petitioner-Appellant Beth Perez appeals from a final order entered by the Superior Court, affirming a Decision and Judgment issued by Respondent-Appellee Civil Service Commission ("CSC"). The CSC found by clear and convincing evidence that the adverse action Real Party in Interest-Appellee Guam Department of Education ("GDOE") took against Perez was appropriate. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Perez previously served as principal of Simon Sanchez High School ("SSHS" or "the school"). At the urging of the Governor of Guam, various public entities conducted assessments at SSHS. The findings of these agencies resulted in the immediate shutdown of the school until the various health and safety concerns found as a result of these assessments could be mitigated.

[3] As a result of the concerns raised in the administrative assessments, GDOE issued a final notice of adverse action to Perez and demoted Perez from the position of principal of SSHS to assistant principal of L.P. Untalan Middle School. GDOE indicated in the final notice that "THIS ACTION [WAS] TAKEN IN ACCORDANCE WITH THE PROVISIONS OF DOE PERSONNEL RULES AND REGULATIONS 914.303, AUTHORIZED CAUSES FOR ADVERSE ACTION[,] AND 914.402, RANGE OF PENALTIES FOR STATED OFFENSES," and was based upon Perez's "[r]efusal or failure to perform prescribed duties and responsibilities." *See* Record on Appeal ("RA"), tab 1, Ex. E at 4 (Final Notice of Adverse

Action, Jan. 6, 2014). The final notice also set forth the "relevant factual background," including the following:

- Aug. 9, 2007 – "The [Guam Education Policy Board] adopted GUAM ADMINISTRATOR STANDARDS P.3.20 Performance: The administrator facilitates processes and engages in activities ensuring that a safe, secure, and clean school environment is created and maintained. *(See also: Guam Public School System School Leader Evaluation Program.)*"
- Nov. 16, 2013 – Various public agencies "conducted a joint assessment of [SSHS] for the health, safety and welfare of the school's occupants. Each would subsequently submit individual reports to the Superintendent of Education reflecting findings within their expertise and jurisdiction and attached to this report."
- Nov. 18, 2013 – The Guam Fire Department issued its assessment and noted 13 violations.
- Nov. 19, 2013 – The Director of Public Works issued a report prepared by CIP Engineers who determined the building was structurally sound, but that certain areas were in need of repair. The final notice indicated, however, that "[a]lthough some of these smaller repairs identified may be well within the Administrator's means to address, these findings are not considered to be within the scope of the school administrator's sole responsibility and no liability arises to the school site administrator from DPW CIP Engineers' findings."
- Nov. 21, 2013 – The Guam Environmental Protection Agency submitted an inspection report that noted at least 11 different health and safety concerns.

Id. at 7-9. GDOE went on to explain that Perez had "either refused or failed to perform [her] prescribed duties and responsibilities [as] set forth in the *Guam Public School System School Leader Evaluation Program and School Guam Administrator Standards for Performance*" and listed 18 points of failure by Perez. *Id.* at 10-11.

[4] Perez appealed the adverse action to the CSC. GDOE was represented in proceedings before the CSC by a lay representative, Robert Koss. Prior to a hearing on the merits, Perez objected to the CSC's consideration of two proposed exhibits submitted by GDOE: a letter of reprimand and a request for adverse action dating from June 2011 that were issued in response to

an assessment of SSHS conducted by the Guam Department of Public Health and Social Services ("DPHSS"). Perez argued that the exhibits were irrelevant and should have been removed from Perez's personnel file under applicable GDOE regulations. The CSC granted this request. Additional documents related to assessments conducted by the DPHSS in 2011 were included in the record before the CSC, and Perez did not object to their inclusion.

[5] Following the taking of testimony, the CSC deliberated on the open record. Four commissioners voted in favor of GDOE, and one voted in favor of Perez. Consistent with its determination at the hearing, the CSC issued a written Decision and Judgment. The CSC found, among other things, that Perez had "adequate written notice of her responsibility and duty to maintain a clean and safe school." RA, tab 1, Ex. A at 3 (Dec. & J., Jan. 7, 2016). The CSC also found that Perez admitted that she was aware of these duties and responsibilities and that the safety reports submitted were uncontested and reliable. Finally, the CSC found GDOE's actions were reasonable based upon ten underlying factual findings. The CSC noted that Perez's defense amounted to an attempted justification, but that the justification could not account for the numerous health and safety violations noted by the multi-agency assessments. Thus, GDOE had "met its burden of proof by clear and convincing evidence to show that its action was proper." *Id.* at 6.

[6] Thereafter, Perez filed a motion with the CSC to reconsider its Decision and Judgment. GDOE opposed this motion, and the CSC denied it.

[7] Perez next filed a Petition for Judicial Review in the Superior Court of Guam. Following briefing from the parties, the Superior Court issued a written Decision and Order resolving Perez's petition. The Superior Court found that GDOE relied on a proper legal basis in taking

adverse action against Perez, the CSC did not improperly rely on the 2011 incident, the CSC had substantial evidence before it to support its decision, and proper procedure was followed in the merits hearing. This appeal timely followed the Superior Court's final order.

