



EXECUTIVE SUMMARY

Port Authority of Guam Back Wages Series, Part B
OPA Report No. 21-09, December 2021



Our performance audit of the back wages of two reinstated Port Authority of Guam (Port) employees – “Employee S” and “Employee T”– found that Port’s reinstatements of these two employees were generally made in accordance with administrative and judicial review judgments and orders. The legal remedies stipulated in the *Agreement to Satisfy Judgment* and *Settlement Agreement* were likewise complied by the Port. The Port paid a total of **\$1.0 million (M)** as legal remedies of Employee S and Employee T.

However, in our review of documentation provided and analysis of processes executed to satisfy legal remedies, we found deficiencies in documentation, deviations from certain provisions of Port Personnel Rules and Regulations (PRR) and internal policies, deficiencies in calculations resulting in discrepancies and overpayments, conflicting Notification of Personnel Action (NPA), non-deduction of withholding tax for back wages, and other matters of concern.



The Port paid a total of \$1.0 million (M) as legal remedies of Employee S and Employee T.



Specifically, we found:

- Legal remedies paid (satisfied) without board ratification by a resolution;
- Inconsistencies and deficiencies in the *Agreement to Satisfy Judgment and Settlement Agreement*;
- Deviations from certain provisions of Port's Personnel Rules and Regulations
 - Highest number of incremental sub-steps granted annually without the required performance evaluations approved by the former General Manager (GM);
 - Annual salary increments based partly on three prior years' "Outstanding" or "Highly Satisfactory" rating not approved by any GM.
 - Discrepancies in using the "Outstanding" and "Highly SAT" ratings instead of eligible "Marginal Satisfactory" rating due to the absence of or NRPER not approved by former GM; and
 - Conflicting Notifications of Personnel Actions.
- Deficiencies in Port back wages calculations resulting to potential overpayments due to:
 - Unapproved increments due prior to employees' terminations included in paid back wages; and
 - Questionable and unaccounted back wages paid.
- Income Tax withholding not deducted from paid back wages.
- Other Matters
 - Potential violation prohibition on retroactive pay raises
 - Pay raise prior to end of freeze period potentially violated the freeze increment mandate.
 - Appearance of conflict of interest

Legal Remedies without Board Ratification by Resolution

Employees S and T were reinstated in November 2019 and January 2020, respectively into the same positions when they left the Port as mandated. Both employees received back wages and other benefits, attorney's fees, and legal costs, totaling \$1M as prescribed in the agreements. However, the Port management paid these legal remedies and terms without seeking the Board's ratification via resolution.

There was no Board Resolution for the reinstatement of Employee S and ratification of the legal remedies, even though the reinstatement was ordered per the Civil Service Commission (CSC) - Decision and Judgment dated March 2015 and November 2019. The Port management confirmed the lack of Board Resolution and provided a duly executed Agreement to Satisfy Judgment.

Whereas Board Resolution No. 2019-20 relative to the reinstatement Employee T, merely authorized the Port to offer a settlement agreement with the employee and authorized the Port's Deputy GM to execute and deliver all documents and undertake acts to comply with the terms of the settlement.

Deviations from Certain Provisions of Port's Personnel Rules and Regulations

Highest Number of Incremental Sub-Steps Granted Annually without the PRR Required Performance Evaluations Approved by the Former GM

We reviewed Port's calculation of the reinstated employees' back wages during the seven-year employees' termination period. We found that the Port consistently used the **"5" sub-steps** for Employee S and **"4" sub-steps** for Employee T, which correspond to an "Outstanding" and "Highly Satisfactory" ratings, respectively. The Port's average calculation methodology resulted in gross back wages amounting to \$537K for Employee S and \$189K for Employee T, which was mathematically correct. Comparatively, another autonomous agency considered **"5" as a rare rating, which means that the employee significantly exceeded expectations.**

We respect that Port's calculation was based on the understanding that reinstated Employees S and T's back wages and benefits should be processed as if there was no work interruption. Port confirmed that the annual increments granted to the employees during their termination periods were based on the **average ratings** of employees' last three years' employment at the Port (2010, 2011, and 2012). In the absence of a required annual performance evaluation for every increment period, Port resorted to this average calculation method because management believed that these employees could render a consistently "Outstanding" performance during the seven-year termination period. They explained that the surrounding circumstances are not regular and that Port addressed this issue differently fitted with the prevailing circumstances.