II. JURISDICTION

[8] A decision of the CSC is subject to judicial review. 4 GCA § 4406(d) (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). We have 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. 115-231 (2018)); 7 GCA §§ 3105, 3107(b), 3108(a), 25102(a) (2005).

III. STANDARD OF REVIEW

[9] We review questions of fact as determined by the Civil Service Commission under a "substantial evidence" standard, and we review questions of law *de novo*. *Guam Mem'l Hosp. Auth. v. Civil Serv. Comm'n (Chaco)*, 2015 Guam 18 ¶¶ 15, 17. 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 v. Dell'Isola*, 2006 Guam 11 ¶ 11 (alterations in original) (quoting *Alcala v. Dir., Office of Workers Comp. Programs*, 141 F.3d 942, 944 (9th Cir. 1998)). Substantial evidence is defined as "such relevant evidence as 'a reasonable mind might accept as adequate to support a conclusion.'" *Chaco*, 2015 Guam 18 ¶ 15 (quoting *NLRB v. Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1054 (9th Cir. 2003)). It is "more than a mere scintilla, but less than a preponderance." *Id.* (quoting *Int'l Bhd.*, 345 F.3d at 1053-54).

IV. ANALYSIS

[10] Perez raises four main issues on appeal. First, she alleges that GDOE's final notice of adverse action was legally defective because it improperly relied upon Guam Administrator Standards. Second, Perez claims that GDOE failed to comply with its internal disciplinary rules. Third, she argues that the CSC's decision was not supported by substantial evidence. And fourth, she claims that improper conduct by GDOE materially prejudiced the CSC against her. We consider each of these arguments in turn and find that none of the allegations of error justify reversal of the trial court's order affirming the CSC's Decision and Judgment.

A. GDOE's Final Notice of Adverse Action Was Not Legally Defective

[11] Perez argues that the final notice of adverse action was defective because it relied upon the Guam Administrator Standards as the sole legal basis to justify her demotion. *See* Appellant's Br. at 17-18 (Oct. 27, 2017). This argument is without merit. GDOE premised the adverse action upon a violation of its Personnel Rules and Regulations ("PRR"), which GDOE adopted in accordance with 4 GCA §§ 4105 and 4106. *See* RA, tab 1, Ex. C (Notice of Proposed Adverse Action, Dec. 18, 2013); RA, tab 1, Ex. E at 10 (Final Notice of Adverse Action); 4 GCA §§ 4105–4106 (as amended by P.L. 28-113:5 (Apr. 14, 2006) and P.L. 28-187:4 (Jan. 29, 2007), respectively). The GDOE PRR sets forth the appropriate procedure for GDOE to employ in undertaking adverse action against its employees. Under GDOE PRR § 914.303, the superintendent of GDOE is authorized to undertake adverse actions against employees for, among other things, "[r]efusal or failure to perform prescribed duties and responsibilities." GDOE PRR § 914.303(B). These rules further provide that a final notice of adverse action "shall be in writing; be dated; state the specific facts found upon which such action is based; inform the

employee of his right to appeal to the Commission; and, inform the employee of the time limit of 20 days within which an appeal may be submitted" to the CSC. GDOE PRR § 914.311(A). No authority exists in these rules, or elsewhere in Guam law, to support the contention that GDOE is required to specify the exact document that sets forth the "prescribed duties and responsibilities" of an employee in cases where adverse action is premised on GDOE PRR § 914.303(B).

[12] Perez seeks a specificity that the law does not require. The law demands only that an adverse action be "justified." *See Blas v. Guam Customs & Quarantine Agency*, 2000 Guam 12 ¶ 16. Under this standard, due process requires that an employee have fair and reasonable notice of what conduct may subject him or her to an adverse action. *Cf. Castro v. G.C. Corp.*, 2012 Guam 6 ¶¶ 24-25. Perez was provided fair and reasonable notice in this case.

[13] In the final notice of adverse action, GDOE identified Guam Administrator Standard P.3.20 as providing that notice. *See* RA, tab 1, Ex. E at 10 (Final Notice of Adverse Action). Guam Administrator Standard P.3.20 states that a prescribed duty of Guam school administrators is "facilitat[ing] processes and engag[ing] in activities ensuring that a safe, secure, and clean school environment is created and maintained." *See* RA, tab 20, Ex. A (Mgmt.'s Evid. Exs., M-74) (hereinafter, "CSC Cert. Record"). During the merits hearing, Perez admitted that this was one of her prescribed duties. *See* RA, tab 16 at 34 (Pet'rs Prod. of Certified Transcripts ("Tr."), Sept. 16, 2016 (Merits Hr'g, Oct. 15, 2015)) ("Q: Is it a part of the principal's job to protect and assure [sic] the students are safe while they're at school? A: Yes."). In this case, GDOE PRR § 914.303(B) provides the legal basis for Perez's demotion, not Guam Administrator Standard P.3.20. The citation to Guam Administrator Standard P.3.20 and Perez's admission of her duties on the record support a finding that Perez was fairly and reasonably informed of her duties and

responsibilities. *See, e.g.*, Tr. at 15 (Merits Hr'g, Jan. 28, 2016); Tr. at 68 (Merits Hr'g, Oct. 13, 2015). We therefore reject Perez's argument that the final notice of adverse action was legally defective.