We verified that the annual increments granted for 2013 through 2019 (seven years) were not supported with duly accomplished performance evaluation reports, which need to be approved by (and accountable to) the former GM, in compliance with the Ports PRR 6.302 and 7.010. Based on this PRR provision, without any approved performance evaluation reports, Port would have no valid basis in calculating applicable sub-steps and granting the increments.

After the “5” or “4” sub-step annual salary adjustments from 2012 thru 2019, Employee S got an adjusted annual salary of \$118K and Employee T received an adjusted annual salary of \$52K upon their reinstatements.

Annual Salary Increments Based Partly on Three Prior Year “Outstanding” or “Highly Satisfactory” Ratings not Approved by any GM

We verified employees’ performance evaluation reports for 2010, 2011, and 2012 to determine if these employees got average ratings of “Outstanding” and “Highly Satisfactory”. Our verification and recalculation found that Employees S & T got averages of “**Marginal Satisfactory**” rating or are eligible only of “**2**” **sub-steps** due to the lack of Notice of Results of Performance Evaluation Report (NRPER) or NRPER were not signed by the former GM to signify his approval of the recommended increments. The recalculated **eligible “2” sub-steps** for Employees S & T is way below compared with the “**5**” or “**4**” **sub-steps** granted by Port. The recalculated **eligible “2” sub-steps** for Employees S & T as opposed to “**5**” or “**4**” **sub-steps** granted by Port resulted in discrepancies totaling \$105K. This discrepancy could have a financial impact on the Port.

Discrepancies in Using the “Outstanding” and “Highly Satisfactory” ratings (“5” or “4” sub-steps) Instead of Marginal Satisfactory Rating (“2” sub-steps) due to Absence of or NRPER not Approved by former GM

We acknowledge Port management’s efforts to provide reinstated Employees S and T with all the expected benefits “**to make the employee whole**” as if they were not terminated. However, the audit’s calculation of the average rating for the three prior years resulted in a “**Marginal Satisfactory**” rating (“2” sub-step) as opposed to “Outstanding” or “Highly Satisfactory” (“5” or “4” sub-steps) in Port’s calculation of annual increments. The “Marginal Satisfactory” rating for which the employees were eligible stemmed from the absence of **approved performance evaluation documents** required per Ports’ PRR Section 6.302, 7.008, and 7.010.

The Port explained that since the employees were deprived to work with Port to prove the consistency of their “Outstanding” performance ratings, they should not be penalized by receiving a lower rating due to the absence of approval by the former GM. Thus, the Port used the “Outstanding” or “Highly Satisfactory” rating equivalent to “5” or “4” sub-steps.

In Part A, Port management responded to this similar finding that there was no letter from the former GM denying the employee increment. It further stated that leaving a performance unsigned should not be akin to rejecting it.

Since the auditors deal with evidentiary documents, an absence of GM’s signature on the NRPER could also be interpreted as **unapproved**. Therefore, the employee might not be eligible for an increment of “5” or “4” sub-steps.

By not using the eligible “2” the incremental sub-steps, this resulted in discrepancies in paid back wages approximately totaling to \$105K, which could have a financial impact on Port.

Conflicting Notification of Personnel Action

The \$189K back wages (net of offset) was arrived at by using hourly rates, which did not conform to the hourly rates reflected on the supporting NPA's provided. The Port explained that their subsequent calculations, which were made upon the employees' reinstatements, were guided by the amounts reflected in the *Settlement Agreement* as agreed between the employees and the Port representatives. Human Resources Department prepared the NPAs upon the employees' reinstatement based on the agreed sub-steps for increment in accordance with the Pay Schedule. Thus, NPA hourly rates would potentially be discrepant (different) against the hourly rates used in employees' calculations for the *Settlement Agreement*. Since settlement agreements would legally bind and obligate parties for compliance, the back wages amounts should be stated therein reviewed and validated by both parties.