B. GDOE Properly Complied With Its Own Internal Rules and Regulations in Demoting Perez

[14] Perez next argues that the process that ultimately led to her demotion did not comply with internal GDOE rules because she was not provided an opportunity to correct any misconduct and the GDOE failed to employ progressive discipline. Appellant's Br. at 18-22. In particular, Perez argues that the GDOE failed to comply with GDOE PRR § 914.202. *See* Appellant's Br. at 18-19. That provision states in relevant part:

> A. All levels of supervision and management, share the responsibility for strict adherence to employee's job protection rights and considerations including:
>
> 1. Informal counseling at the first indication that an on-the-job or personal problem is affecting the employee's job performance.
>
> 2. A reasonable opportunity for the employee to correct inadequate performance including providing specific training to the employee to improve the level of his job performance, or to correct unacceptable habits or practices, such as tardiness or lack of attention to work requirements.
>
> . . . .
>
> B. The Director of Education/Superintendent shall insure [sic] that each supervisor and division head has received orientation and training on the basic intent that discipline shall be a method for correcting people in such a way as to produce satisfactory job performance. The use of discipline in a punitive [manner] is inconsistent with the DOE's concept of discipline as an opportunity to provide constructive correction.

GDOE PRR § 914.202. Perez essentially asks the court to adopt a *per se* rule that an opportunity to correct misconduct and progressive discipline must be utilized in every case. We have previously found that no such general obligation exists under Guam law. *See Chaco*, 2015

Guam 18 ¶ 37 (stating without discussion that "no policy requires [Guam Memorial Hospital Authority] to utilize progressive discipline before terminating an employee for violation of GMHA Policies"). And we are not convinced that such a broad, general obligation exists for GDOE under section 914.202 of the PPR. *Accord* GDOE PRR § 914.402 (indicating that even a first-time offense can result in dismissal); *Woodland Joint Unified Sch. Dist. v. Comm'n on Prof'l Competence*, 4 Cal. Rptr. 2d 227, 239-41 (Ct. App. 1992) (rejecting argument that underlying policy rationales for the disciplinary scheme required the use of progressive discipline and rejecting the argument that the scheme "implied" such requirements); *Cox v. State ex rel. Okla. Dep't of Human Servs.*, 2004 OK 17, ¶¶ 18-26, 87 P.3d 607, 614-17 (2004) (finding that progressive discipline is not mandatory in all cases and that public employer does not have an obligation to demonstrate that some lesser disciplinary act would be ineffective before imposing more stringent penalty).

[15] Even assuming progressive discipline and an opportunity to take corrective action are required under the applicable GDOE rules, the CSC was justified in finding that GDOE provided Perez with a reasonable opportunity to undertake corrective action and progressive discipline. Perez's argument on appeal artificially looks at the 2013 agency assessments in isolation by ignoring similar failings that occurred in 2011. The underlying logic to Perez's argument is that each time a mistake is made or misconduct found, an employee should be entitled to a chance to correct that mistake or misconduct before any adverse action is taken. This runs counter to the concept of progressive discipline, which takes a more holistic view of an employee's conduct. *See, e.g.*, *Downie v. Indep. Sch. Dist. No. 141*, 367 N.W.2d 913, 918 (Minn. Ct. App. 1985) (rejecting argument that "it was improper for the fact finder to look beyond . . . the triggering

[misconduct] incident . . . to determine whether [the adverse action of] immediate discharge was appropriate"). Taking Perez's position to its logical extreme, an employee could engage in misconduct, remedy it, then engage in similar misconduct, again remedy it, and continue to do so in an endless cycle without the risk that adverse action would result. This reasoning is detached from the reality of the workplace, and we avoid interpreting the PRR in such a way that would lead to such an unreasonable result. *See, e.g.*, *People v. Manila*, 2015 Guam 40 ¶ 47 (rejecting unreasonable interpretation of a statute); *Guerrero v. Santo Thomas*, 2010 Guam 11 ¶ 40 (rejecting as unreasonable management's interpretation of an executive order); *cf. HRC Guam Co. v. Bayview II L.L.C.*, 2017 Guam 25 ¶ 60 ("We will not entertain a strained interpretation of a contract, and preference should be given to reasonable interpretations of a contract rather than an unreasonable interpretation." (citations omitted)).

[16] The mandatory procedures for undertaking adverse action are set forth in the GDOE PRR under the sub-heading "Adverse Action Procedures." *See* GDOE PRR §§ 914.301-.313. Perez does not argue that GDOE failed to comply with any of these specific provisions, including providing notice of the proposed adverse action, an opportunity to informally contest the proposed adverse action, and a final notice of adverse action. From the record before us, we conclude that the Superior Court did not err when it found that the GDOE adequately complied with its internal disciplinary rules.

C. The CSC's Decision Was Supported by Substantial Evidence

[17] Perez next argues that the CSC's decision was not supported by substantial evidence. *See* Appellant's Br. at 11-17. The CSC found in its Decision and Judgment that

> Management's action to demote [Perez] to an Assistant Principal was reasonable based on: (1) the employee failed to perform her duties and responsibilities to

> ensure that a clean and safe school was maintained; (2) the Employee had clear notice that it is her duty and responsibility to ensure a clean and safe school environment was maintained; (3) the Employee was provided with adequate training; (4) the Employee's failure was a repeated violation; (5) in her position of Principal, the Employee had adequate human resources available and adequate authority to direct them; (5) a contracted cleaning services was provided to assist the employee in maintaining a clean and safe school; (6) a contracted grounds maintenance services was in place; (7) a trash removal services was either available or should have been retained by the Employee for the regular removal of refuse; (8) adequate financial resources were provided and available to the employee for ensuring a clean and safe school was maintained; and, (9) other community based resources were also available to the Employee.

RA, tab 1, Ex. A at 4 (Dec. & J.). Perez argues that the CSC's determination was in error because she had no direct control over the custodians or GDOE's Facilities and Maintenance Division. *See* Appellant's Br. at 11-17.

[18] "[T]he standard of review for an agency's factual findings is the substantial evidence standard." *Chaco*, 2015 Guam 18 ¶ 15. This standard is satisfied when there exists "such relevant evidence as 'a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Int'l Bhd.*, 345 F.3d at 1054). Under this standard, we 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." *Id.* ¶ 16. This is an "extremely deferential" standard that requires the court to uphold the agency's factual findings "unless the evidence presented would *compel* a reasonable factfinder to reach a contrary result." *Id.* (quoting *Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir. 2003), *amended by* 339 F.3d 1012 (9th Cir. 2003)). "If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the agency." *Id.*

[19] Perez did not dispute two important facts during the administrative hearing. First, Perez admitted during her testimony that she was fully aware of her duty to maintain a clean and safe

school environment at SSHS. *See* Tr. at 17, 34, 52, 55 (Merits Hr'g, Oct. 15, 2015). Second, Perez did not challenge most of the underlying health and safety violations found by the reviewing agencies during their assessments. *See id.* at 8 ("Q: . . . Is it your concern [about the adverse action] that the findings of the regulatory agency are false, these are not true, that these things were not present at [SSHS] on that day? A: No."). Indeed, Perez admitted that many, although not all, of the specific violations found by the reviewing agencies were correct. *See, e.g.*, *id.* at 16 (admitting some evacuation plans not posted); *id.* at 22 (admitting some fire extinguishers not in place); *id.* at 31 (admitting some exit signs not posted); *id.* at 52 (admitting to some unclean toilets); *id.* at 55 (admitting that there was refuse around campus).

[20] Perez's argument before the CSC and on appeal is that it was GDOE contractors and the Facilities and Maintenance Division of GDOE that had responsibility to maintain a clean and safe school environment and that she did not directly control their work. Even accepting that GDOE's contractors and the Facilities and Management Division had *primary* responsibility for ensuring that health and safety standards were maintained at SSHS, Perez admitted that when the contractors and Facilities and Management fall short "it's [her] responsibility to step up to the plate." *Id.* at 52 (Q: . . . Ms. Perez, earlier you said that if the vendor falls short, it's your responsibility to step up to the plate. You said that. A: Absolutely. Q: Okay -- A: And I stand by that."). This admission was corroborated by other testimony. *See also* Tr. at 114 (Merits Hr'g, Oct. 8, 2015) (deputy superintendent stating that as a principal "it was [his] obligation to notify [Facilities and Maintenance] via service request to come out . . . . But if [he] didn't do that, and a regulatory agency came out and cited [him] for that, it would be my responsibility for failing to request for the service.").

[21] The CSC specifically found that Perez "had adequate human resources available and adequate authority to direct them," as well as "adequate financial resources . . . for ensuring a clean and safe school was maintained." RA, tab 1, Ex. A at 4 (Dec. & J.). These findings were supported by the record. *See, e.g.*, Tr. at 106 (Merits Hr'g, Oct. 13, 2015). For example, Perez testified that when necessary she would order staff to clean—even though that was not their assigned function—and would take it upon herself to clean bathrooms. *See, e.g.*, Tr. at 54 (Merits Hr'g, Oct. 15, 2015) (Perez: "I would send available staff in there when [the cleaning contractors] fell short of their responsibility to make sure that those restrooms were clean."); *id.* at 104 (same regarding Facilities and Maintenance failures); *id.* at 116-17 (same regarding Yigo Mayor's Office failures); *id.* at 149 (discussing sending staff to complete maintenance tasks). There was also a separate fund provided to school administrators that Perez admittedly used on occasion to buy cleaning and sanitation supplies. *See id.* at 11, 45 (Merits Hr'g, Oct. 15, 2015). Other testimony also corroborated these admissions. *See* Tr. at 24-28, 30-32, 37-38 (Merits Hr'g, Oct. 8, 2015); Tr. at 27-28, 81-82, 103 (Merits Hr'g, Oct. 13, 2015).