Since NPAs are actionable documents, which support the Pay Grade/Scale and the hourly rate that should be paid to employees, these must reflect accurate pay rates that support incremental payments.

Deficiencies in Port Back Wages Calculation Resulting in Potential Overpayments

Unapproved Increments Prior to Employees Terminations Included in the Paid Back Wages

Back wages paid to Employee S and Employee T included increments totaling \$1,939 prior to the employees' terminations (10/07/12-12/12/12 and 10/07/12-02/23/13). The Port based these increments were based on NPAs prepared in 2019 and 2020, signed by the current GM. According to Port's responses, the former GM did not sign the 2013 prepared NPAs thus were replaced. The NRPER, which supported the 2013 NPAs were, likewise not signed by the former GM. The absence of GM signature apparently indicated non-approval; there was no valid basis for granting the employees increments with the highest number of incremental sub-step of 5% or 4%, respectively. Besides, per Civil Service Commission–Decision and Judgment, the employees shall be compensated for all the time **following their December 2012 and February 2013 terminations, respectively until the dates they are reinstated.**

Per Port's response to OPA questions, management stated that the employees did not receive the increments that were due to them prior to their termination.

Questionable and Unaccounted Additional Back Wages Paid

Our verification of Port's calculation of back wages paid to Employee T found that the actual gross back wages of \$318K were over by \$20K. This amount labeled as "**non-tax item**" was added to Port's original calculated back wages of \$299K. This item could not be identified with any pay period in Port's calculation. In Port's response, it stated that the item was miscategorized and part of the settlement amount.

Income Tax Withholding not deducted from Paid Back Wages

The Port did not deduct back wages totaling \$189K with payroll tax, specifically "income tax withholding". The *Settlement Agreement* provided that the first installment should only be

deducted with payroll taxes, which include among others federal income tax, Medicare, etc. Non-deduction of income tax withholding was based on the employee's request. During the November 2021 discussion, the Port stated the employee requested not to tax the lump sum amount and that the payment of income tax is the responsibility of the employee.

In Form W-4 (Employees Withholding Allowance Certificate), if the employee meets the requirement for tax exemption from federal income tax withholding, the employee can claim exemption on IRS Form –W-4. The employee's W-4 form for 2020 (2019 form altered to 2020) was not marked that the employee was "**Exempt**".

Per Internal Revenue Regulations Employer & Employee Responsibilities, it stated that employer and employee hold the responsibility for collecting and remitting withholding taxes to the Internal Revenue Service (IRS). In cases where an employer does not do this, or where an employee is self-employed, it is the responsibility of the employee to pay these withholding taxes.

Other Matters

Although not directly related to our audit objective, we became aware of other concerns that warrant Port's attention.

Potential Violation on Retroactive Pay Raises

The Port revised the NPAs prepared in August 2013 for the annual increments of Employee S and Employee T effective October 2012. These increments were due **prior to the employees' terminations in December 2012**. The revised (new) NPAs were prepared and signed by the current GM in 2019 and 2020 and were effected **retroactive October 2012**. These increments were retroacted seven (7) and eight (8) years after the increments were due. These new NPAs replaced the NPAs prepared in 2013 because the former GM did not sign the evaluation reports.

In the Attorney General of Guam's (AG) opinion issued in November 2021, he cited 4 GCA §6218.1 - Prohibition on Retroactive Pay Raises which covers all classified and unclassified employees of GovGuam. In his conclusion, he stated that unless authorized by statute and regardless of justification, **Government of Guam employees are prohibited from receiving salary increases that are paid retroactively from the date of authorization**. Salary increments based upon performances can only be paid prospectively, upon authorization date, and not retroactive from any date prior. Any retroactive payment is prohibited by Guam law.