[22] Perez argues on appeal that under the applicable contract with the cleaning contractor, "*all* [Perez] could do was notify [Facilities and Maintenance] of the school's concerns with the contractor." Appellant's Br. at 14 (emphasis added). The CSC disagreed and found that there were tools at Perez's disposal that she could have used to motivate the cleaning contractors. RA, tab 1, Ex. A at 5 (Dec. & J.). This too is supported by the record. There was testimony to the effect that the principal could take steps to make sure payment was withheld from the

contractors,[1] *see* Tr. at 85-87, 110-11 (Merits Hr'g, Oct. 8, 2015); Tr. at 25-27, 100-01 (Merits Hr'g, Oct. 13, 2015); take other informal steps to ensure compliance by the contractors, *see* Tr. at 99-100 (Merits Hr'g, Oct. 8, 2015); and take steps directed at other interest holders that were under the direct supervision of the principal, such as teachers or school aides, *see id.* at 100; Tr. at 30-33 (Merits Hr'g, Oct. 13, 2015). Moreover, if Facilities and Maintenance was not responding appropriately, it was the principal's responsibility to "speak to her deputy to . . . [r]eport the matter up" through the appropriate chain of command. Tr. at 117-18 (Merits Hr'g, Oct. 8, 2015).

[23] In addition, the CSC determined that, taking into account all of Perez's alleged justifications for the health and safety violations, "there were numerous violations that had nothing to do with the . . . excuses" proffered by Perez. RA, tab 1, Ex. A at 5 (Dec. & J.). Therefore, according to the CSC, "even if [it] accepted the veracity of [Perez's] excuses, there remained items within her control that were not fulfilled." *Id.* This too was supported by the record. *See* Tr. at 100-02 (Merits Hr'g, Oct. 13, 2015) ("The issues at hand were not purely custodial. . . . So, I would say even if I granted and said, 'You know what, she's right. The custodial vendor was a problem,' I would tell you that that's not what the regulatory agencies told me."); *id.* at 78-79; Tr. at 24-28 (Merits Hr'g, Oct. 8, 2015). Perez does not address this issue in her briefing.

[24] As discussed further below, *see infra* Part IV.D.1, Perez has also argued that there was no evidence supporting the CSC's finding that the 2013 health and safety violations were "a repeated violation." *See* Appellant's Br. at 24 (citing RA, tab 1, Ex. A at 4 (Dec. & J.)). But,

[1] The record before the CSC indicates that Perez in fact either recommended or did this on at least one occasion. *See* Tr. at 54-58 (Merits Hr'g, Oct. 13, 2015).

this finding was supported by the factual record. In addition to the inspection reports from 2011 that were part of the record (and to which Perez did not object at the time of the merits hearing), *see* RA, tab 20, Ex. A (CSC Cert. Record, M-90 through M-104), the record also indicated that Perez was briefed on the 2011 inspection failures, *see* Tr. at 69-70 (Merits Hr'g, Oct. 13, 2015). Moreover, the superintendent testified that he took the 2011 inspections, as opposed to the punishment imposed at the time, into consideration in determining that a demotion was appropriate. *Id.* at 37. The CSC did not strike this testimony from the record, and as discussed further below, allowing this testimony was not error.

[25] The record supports the factual findings underpinning the CSC's determination that a demotion was a reasonable punishment. The record establishes, as Perez contends, that she did not have direct control over the conduct of contractors and the Facilities and Maintenance employees. *See* Tr. at 89-90 (Merits Hr'g, Oct. 8, 2015). We, however, must "review the administrative record as a whole" and "may not substitute [our] judgment for that of the agency." *Chaco*, 2015 Guam 18 ¶ 16 (citations omitted). The CSC took a holistic approach to determining the reasonableness of GDOE's adverse action and rejected Perez's position that there was nothing else she could have done in order to maintain a safe and healthy school environment in the absence of direct control over the contractors and facilities employees. The CSC analyzed the issue as follows:

> Ultimately, the position of principal is the pinnacle of authority at a school and the buck must stop somewhere. It is a position that individuals volunteer to take on and one they can elect to step down from if they believe they cannot fulfill the requirements given the resources provided. Being principal of a school is akin to being in a senior management position in DOE. If the job is not being done and the Superintendent believes another can do it with the same resources, then DOE needs the flexibility to ensure that schools are properly run and maintained.

RA, tab 1, Ex. A at 6 (Dec. & J.). This same understanding and policy is expressed in the GDOE PRR. *See* GDOE PRR § 914.201(A) (removal or demotion to be employed where it "will promote the efficiency of DOE service"). Under our "extremely deferential" standard of review, *Chaco*, 2015 Guam 18 ¶ 16, we find no basis to set aside the CSC's factual findings in this case.

D. Any Misconduct or Evidentiary Error Committed at the Merits Hearing Did Not Affect the Outcome of the Proceedings

[26] "[T]he primary purpose of the civil service laws . . . is to provide due process protection to members of the classified service of the government of Guam." *Blas*, 2000 Guam 12 ¶ 24; *see also Carlson*, 2007 Guam 6 ¶ 33 ("Due process protection is an integral part of the merit system."). "The Due Process Clause entitles a person to an impartial and disinterested tribunal . . . ." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *see also HRC Guam Co.*, 2017 Guam 25 ¶ 120. We have stated: "Improprieties on the part of administrative boards may indeed result in violations of due process and give rise to possible avenues of judicial relief." *Enriquez v. Smith*, 2015 Guam 29 ¶ 21. A "lower court's legal conclusion that [an appellant's] due process rights were not violated by an unfair administrative hearing is reviewed *de novo*." *Sule v. Guam Bd. of Dental Exam'rs*, 2008 Guam 20 ¶ 11. "However, the factual findings underlying this determination are reviewed for whether they are supported by substantial evidence." *Id.* Misconduct by a party representative does not justify appellate relief unless such misconduct prejudiced a party by affecting the outcome of the proceedings. *See Adams v. Duenas*, 1998 Guam 15 ¶ 17 ("Attorney misconduct warrants a new trial only if such misconduct affected the verdict."); *see also HRC Guam Co.*, 2017 Guam 25 ¶ 108; *Thornbrough v. W. Placer Unified Sch. Dist.*, 167 Cal. Rptr. 3d 24, 49 (Ct. App. 2013) (noting that procedural due process claims regarding administrative hearings are subject to a harmless error analysis).

1. The events underlying the 2011 school closure were part of the official record, even if the reprimand was not

[27] Perez asserts that GDOE's repeated reference to events in 2011 violated the CSC's evidentiary ruling and that the CSC improperly relied upon this evidence in finding that GDOE's adverse action was supported by clear and convincing evidence. *See* Appellant's Br. at 22-25. As part of its defense of its adverse action, Management submitted a number of documents to the CSC for its consideration that related to events occurring in 2011. These documents included (1) a Letter of Reprimand, dated June 28, 2011, *see* RA, tab 20, Ex. 1 (CSC Cert. Record, M-75 through M-78); (2) a Request for Adverse Action, dated June 23, 2011, *see id.* (CSC Cert. Record, M-79 through M-82); and (3) seven different inspection reports from the DPHSS, dated between May 14, 2010, and June 7, 2011, *see id.* (CSC Cert. Record, M-90 through M-104). Perez objected to the CSC's consideration of the letter of reprimand and request for adverse action, arguing that the exhibits were irrelevant, among other things. *See* RA, tab 1, Ex. F (Employee's Obj. to Mgmt.'s Exs., Sept. 9, 2015). The CSC granted Perez's motion and voted to disallow the consideration of the letter of reprimand and request for adverse action from 2011. *See* Tr. at 16 (Merits Hr'g, Oct. 6, 2015). Perez did not move, however, to exclude the 2011 inspection reports from consideration.[2] *See* RA, tab 1, Ex. F (Employee's Obj. to Mgmt.'s Exs.). These documents are part of the record properly considered by the CSC and the Superior Court, as well as this court. *Cf. Port Auth. of Guam v. Civil Serv. Comm'n (Guevara)*, 2018 Guam 1 ¶ 29 (discussing what record can be considered by Superior Court).

[2] Perez objected to discussion of the 2011 investigation reports on the basis of relevance in that they discussed inspection failures that were not under Perez's control, but the commissioners permitted discussion of the 2011 inspections over this objection. *See* Tr. at 70-71 (Merits Hr'g, Oct. 13, 2015).

[28] Despite the CSC's evidentiary ruling regarding the two excluded documents, the GDOE representative referred to the 2011 reprimand on three occasions—over nine pages of transcript—during his opening statement. *See* Tr. at 19-21, 25, 28 (Merits Hr'g, Oct. 6, 2015). These references were improper and contrary to the CSC's evidentiary ruling. Perez objected at the time of these statements, but the Chairman stated that the CSC would not take objections during opening statements. *See id.* at 20. Beyond these three comments during opening statements, Perez also complains about a number of other references to the 2011 incident. In each of these other instances, however, the record shows that either Perez's counsel opened the door to the specific reference or reference was made only to the underlying inspection, as opposed to the reprimand or proposed adverse action.

[29] Where evidence may otherwise be inadmissible, a party may nevertheless open the door to its admission by specifically asking questions related to that evidence. *See, e.g.*, *People v. Finik*, 2017 Guam 21 ¶¶ 35-43; *People v. Ongiil*, 2016 Guam 34 ¶ 37. In response to two different questions by Perez's counsel, one witness brought up the 2011 reprimand. *See, e.g.*, Tr. at 13-15, 35 (Merits Hr'g, Oct. 20, 2015). A number of other statements challenged by Perez refer only to the 2011 inspection and subsequent school closure; no reference was made to the adverse action, reprimand, or other excluded material. *See, e.g.*, Tr. at 37, 70, 98, 132 (Merits Hr'g, Oct. 13, 2015); Tr. at 35 (Merits Hr'g, Oct. 20, 2015); Tr. at 18-19 (Merits Hr'g, Oct. 22, 2015). Because Perez's counsel opened the door for the testimony, these comments were not improper.