Pay Raise Prior to End of Freeze Period Potentially Violated the Freeze Increment Mandate

P.L. 34-116, Chapter 13, Section 3 mandated a freeze on all salary increments, promotions, reclassifications, merit bonuses, and any other upward pay adjustments to take effect from October 1, 2018, through September 30, 2019. The law further specified that the payment of increments and merit bonuses ***must not be retroactively applied***.

Four days after the public law passed a pay raise freeze, on August 24, 2018, Port passed board resolution no. 2018-05 on August 28, 2018, to adopt an updated pay plan that would result in an agency-wide pay adjustment (pay raise) which took effect **October 1, 2017**. The employees received salary increments effective October 13, 2017, up to September 15, 2018. With the

majority of Port employees at risk of not getting their annual salary increment, Port implemented an agency-wide pay adjustment to take effect **on September 16, 2018** – two weeks before the statutory freeze started on October 1, 2018.

To authorize for the two-week period, this salary increment is an apparent violation of P.L. 34-116:13:3. An overpayment of \$400 to two employees may appear minimal. However, the cumulative financial impact of Port’s action of granting increments within the freeze period could be significant depending on the number of employees involved.

Appearance of Conflict of Interest

The Port’s incumbent Deputy General Manager (DGM) served as the Chairman of the Board of the Civil Service Commission (CSC) from 2003 to 2019, until he transferred to the Port of Authority of Guam in December 2019. As Chairman of the CSC Board of Commissioners, he signed the CSC Decisions and Judgments of the appeal cases of Employees S & T between 2014 and 2019. The CSC Board Chairman joined the Port Authority of Guam in December 2019 as Deputy General Manager for Finance and Administration. From then on, he signed the Agreement to Satisfy Judgement and NPAs for Employee T’s reinstatement and annual salary increments from 2012 to 2019, which were all prepared in January 2020.

With the incumbent Deputy GM’s participation in the CSC - Appeal Case Judgment Promulgation and signing of Port documents related to the employees’ reinstatement, these portrayed an **appearance of a conflict of interest**. Although the incumbent GM has no financial interest in his official actions and neither is he related to the reinstated employees, as declared by the Port GM, we refer the applicable provision of 4 GCA Chapter 15, Standard of Conduct for Elected Officers, Appointed Officers, and Public Employees of the Government of Guam §15210-Restrictions on Post Employment, which states:

“No former employee shall, within twelve (12) months after termination from employment, assist any person or business, or act in a representative capacity for a fee or other consideration, on matters involving official action by the particular territorial agency with which the employee had actually served”.

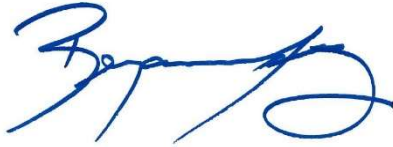
As former Chairman of the Board of CSC, the incumbent DGM had served any GovGuam agency by rendering decisions relative to the cases filed with CSC by an agency involved. Therefore, it would have been prudent for the DGM to recuse himself from participating in Port actions relative to the employees’ reinstatements.

Conclusion and Recommendation

Based on Civil Service Commission Decision and Judgment, Employees S & T, have to be reinstated and be fully compensated to include salaries and all benefits, under the Guam law, for all the time following their terminations until the date they are reinstated. We acknowledge and commend the Port’s adherence to the CSC decision with the intention “to make the employee whole” and processed salaries and benefits as if there was no work interruption. However, in the implementation processes and execution of legal remedies, Port also needs to comply with its Personnel Rules and Regulations specifically on performance-based annual increments. Certain

deviations from PRR and other internal policies resulted in discrepancies of approximately \$105K and potential overpayments of \$22K, which could have a potential financial impact on the Port.

In the absence of any provision in the PRR relative to the processing of annual increments for reinstated employees, it is prudent for the management to seek Board's advice on the appropriate course of action relative to annual increments or seek the Attorney General's opinion. Moving forward Port management and the Board should decide on how this PRR requirement on annual increments for reinstated employees be satisfactorily complied. In this audit, we made six recommendations.



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