[30] Even though GDOE's reference to the 2011 reprimand during opening statements was improper, "this alone does not entitle [Perez] to relief on appeal." *HRC Guam Co.*, 2017 Guam

25 ¶ 108. Prejudice must also be shown.[3] *Id.* In determining that GDOE's adverse action was reasonable, the CSC relied upon a finding that "[Perez's] failure was a repeated violation." RA, tab 1, Ex. A at 4 (Dec. & J.). This statement, standing alone, is amorphous—it is not entirely clear that the CSC was referring to a violation of personnel rules (and thus based on excluded material) or a violation of the health and safety standards.[4] This is the only statement regarding the 2011 incident in the Decision and Judgment. In discussing their thoughts on the case, the commissioners of the CSC referenced the 2011 incident twice. In each statement, the commissioners did not refer to Perez's punishment. Tr. at 9 (Merits Hr'g, Oct. 27, 2015) ("Back in early 2011, Simon Sanchez High School was also shut down for a week for health and safety violations and the regulatory agencies did their inspections of repair work to ensure a quick reopening of the school."); *id.* at 11 ("Under Mrs. Perez' [sic] leadership, Sanchez High School was forced to close in 2011 and 2013 for health and safety violations.").

[31] In seeking reconsideration of the CSC's decision, Perez made the identical argument she now makes on appeal regarding the improper references to the 2011 reprimand. *See* RA, tab 20, Ex. 1 (CSC Cert. Record, Employee's Mot. for Recons. at 6-7). The CSC found, however, that it did not inappropriately "rel[y] on facts it should not have relied upon." RA, tab 20, Ex. 1 (CSC Cert. Record, Order at 5 (Apr. 14, 2016)). On this record, we need not speculate whether the

[3] Perez alternatively implies that discussion of the 2011 reprimand was evidentiary error by citing cases where alleged evidentiary error—not attorney misconduct—was at issue. *See* Appellant's Br. at 22 (citing *Shorba v. Bd. of Educ.*, 583 P.2d 313, 319 (Haw. 1978); *Thornbrough*, 167 Cal. Rptr. 3d at 49). Because the only incidents in which the 2011 reprimand were improperly referenced occurred during opening statements, we need not address this alternative theory. Regardless, even if viewed through the lens of evidentiary error, reversal would be inappropriate "unless the petitioner can show prejudice resulting from the admission of irrelevant or incompetent evidence." *Shorba*, 583 P.2d at 319; *see also Thornbrough*, 167 Cal. Rptr. 3d at 49.

[4] Elsewhere in the Decision and Judgment, the CSC uses the word "violation" to refer only to violations of health and safety standards. When the CSC refers to a violation of personnel rules, the CSC uses the nomenclature "failure to perform." This supports a reading of this statement cutting against Perez's position on appeal.

CSC's decision rested upon the 2011 reprimand, as the CSC has clearly stated that it did not. Thus, any reference made by GDOE to the 2011 reprimand during its opening statements did not prejudice Perez.

2. To the extent that there was other misconduct on the part of GDOE, Perez was not prejudiced and reversal is therefore inappropriate

[32] Perez also takes issue with a litany of other comments made by GDOE that Perez believes amounted to misconduct. *See* Appellant's Br. at 25-28. Not all of these comments constitute misconduct, however, and Perez has not established that the outcome would have been different had GDOE not made the comments challenged by Perez on appeal.

[33] Perez first asserts that the GDOE representative "accused [Perez and others] of intentionally allowing SSHS to fall into a state of dilapidation to get SSHS rebuilt." *Id.* at 25. To support this proposition, Perez cites to the closing statement of GDOE, wherein its lay representative stated the following:

> [Mr. Koss:] Beth Perez' [sic] testimony provided some insight over this. She testified that she deliberately made certain that there would be no soap, no paper towels, not [sic] toilet tissue in the restrooms when government officials and parents visited the school because that's what she wanted them to see. She even included it in writing in her email.
>
> Beth Perez, Melvin Finona, Rebecca Duenas all testified that they had these items on hand, and available. And yet when government officials accepted their invitation to visit the school, these items were not in place. This deliberate act by the principal was nothing short of sabotage and a breach of her duty and responsibility, not to mention insubordination.

Tr. at 9-10 (Merits Hr'g, Oct. 22, 2015). GDOE's argument is grounded, at least in part, in the record. During the merits hearing, Perez was questioned about an email she sent in which she stated: "It would be such a shame for [Dr. Cruz and Speaker Won Pat] to see that our vendor

cannot provide tissue." Tr. at 48-49 (Merits Hr'g, Oct. 15, 2015). Under questioning, GDOE attempted to frame this statement as a cynical, sarcastic comment that implied Perez purposefully showed public officials unsanitary or unsafe conditions at SSHS in an attempt to get their support in rebuilding the school. *See id.* Perez denied that she deliberately sabotaged the school, but this line of questioning emerged during several other parts of the merits hearing. *See, e.g.*, *id.* at 135-37, 151; Tr. at 124-33 (Merits Hr'g, Oct. 21, 2015).

[34] This argument advanced by GDOE during closing statements did go beyond what the testimony supports. In particular, Perez never "testified that she deliberately made certain that there would be no soap, no paper towels, not [sic] toilet tissue in the restrooms when government officials and parents visited the school." *Id.* at 9-10 (Merits Hr'g, Oct. 22, 2015). But, the broader statement and the theme of deliberate sabotage finds some limited support in the record, depending on how certain record evidence is framed or viewed. In *HRC*, we stated:

> Generally speaking, "great latitude is accorded counsel in presenting closing arguments to a [finder of fact]." This latitude permits counsel to "try their cases with earnestness and vigor," while entrusting the [fact finder] "within reason to resolve . . . heated clashes of opposing views." An attorney's closing argument is an occasion calling for "energy and spontaneity" rather than a simple narration of uncontroverted evidence. Moreover, an attorney "is not barred from commenting on the evidence presented at trial or urging the jury to draw reasonable inferences from the evidence that support [its] theory of the case . . . ."

HRC Guam Co., 2017 Guam 25 ¶ 95 (third alteration in original) (citations omitted). While *HRC* dealt with the propriety of arguments in a jury trial, we believe the same principle can be appropriately applied in other adversarial adjudicative proceedings. To the extent that the closing statement is supported by the record, it does not constitute misconduct on the part of GDOE. *See HRC Guam Co.*, 2017 Guam 25 ¶ 103. And to the extent that this statement goes beyond what the record supports, the potential prejudice was limited by the fact that it was an

isolated comment, *see id.* ¶ 117, and the fact that Perez did not contemporaneously object, *see id.* ¶¶ 90-94, 115. Perez also repeatedly denied any deliberate sabotage, as did several third-party witnesses. *See* Tr. at 137 (Merits Hr'g, Oct. 15, 2015); Tr. at 96-97 (Merits Hr'g, Oct. 21, 2015). There is no indication to suggest that the isolated comment influenced the CSC's decision; no reference was made to deliberate sabotage or any related theme during the CSC's deliberation or in its Decision and Judgment. The commissioners also seemed generally sympathetic to the situation Perez found herself in. *See infra*. Perez has thus not established that the CSC would have reached a different decision had GDOE not made this argument.

[35] Perez also alleges a number of other argumentative errors. She alleges that GDOE "accused [Perez's] counsel of conspiring with Guam Pacific Daily News to publish stories regarding SSHS's dilapidated facilities and GDOE's failures, based solely on the fact that both have offices in the same building." Appellant's Br. at 25-26. Perez next asserts that "[o]ver counsel's objections, the [CSC] allowed Koss to question witnesses about irrelevant issues outside the scope of the Adverse Action involving trash behind a stage." *Id.* at 26. Finally, she complains of error in comments made by GDOE regarding the preparation of witnesses and implications that Perez's counsel encouraged his witnesses to lie. *See id.* at 26-27. Upon review of the record, we find no evidence to support a finding of prejudice, even if Perez's allegations constitute error. *See, e.g.*, *J.J. Moving Servs., Inc. v. Sanko Bussan (Guam) Co.*, 1998 Guam 19 ¶ 21 (discussing that the party claiming error bears the burden of demonstrating prejudice).

[36] More broadly, it does not appear from the record that the members of the CSC were personally prejudiced against Perez, as she alleges on appeal. The CSC expressly stated in its Decision and Judgment that it did not intend to "critique . . . Ms. Perez herself. . . . Obviously

[GDOE] continues to value her judgment and ability and we see no need to question it either. It is clear from the evidence that Ms. Perez worked very hard." RA, tab 1, Ex. A at 5 (Dec. & J.). Indeed, one commissioner voted in favor of Perez, *see* Tr. at 18 (Merits Hr'g, Oct. 27, 2015), and that same commissioner voted to grant reconsideration, *see* Tr. at 27, 30 (Merits Hr'g, Jan. 28, 2016).

[37] Other commissioners also appeared sympathetic to Perez's situation. For example, one commissioner that ultimately voted in favor of GDOE stated:

> I think there's a lot of problems on both sides of this -- both sides of the road. I think the Department of Education itself with how it reacted to the school could've done a lot better; I mean the contracts, so many of these things that were done so poorly. On the administrative side, I think that's something hopefully that you guys can fix in the future going forward.

Tr. at 11-12 (Merits Hr'g, Oct. 27, 2015). That same commissioner also expressed that "it's unfortunate that it came down to this, but I also vote in favor of management on this case. . . . I don't blame all of the issues on Ms. Perez, but unfortunately she is in charge and she's going to have to bear the brunt of this right now." *Id.* at 12.

[38] Another commissioner agreed that not all of the eighteen factors listed in the final notice of adverse action were under Perez's control and stated, "I commend [Perez] for emailing her concerns regarding the janitorial services and work requests; but I don't think she should've stopped there." *Id.* at 19-20. That same commissioner also stated that "this is not her fault entirely." *Id.* at 20. The commissioner went on to state:

> I sympathize with her because she and her staff were trying to do their best in cleaning up the place, and there were extenuating circumstances that occurred. But still the responsibilities still rest on her shoulders to make sure that things were going smoothly and things were safe in her school. So, for that, I [vote] in favor of management.

Id. at 22-23.

[39] On this record, Perez has not established that any alleged misconduct personally prejudiced any members of the CSC against her or that the CSC's decision would have been different had certain of the challenged statements not occurred. Therefore, we cannot conclude that her due process rights were violated, and we find no basis to reverse the CSC's decision or trial court's judgment.

V. CONCLUSION

[40] For the reasons discussed above, we **AFFIRM** the Superior Court's Order, dated August 2, 2017.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice