

PORT AUTHORITY OF GUAM BACK WAGES SERIES, PART A

PERFORMANCE AUDIT

October 2010 through November 2020

OPA Report No. 21-03
February 2021





Port Authority of Guam Back Wages Series, Part A

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Table of Contents

Executive Summary	1
Introduction.....	5
Results of Audit	7
Port Adhered to Certain Terms & Conditions of Employee Q’s Not Required by CSC or the Courts’ Judgments	8
Highest Number of Incremental Sub-Steps Granted Based Partly on Prior “Outstanding” Performance Evaluation Ratings Not Approved by Any GM.....	10
A 6% Interest Charge Was Paid to Employee Q Without Any Court Order Requirement, Negotiated Terms, and Proper Calculation.....	14
Successor Management Approved Salary Increments That Their Predecessors Did Not Approve Themselves	16
Legal Remedies Without Seeking Board Ratification by Resolution	18
Legal Remedies Executed Without a Formal Agreement and Liability Release Until After the Final Payment in May 2020.....	19
Different Legal Opinions Resulted in Delay and Certain Unorganized Remedial Actions.....	21
Other Matters.....	24
Port Unified Existing Employees’ Increment Anniversary Dates to Reflect the Dates of Agency-Wide Pay Adjustments	24
Port’s PRR Does Not Have a Cap on Salary Increments.....	25
Port Interpreted Superior Court Decision as Employee Q Did Not Have to Mitigate the Wages Earned During His Termination	25
Conclusion and Recommendations.....	27
Classification of Monetary Amounts	28
Management Response and OPA Reply	30
Appendices:	
1. Objective, Scope, & Methodology	40
2. Employee Q’s Remedy Request Letter	41
3. CSC’s May 13, 2013 Decision and Judgment.....	44
4. Superior Court’s September 26, 2016 Decision and Order.....	49
5. Supreme Court’s February 7, 2018 Judgment.....	52
6. Port's PRR Sections 6.302, 7.008, and 7.010	53
7. Excerpt of Port Board’s April 30, 2019 Meeting Minutes	57
8. Port Management Response	58
9. Status of Audit Recommendations	95



Executive Summary
Port Authority of Guam Back Wages Series, Part A
OPA Report No. 21-03, February 2021

Our performance audit of the back wages of the first of nine reinstated Port Authority of Guam (Port) employees – “Employee Q” – found significant deficiencies in the basis of Port’s calculations for back wages, Medicare tax, retirement contribution, and interest charge that resulted in overpayments of at least \$96 thousand (K) in back wages and \$18K in interest for a total of \$114K. While Port’s legal remedies with Employee Q were generally made in accordance with administrative and judicial review judgments and orders, we found instances of potential noncompliance with applicable laws, regulations, and internal policies, as well as lapses in Port’s internal processes.

Specifically, we found:

- Port adhered to certain terms and conditions of Employee Q’s that were not required by the Civil Service Commission (CSC) or the courts’ judgments, such that:
 - The highest number of incremental sub-steps were granted based partly on two (2) prior years’ “Outstanding” performance evaluation ratings that were not approved by the former (or any) General Manager (GM); and
 - A 6% interest charge was paid to Employee Q without any court order requirement, negotiated terms, and proper calculation.
- Successor management approved salary increments that their predecessors did not approve of themselves;
- Legal remedies were executed without seeking the Board of Directors’ (Board) ratification by resolution and without a formal agreement and liability release until after the final payment in May 2020; and
- Different legal opinions resulted in delay and certain unorganized remedial actions.

Port Adhered to Certain Terms & Conditions of Employee Q’s Not Required by CSC or the Courts’ Judgments

Port calculated Employee Q’s back wages based on CSC and the courts’ judgments, as well as on certain terms and conditions requested by the employee. Employee Q’s additional terms included: (a) granting him the highest number of sub-steps for the annual salary increments within the termination period, based on prior “outstanding” performance evaluation ratings; and (b) paying him a 6% interest charge.

Highest Number of Incremental Sub-Steps Granted Based Partly on Prior “Outstanding” Performance Evaluation Ratings Not Approved by Any GM. Under Port’s Personnel Rules and Regulations (PRR) and salary increment point system, an approved performance evaluation report serves as the basis for whether an employee receives a salary increment or not and for how high

the salary increment shall be. On performance evaluation alone, a Port employee can earn zero (0) to five sub-steps (or 5%) on their annual salary increment. For the termination period (December 19, 2012 through July 29, 2018), Port granted Employee Q with salary increments at five sub-steps each for 2013 through 2017. According to the incumbent GM, Port determined the five sub-step salary increments by averaging the overall performance ratings of Employee Q's last three years actively employed at Port, or in 2010, 2011, and 2012.

While all three performance evaluations indicated overall ratings of "outstanding" (which correspond to five sub-steps), two of the evaluations (for the 2011 and 2012 annual increments) did not bear the former (or any) GM's signature to indicate approval of the overall performance rating, as required by Port's PRR (PRR 6.302, 7.008, and 7.010). Therefore, Employee Q was not eligible to receive salary increments for 2011 and 2012, as evident by the absence of the former (or any) GM's signatures on the evaluation documents. When averaging the sub-steps allowable under Port's PRR and salary increment point system, Employee Q would be eligible for only two sub-steps, as opposed to the five sub-steps Port granted.

In line with the existing PRR for annual increments, we recommend that the GM and the Board standardize a salary increment process for back wages to include a required performance evaluation report (of the sort) accountable to the incumbent GM who approves the number of sub-steps on the personnel action forms.

A 6% Interest Charge (\$95K) Was Paid to Employee Q Without Any Court Order Requirement, Negotiated Terms, and Proper Calculation. Port paid Employee Q \$95K in interest for the period of December 19, 2012 through September 15, 2018. Neither CSC nor the courts ordered Port to pay the 6% interest charge per day requested by Employee Q in his "remedy request letter," which was addressed to and approved by Port's Deputy GM of Administration and Finance (DGMA). Yet, Port did not exercise its option to negotiate an interest rate lower than 6%, as allowable by Title 18 Guam Code Annotated (GCA) Chapter 47 §47106.

By approving the remedy request letter, the DGMA accepted the following issues surrounding this interest charge: (a) a daily 6% interest rate that translates into interest of 2,190% per year, which is exceptionally above the legal rate; (b) the principal amount to be charged with interest was not stated and fixed; and (c) the time, or period (start and end date), in which interest was to be charged was not stated and fixed. Port applied and paid the 6% interest on, generally, an annual basis.

For the same period Port calculated the \$95K interest charge, our audit calculated only \$77K in interest. Just as Port's \$95K interest charge was calculated based on the five sub-step annual salary increments Port granted for the termination period, so was our \$77K interest calculation, as opposed to basing interest on the two sub-steps our audit determined. Port's \$18K overpayment was due primarily to Port not considering time in its interest calculation. Compared to the simple interest formula in which Principal x Rate x Time = Interest, Port's \$95K interest payment resulted from calculating only Principal x Rate. For the same period, Port agreed they overpaid Employee Q by \$18K.

Successor Management Approved Salary Increments That Their Predecessors Did Not Approve Themselves

We found that both Port's prior and incumbent management prepared *identical* Notifications of Personnel Action (NPA) forms for Employee Q's 2011 and 2012 salary increments, despite the GM as of the performance rating period ending being different from the GM's name stated on the evaluation report, and different from the GM whose Deputy authorized the salary increment NPA.

As of November 25, 2020, both the 2011 and 2012 performance evaluation reports themselves remain unsigned by any GM, despite the requirements of Port's PRR. The NPAs for the 2011 and 2012 salary increments (of five sub-steps each) had a domino effect on the subsequent years' pay ranges and salaries. These NPAs became the basis for subsequent salary increases – salary increments for 2013 through 2017, pay adjustments in 2016 and 2018, and the 2019 salary increment.

Legal Remedies Without Seeking Board Ratification by Resolution and Executed Without a Formal Agreement and Liability Release Until After the Final Payment in May 2020

Despite the significant financial impact brought on by the differing legal opinions, this did not motivate Port management to seek and secure Board ratification and execute a formal agreement with a liability release provision before final payments were made. Considering the significant financial impacts of legal remedies paid to Employee Q, we recommend the GM seek the Board's ratification, via board resolution, specifying the composition of total back wages and interest paid to Employee Q.

Furthermore, Port risked the possibility of Employee Q, or his beneficiaries, pursuing further financial demands and litigation on the same termination lawsuit. After we brought up our concern to Port during our July 14, 2020 virtual meeting, Employee Q prepared and signed a liability release letter dated July 23, 2020. However, we found several deficiencies in the liability release letter that we referred to Port management for review and consideration. Therefore, we recommend the GM execute a comprehensive formal agreement that includes (1) the purpose, amounts, and terms of what Port paid for Employee Q's back wages, benefits, attorney fees, and interest charge; (2) a liability release provision; and (3) the signatures of the relevant parties and witness.

Different Legal Opinions Resulted in Delay and Certain Unorganized Remedial Actions

Port received significantly different legal opinions on whether Employee Q's back wages included annual salary increments for the termination period, which resulted in delay and certain unorganized remedial actions. Port's former contracted Legal Counsel advised that any payout to Employee Q would be based on the same pay range as when he was terminated ("base salary") and *without* any salary increments. As such, Employee Q was reinstated at his base salary without any salary increments factored in, then paid back wages (in June 2019) that did not include salary increments. Later, when former "in-house" Staff Attorney advised that back wages should include salary increments, Port granted and paid an annual salary increment to take effect in October 2012 (which was months before Employee Q's termination), annual salary increments for the termination period (for 2013 through 2017), and a pay adjustment (for 2016).

Other Matters

We became aware of other matters not related to our audit objective that warrant Port’s, and possibly the Guam Legislature’s, attention – i.e., the uniformity of existing employees’ anniversary dates and no caps on Port’s salary increments. For these other matters, we made the following additional recommendations: (a) the GM and the Board reconsider their practice of unifying employees’ increment anniversary dates moving forward; and (b) the Board comply with Guam Code and provide parity to ratepayers and taxpayers by incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202 regarding caps on Port’s salary increments.

Port Management Response and Office of Public Accountability Reply

In Port’s official management response, the GM disagreed with the majority of our audit findings and recommendations. In reply, generally, our audit findings and recommendations remained the same.



Benjamin J.F. Cruz
Public Auditor



Introduction

This report presents the results of our performance audit on the Port Authority of Guam’s (Port) execution of settlements, or legal remedies, with one of nine reinstated employees based on resolved Civil Service Commission (CSC) cases. This audit was initiated in response to the public’s concern over Port’s prior decision to keep confidential the settlement costs connected with nine previously terminated employees – salary, employee benefits, and their attorney’s fees and costs. Initially, these settlements were not disclosed by Port, following their former (in-house) Staff Attorney’s legal advice. However, after receiving the Guam Attorney General’s opinion that settlement agreements are public records subject to public inspection, Port posted all nine settlement (or legal remedy) agreements on its website, making them available for public view.

Our audit objective was to determine whether Port’s settlements, or legal remedies, with nine reinstated employees were properly accounted for and paid in accordance with applicable laws, regulations, and administrative and judicial review judgments. However, this specific report (Part A) focused on the audit results of only one of the nine reinstated employees, herein referred to as “Employee Q”. A separate report was necessary because of the significant amount of Employee Q’s legal remedies and how Port executed his payments.

In Part A, our audit scope covered the court orders and judgments, Port documents, and other documents that contributed to Port’s calculations and payments to Employee Q’s legal remedies during our audit engagement (i.e., October 2010 through November 2020).

Our audit results on the other eight employees’ settlements will be issued in separate audit reports. We detailed the objective, scope, and methodology in Appendix 1.

Background

Port is a public corporation and autonomous Government of Guam (GovGuam) agency, for which primary revenues are derived from providing services to major shipping line customers, tariffs, and rentals of equipment and spaces related to ocean commerce, recreational and commercial boating, and navigation. Since fiscal year (FY) 2016, Port’s revenues averaged \$54.4 million (M) a year. On average, 98% of Port’s revenues were derived from the tariffs and rentals paid by Port customers (ratepayers). Port prides itself in dedicating all of its profit to the upgrading of its equipment and facilities and the continued growth of Guam’s seaport.

Confidential Settlements of Multiple, Employee Termination Lawsuits

Port has been a defendant in nine employees’ adverse action (termination) lawsuits. All nine of these employees were reinstated to their original employment position and paid (or will be paid) back wages. Back wages represent the salaries owed to an employee for the period following their

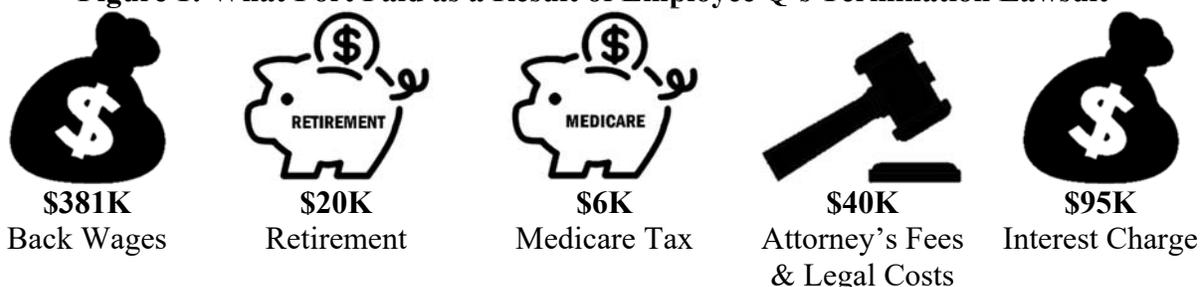
unlawful termination until they are reinstated. Port provided other legal remedies such as reimbursement for the attorney's fees and legal costs related to the employee's lawsuit, and interest for the delay and loss of use of back wages as ordered in a court's decision.

Our initial audit scope included only five reinstated employees with whom Port already executed settlement, or legal remedy, payments. With five reinstated employees set to receive back wages, the public demanded transparency on whether Port was following the law when executing these settlements or legal remedies.

Results of Audit

Based on data and documents provided by Port, Port paid \$542 thousand (K) for Employee Q's back wages, Medicare tax, retirement contribution, interest charge, and attorney's fees and legal costs. See Figure 1.

Figure 1: What Port Paid as a Result of Employee Q's Termination Lawsuit



Source: Port's Check and Deposit Documents

Our performance audit of Employee Q's back wages found significant deficiencies in the basis of Port's calculations for back wages, Medicare tax, retirement contribution, and interest charge that resulted in overpayments of at least \$96K in back wages and \$18K in interest for a total of \$114K. While Port's legal remedies with Employee Q were generally made in accordance with administrative and judicial review judgments and orders, we found instances of potential noncompliance with applicable laws, regulations, and internal policies, as well as lapses in Port's internal processes in executing Employee Q's legal remedies.

Specifically, we found:

- Port adhered to certain terms and conditions of Employee Q's that were not required by CSC or the courts' judgments, such that;
 - The highest number of incremental sub-steps were granted based partly on two (2) prior years' "outstanding" performance evaluation ratings that were not approved by the former (or any) General Manager (GM); and
 - A 6% interest charge was paid to Employee Q without any court order requirement, negotiated terms, and proper calculation.
- Successor management approved salary increments that their predecessors did not approve themselves.
- Legal remedies were executed without seeking the Board of Directors' (Board) ratification by resolution.
- Legal remedies were executed without a formal agreement and liability release until after the final payment in May 2020.
- Different legal opinions resulted in delay and certain unorganized remedial actions.

Also, we identified other matters where:

- Port unified existing employees' increment anniversary dates to reflect the dates of agency-wide pay adjustments.

- Port's Personnel Rules and Regulations (PRR) do not have a cap (limit) on salary increments.
- Port interpreted a Superior Court of Guam Decision as Employee Q did not have to mitigate the wages he earned during his termination.

Port Adhered to Certain Terms & Conditions of Employee Q's Not Required by CSC or the Courts' Judgments

Port calculated Employee Q's back wages based on CSC and the courts' judgments, as well as on certain terms and conditions requested by the employee. These terms and conditions were communicated through the following:

- Employee Q's Attorney's "declaration letter", dated July 11, 2018 and addressed to Port's former contracted Legal Counsel; and
- Employee Q's remedy request letter, dated February 6, 2020 and addressed to and approved by Port's Deputy GM of Administration and Finance (DGMA).

Employee Q's Attorney's Declaration Letter

With the attorney's declaration letter, he attached his calculation schedule of back wages and interest to be paid to his client, Employee Q. The calculation schedule contained terms, which are similar to the additional terms in Employee Q's remedy request letter. The terms contained the following statements, in which the attorney rendered several opinions regarding his client, Employee Q:

1. "Before termination of [Employee Q] on December 18, 2012, he received a performance evaluation from his supervisor, which entitles him [to] an increase [...]. Based on the prior years' performance evaluation[s] [...], his rating [was] Outstanding since 2005. This entitles him to receive the highest points or percentile on the subsequent years. The number of sub-steps for Outstanding ratings is 5 [five] sub-steps."
2. "In 2016, the Port Board approved a new pay scale increasing each position's pay range to match [the] 25% market percentile. This pay schedule is not showing [on] the Port's website. Therefore, [Employee Q's] salary range increased and it should affect [Employee Q's] calculation from the effective date of the new pay schedule to the work date prior to the official starting date he goes back to work at the Port."
3. "The final calculation also includes [a] six percent (6%) pre-judgment interest as allowed by law."

Employee Q's Remedy Request Letter

In his remedy request letter, Employee Q indicated that his terms and conditions were reasonable because they were in accordance with CSC and the Supreme Court of Guam's judgments and Guam law. Employee Q's terms and conditions included the following statements, which were not specified in CSC or the courts' judgments, nor Guam law:

1. "That [Employee Q's] reinstatement includes *all* salary increments that were due for the period of December 18, 2012 to the current date [February 6, 2020] using the last performance appraisal rating on record of "*Outstanding*" to adjust [his] salary accordingly."

2. “A 6% interest charge *per day*¹ is effectuated. Payment to be made by the 60th day of management approval.”

See Table 1 below for the basis of Port’s payments and Appendix 2 for the remedy request letter and Appendices 3, 4, and 5 for CSC and the courts’ judgments.

Table 1: What Port Paid Employee Q and Its Basis

Remedy	What Port Paid	Judgment/Order	Rendered by
Back Wages – Base Salary, plus Pay Changes, minus \$209K of Outside Income	\$361,476	"The Port Authority of Guam is further ordered to fully compensate Employee [Q] for all the time following his termination on December 18, 2012 until the date he is reinstated to his prior position of employment."	Civil Service Commission
		" [...] upholds the Civil Service Commission's Order awarding [Employee Q] full back pay and benefits from the date of his termination until Petitioner PAG complies with the Commission's Order and allows [Employee Q] to return to work."	Superior Court of Guam
Pay Changes after Reinstatement	\$19,273	<i>Not</i> ordered or required by CSC or judicial courts' judgments, regulations, or laws.	
Pay Changes before Termination	\$771	<i>Not</i> ordered or required by CSC or judicial courts' judgments, regulations, or laws.	
Total Back Wages	\$381,520		
Retirement Contribution on Back Wages	\$18,548	"The compensation shall include all employer [Q's] contributions to the Government of Guam Retirement Fund [...] for all the pay periods between December 18, 2012 and the date Employee [Q] is reinstated."	Civil Service Commission
		" [...] upholds the Civil Service Commission's Order awarding [Employee Q] full back pay and benefits from the date of his termination until Petitioner PAG complies with the Commission's Order and allows [Employee Q] to return to work."	Superior Court of Guam
Retirement Contribution on Pay Changes after Reinstatement	\$1,186	Result of payout <i>not</i> ordered or required by CSC or judicial courts' judgments, regulations, or laws.	
Retirement Contribution on Pay Changes before Termination	\$39	Result of payout <i>not</i> ordered or required by CSC or judicial courts' judgments, regulations, or laws.	
Total Retirement Contribution	\$19,773		

¹ Emphasis added.

Remedy	What Port Paid	Judgment/Order	Rendered by
Medicare Tax on Back Wages	\$6,028	Result of ... "The Port Authority of Guam is further ordered to fully compensate Employee [Q] for all the time following his termination on December 18, 2012 until the date he is reinstated to his prior position of employment."	Civil Service Commission
		Result of ... " [...] upholds the Civil Service Commission's Order awarding [Employee Q] full back pay and benefits from the date of his termination until Petitioner PAG complies with the Commission's Order and allows [Employee Q] to return to work."	Superior Court of Guam
Medicare Tax on Pay Changes after Reinstatement	\$279	Result of payout not ordered or required by CSC or judicial courts' judgments, regulations, or laws.	
Medicare Tax on Pay Changes before Termination	\$11	Result of payout not ordered or required by CSC or judicial courts' judgments, regulations, or laws.	
Total Medicare Tax	\$6,318		
Attorney Fees & Legal Costs	\$40,043	"The Port Authority of Guam is further ordered to pay the attorney's fees incurred by Employee [Q], during the appeal of the December 18, 2012 adverse action in the amount of \$9,380.95." <i>Judgment passed on May 13, 2013.</i>	Civil Service Commission
		"The Court hereby Orders that Real Party in Interest [Employee Q] is awarded the amount of Twenty Two Thousand Eight Hundred Ten Dollars and Ninety-five Cents (\$22,810.95) as reimbursement for attorney's fees and costs Real Party in Interest [Employee Q] has incurred in his prosecution of his appeal of his termination." <i>Order passed on September 29, 2016.</i>	Superior Court of Guam
Interest Charge	\$94,621	Not ordered or required by CSC or judicial courts' judgments, regulations, or laws.	
Total Remedy Cost	\$542,275		

Sources: Port's Check and Deposit Documents; CSC Orders and Judgments; Superior Court Orders and Judgments.

Highest Number of Incremental Sub-Steps Granted Based Partly on Prior "Outstanding" Performance Evaluation Ratings Not Approved by Any GM

It was the legal opinion of Employee Q's attorney that Employee Q's prior years' "outstanding" performance evaluation ratings *entitled* him "to receive the highest points or percentile on the subsequent years."

Port's Annual Salary Increment System

Under Port's PRR and salary increment point system, an approved performance evaluation report serves as the basis for whether an employee receives a salary increment or not and for how high the salary increment shall be. On performance evaluation alone, the highest a Port employee's salary increment can increase is up to five sub-steps (or 5%) every year. According to Port's PRR 6.302, salary increments are based on an annual performance evaluation, for which the employee is given zero to five points for every performance factor evaluated. According to interim procedures approved by then Port GM in October 2010, employees are eligible to the increment sub-steps that correspond with the total points their overall performance earned, as shown in Table 2.

Table 2: Salary Increment Point System

Total Points	Overall Performance Rating	Sub-Steps
0 – 25	Unsatisfactory	0
26 – 34	Satisfactory (Marginal)	2
35 – 49	Satisfactory	3
50 – 59	Satisfactory (Highly)	4
60 – 65	Outstanding	5

Source: Port Inter-Office Memorandum, October 11, 2010

PRR 6.302 also states that the salary increment will be granted by the GM's certification (signature) that satisfactory service was rendered for the performance-rating period preceding such (incremental) increase.

Under Port's salary increment point system, an employee's salary increment can increase up to five sub-steps (or 5%) every year, as opposed to a more common *one*-step salary increment widely used by the rest of GovGuam.

An "outstanding" rating is immaterial under the one-step salary increment system widely used by the rest of GovGuam. However, the annual salary increase of five sub-steps (or 5%) that corresponds to an "outstanding" rating under Port's salary increment point system is financially significant.

Two Prior Years' Performance Evaluation Ratings Not Approved by Former GM Results in the Lowest Number of Incremental Sub-Steps

During our September 2020 virtual meeting with the GM and the DGMA, the incumbent GM insisted that Port determined the five sub-step salary increments for the termination period (for 2013 through 2017) by averaging the overall performance ratings of Employee Q's last three years actively employed at Port (2010, 2011 and 2012). Upon review of the three performance evaluations that Port based the paid back wages on, we noted that the overall performance rating for all three periods was "outstanding." However, we found that, of the three performance evaluations, two (for the 2011 and 2012 annual increments) did not bear the former GM's signature to indicate certification (or approval) of the overall performance rating.

It is the incumbent GM’s understanding that the GM is required to reject a performance rating recommendation “in writing and provide justification” as to why he/she does not want to grant a salary increment. Additionally, he stated that “Employee Q should not be penalized for prior Port management’s failure to adhere to the [PRR] and process his salary increment due to him [...] on a timely basis prior to his termination on December 2012.”

However, we found at least three sections in Port’s PRR explaining that the GM has the final say on all salary increments, as follows:

- All salary increments will require the GM’s approval (PRR 7.008).
- The salary increment will be granted by the GM’s certification (signature) that satisfactory service was rendered for the performance rating period preceding such increase (PRR 6.302).
- A Division Head shall submit a written recommendation to the GM regarding the performance appraisal of every employee. The GM shall make a final performance appraisal accepting or rejecting said recommendation and make the corresponding salary adjustments. (PRR 7.010).

Refer to Appendix 6 for relevant PRR sections. Based on the same sections of the PRR, Employee Q was not eligible to receive a salary increment for years 2011 and 2012 because the corresponding performance evaluations were not approved by the former GM. See Table 3 for what Port granted versus what Employee Q was eligible for.

Table 3: What Port Granted vs. What Employee Q Was Eligible For

Performance Rating Period Ending	Overall Performance Rating*	GM's Signature Approval**	Increment Sub-Steps	
			What Port Granted	What Employee Was Eligible For
10/12/2012	Outstanding	✘	5	0
10/12/2011	Outstanding	✘	5	0
10/13/2010	Outstanding	✓	6	6
Average			5	2

Sources: Employee Q’s Performance Evaluation Reports; Notifications of Personnel Actions; Port Inter-Office Memorandum, October 11, 2010; PRR.

*Division Head’s written recommendation to the GM regarding the employee’s performance appraisal.

**The GM’s final performance appraisal accepting or rejecting said recommendation for the corresponding salary adjustment.

When averaging the sub-steps allowable under Port’s PRR and salary increment point system, Employee Q would be eligible for only “2” sub-steps (as shown in Table 3) or a “marginal satisfactory” rating (as shown in Table 2). Employee Q’s eligibility for increments of only *two sub-steps* results from the prior 2011 and 2012 performance evaluations that were not signed by the former GM. The absence of such a signature signifies that there was no valid basis for granting Employee Q the highest number of incremental sub-steps to be applied to the five-year termination period.

Comparison of Annual Salary Increments Based on the Last Performance Rating

In our initial (virtual) discussion, in July 2020, the DGMA explained that, although not stated in CSC’s judgment, it is implied that Port will apply the last performance evaluation rating to the entire termination period’s back wages. The DGMA, Employee Q’s immediate supervisor, further stated that Port assumed Employee Q’s performance evaluations would have been consistently rated “outstanding” had he not been unlawfully terminated. He further emphasized that Port’s performance standards have not changed.

We acknowledge the immediate supervisor’s determination to grant Employee Q an “outstanding” performance rating, however, his assumption that an employee’s performance would not, or could not, have changed over time seemed unrealistic. An employee’s work performance can change because of external or internal factors that could influence a person’s behavior. Even if an employee maintained the same quality of work performance, it is still possible for the performance evaluation rating to change if the evaluator or the evaluator’s perception changed.

In applying his prior “outstanding” rating to five non-working (inactive) years, Port granted Employee Q the highest number of incremental sub-steps on the assumption that his work performance could not have possibly changed. See Table 4 for a comparison of the annual salaries using the different performance ratings.

Table 4: What Port Assumed vs. Eligible Satisfactory

Effective Date of Salary Increment	Port's Assumed "Outstanding" 			Eligible "Marginal Satisfactory" 			Variance
	Pay Grade /Step	Annual Salary	Hourly Rate	Pay Grade /Step	Annual Salary	Hourly Rate	
	10/13/2013	N 11D	\$92,678	\$44.56	N 8C	\$81,432	
10/13/2014	N 13A	\$97,405	\$46.83	N 9A	\$83,069	\$39.94	\$14,336
10/13/2015	N 14B	\$102,374	\$49.22	N 9C	\$84,739	\$40.74	\$17,635
10/13/2016	NN 9D	\$109,808	\$52.79	NN 4B*	\$88,220	\$42.41	\$21,588
10/13/2017	NN 11A	\$115,410	\$55.49	NN 4D*	\$89,993	\$43.27	\$25,417
Total		\$517,675			\$427,453		\$90,222

Sources: Notifications of Personnel Actions; Port’s Pay Plan.

*These are only estimates because they are dependent on the salary range Port would have granted for the 2016 agency-wide pay adjustment. Despite our requests, Port did not provide us with their detailed policy on how to migrate their employees’ salaries into the pay plan that was first adopted in October 2009.

Under *Port's Assumed "Outstanding"* column, the October 2013 increment pay range increased based on the five sub-step pay ranges Port granted for years 2011 and 2012. Under the *Eligible "Marginal Satisfactory"* column, we did not factor in the 2011 and 2012 increments’ pay ranges because their supporting evaluations lacked the former GM's signature approvals, as required by Port’s PRR. If Port used the “marginal satisfactory” rating (or averaged “2” sub-step) in its calculation of annual increments, it would save approximately \$90K, as shown in Table 4.

While we acknowledge Port management's efforts to provide Employee Q with all the expected benefits "to make the employee whole" as if he was not terminated, we refer this calculation for Port management's review and consideration.

Annual Salary Increments Included Without Performance Evaluation Reports Approved by and Accountable to the GM

We respect that Port's calculation was based on the understanding that Employee Q's back wages and benefits should be processed as if there was no work interruption. However, the annual increments granted for 2013 through 2017 were not supported with duly accomplished performance evaluation reports, which need to be approved by (and accountable to) the incumbent GM, in compliance with the PRR. Port prepared notifications of personnel action (NPA) forms for these five sub-step annual salary increments without the approved performance evaluation reports to serve as the basis for granting the increments and the calculation of sub-steps.

In line with the existing PRR for annual increments, we recommend that the GM and the Board standardize a salary increment process for back wages to include a required performance evaluation report (of the sort) accountable to the incumbent GM who approves the number of sub-steps on the personnel action forms.

A 6% Interest Charge Was Paid to Employee Q Without Any Court Order Requirement, Negotiated Terms, and Proper Calculation

Port paid Employee Q \$95K in interest for the period of December 19, 2012 through September 15, 2018. According to Title 18 Guam Code Annotated (GCA) Chapter 47 §47106, the legal rate of interest is 6% per year on accounts "after demand or judgment rendered in any court of the territory." Section 47106 further states that *it is acceptable for the parties involved to contract in writing an interest rate that does not exceed* the interest rates specified in 14 GCA, the Uniform Consumer Credit Code.

Interest Charge Paid Without Any Court Order Requirement

Neither CSC nor the courts ordered Port to pay an interest charge to Employee Q, let alone require 6% (or \$95K). Refer to Appendices 3, 4, and 5 for CSC and the courts' judgments/orders.

Yet, Port did not exercise its option to negotiate an interest rate lower than 6%, as allowed by 18 GCA §47106. According to the incumbent GM, Port's former contracted Legal Counsel and Port's former "in-house" Staff Attorney did not dispute the 6% interest rate.

Interest Charge Paid Without Negotiated Terms

In his February 2020 remedy request letter, Employee Q requested a 6% interest charge *per day* (or 2,190% per year). Upon approving such letter immediately, the following day, the DGMA accepted the following issues surrounding this interest charge, as shown in Figure 2:

- Interest at 6% per day is effectuated. A daily 6% interest rate translates into interest of 2,190% per year, which is exceptionally above the legal rate. However, Port applied and paid the 6% interest on, generally, an annual basis.
- The principal amount to be charged with interest was not stated and fixed.
- The time, or period (start and end date), in which interest was to be charged was not stated and fixed.

Figure 2: What Port Accepted vs. Simple Interest Formula

What Port Accepted	vs.	Simple Interest Formula
 x 2,190% x  = 		 x % x  = 
Principal x R ate x T ime = Interest		Principal x R ate x T ime = Interest

Source: Employee Q’s Remedy Request Letter

Port’s \$95K payment is based on an interest calculation schedule containing the following note (disclosure), which reads as if Employee Q could still claim nine more months of interest.

“Interest calculation was from December 19, 2012 to September 15, 2018. Initial check payments for the salaries owed during my absence was cut on June 24, 2019. *Any interest owed from unpaid salary from September 16, 2018 to June 23, 2019 is not included in the interest calculation².*”

Port’s \$95K interest payment to Employee Q was made in April 2020, which was a month prior to the last remedial payment made in May 2020. During our recorded July 2020 virtual meeting with Port management and staff, we were told that the 6% interest charge to Employee Q was fully paid with the \$95K interest charge payment.

Federal Interest Rates Used for Computation of Back Pay

In the U.S. Office of Personnel Management’s (OPM) chart of annual interest rates used for the computation of back pay³, the interest rate gradually increases from 3% to 5% over the time/period Employee Q charged Port. If Port had meant to negotiate the terms of the interest charge and used OPM’s graduating interest rate, Port could have saved at least 2% a year, based on Table 5.

Table 5: What Port Accepted vs. OPM Interest Rates

Applicable Period Start	Applicable Period End	Annual Interest Rate Port Accepted	Interest Rate Port Applied	OPM’s Annual Interest Rates
12/19/2012	3/31/2016	2190%	6%	3%
4/1/2016	3/31/2018	2190%	6%	4%
4/1/2018	9/15/2018	2190%	6%	5%
Average		2190%	6%	4%



Sources: Port’s Interest Calculation Schedule; OPM Fact Sheet

Interest Charge Paid Without Proper Calculation

For the same period Port calculated the \$95K interest charge, our audit calculated only \$77K in interest. Just as Port’s \$95K interest charge was calculated based on the five sub-step annual salary increments Port granted for the termination period, so was our \$77K interest calculation, as opposed to basing interest on the two sub-steps our audit determined. Port’s \$18K overpayment was due to primarily Port’s method of using a 6% flat rate regardless of how much time had passed,

² Emphasis added.

³ [OPM Fact Sheet: Interest Rates Used for Computation of Back Pay](#)

be it 11, 300, or 365 days. Compared to the simple interest formula of Principal x Rate x Time = Interest (as shown in Figure 2), Port's \$95K interest payment resulted from calculating only Principal x Rate = Interest. As such, Port did not properly consider time in its interest calculation.

Port agreed with our calculation for interest covering the period of December 19, 2012 through September 15, 2018. For the same period, Port also agreed that they overpaid Employee Q by \$17,822 (which our report rounds up to \$18K).

Successor Management Approved Salary Increments That Their Predecessors Did Not Approve Themselves

On November 25, 2020, Port resubmitted to us Employee Q's 2011 and 2012 performance evaluation reports, along with additional documents. As of November 25, 2020, both the 2011 and 2012 performance evaluation reports themselves remain unsigned by any GM, despite the requirements of Port PRR 6.302 and 7.010.

Based on the additional documents provided, we found that both Port's prior and incumbent management prepared *identical* NPAs for these two salary increments without the GM's signature approval on the evaluation reports, which serve as the basis of increment calculation (sub-steps). Refer to Table 6 for a summary of the management, dates, and signatures (or lack thereof) surrounding Employee Q's 2010, 2011, and 2012 salary increments. These were the three years for which incumbent management based the five sub-step salary increments granted for Employee Q's termination period.

As shown in Table 6, the 2010 increment was the only one (of the three salary increments) for which:

- The supporting performance evaluation report was approved by the GM; and
- The GM as of the performance rating period ending was the same GM that approved the evaluation report and resulting salary increment NPA.

Also shown in Table 6, the 2011 and 2012 salary increments share the following common deficiencies:

- The GM as of the performance rating period ending was not the same as the GM's name stated on the evaluation report.
 - For the 2011 salary increment, as of October 2011, GM 2 was the agency head, yet it was GM 4's signature that was requested and not given.
 - For the 2012 salary increment, as of October 2012, GM 3 was the agency head, yet it was GM 4's signature that was requested and not given.
- Deputy GMs approved the corresponding salary increment NPAs despite the absence of *any* GM's approval on the corresponding evaluation reports.
- Two (2) NPAs exist for each salary increment – one NPA created in 2013 and another NPA created in 2020.
 - For the 2011 salary increment, GM 4's Interim Deputy approved the NPA in 2013; then the incumbent GM's Deputy duplicated and approved the NPA in 2020.
 - For the 2012 salary increment, an NPA was created, but not signed approved, in 2013; then the incumbent GM's Deputy duplicated and approved the NPA in 2020.

Based on documents provided by Port, it does not appear that the 2011 salary increment was paid to Employee Q. However, in May 2020, Port’s incumbent management paid the 2012 salary increment. Port’s payment of this salary increment included the months before Employee Q was terminated in December 2012, which was under GM 3’s management. We find it curious how successor GM’s or their Deputy GM’s approve salary increments that their predecessors did not approve (or sign off) on themselves.

Table 6: What Port Based Employee Q’s Salary Increments On for Back Wages

Who was GM as of the Performance Rating Period Ending?	GM 1	GM 2	GM 3
PERFORMANCE EVALUATION REPORT:			
Rating Period Start	10/13/2009	10/13/2010	10/13/2011
Rating Period Ending	10/13/ <u>2010</u>	10/12/ <u>2011</u>	10/12/ <u>2012</u>
Overall Rating	Outstanding	Outstanding	Outstanding
Which GM’s signature was requested?	GM 1	GM 4	GM 4
When was GM’s signature requested?	11/10/2010	12/31/2012	2/22/2013
Did GM sign his/her approval?	✓	✗	✗
SALARY INCREMENT NPA*:			
1 ST Salary Increment NPA	11/19/2010	1/9/2013	8/16/2013
From pay range and salary	N-6C \$75,201	N-8A \$79,828	N-9B \$83,900
To pay range and salary	N-8A \$79,828	N-9B \$83,900	N-10C \$88,180
Which GM authorized the NPA?	GM 1	GM 4’s Former Interim DGM	✗
Time Elapsed from Rating Period	1.2 months	1.2 years	10.1 months
2 ND Salary Increment NPA	–	2/10/2020	2/10/2020
From pay range and salary	–	N-8A \$79,828	N-9B \$83,900
To pay range and salary	–	N-9B \$83,900	N-10C \$88,180
Which GM authorized the NPA?	–	Incumbent DGMA	Incumbent DGMA
Time Elapsed from Rating Period	–	8.3 years	7.3 years

Sources: Employee Q’s Performance Evaluation Reports; Board’s Meeting Minutes; Board Resolutions; Notifications of Personnel Action (NPA)*.

Included with the additional documents Port provided was a February 2013 interoffice memorandum from the Interim Deputy GM (at the time) authorizing the payment processing of Employee Q’s 2011 salary increment. Despite this authorizing memorandum, we observed the following:

- The former Interim DGM already approved the 2011 salary increment NPA a month prior, in January 2013 (as shown in Table 6); and

- Neither the former GM (or GM 4) nor her Interim DGM, signed approval on the performance evaluation report itself, despite Port PRR’s requirement.

The incumbent GM asserts that GM 4 did not rescind the Interim DGM’s memorandum authorization to process Employee Q’s 2011 salary increment. If so, we question why the DGMA duplicated the NPA processing of Employee Q’s 2011 salary increment. Dated February 10, 2020, the DGMA authorized the 2011 salary increment NPA with the stated pay range and salary that is *identical* to the pay range and salary of the first NPA already authorized by the former Interim DGM in January 2013.

The financial effect of the 2011 and 2012 annual salary increments, for which performance evaluations were not approved by *any* GM, needs to be reviewed by the incumbent management. The NPAs for the 2011 and 2012 salary increments (of five sub-steps each) had a domino effect on the subsequent years’ pay ranges and salaries. These NPAs became the basis for subsequent salary changes – salary increments for 2013 through 2017, pay adjustments in 2016 and 2018, and the 2019 salary increment. See Table 4 and Table 7 for the financial effect on the salary increments for 2013 through 2017.

If our audit calculation used the averaged two sub-steps salary increments (as determined and shown in Table 3) and excluded the 2012 increment, for which the performance rating was not approved, Port made an overpayment of approximately \$96K in back wages. See Table 7.

Table 7: What Port Paid vs. What Employee Q Was Eligible For

Salary Increment Year	Performance Evaluation Deficiency	Eligible Sub-Steps	Eligible Pay Changes	What Port Paid for Pay Changes	Variance
2011	Not Approved	0	\$0	\$0	\$0
2012	Not Approved	0	\$0	\$7,604	\$7,604
2013	None Prepared	2	\$1,602	\$12,854	\$11,253
2014	None Prepared	2	\$3,257	\$17,644	\$14,386
2015	None Prepared	2	\$4,796	\$22,108	\$17,312
2016	None Prepared	2	*\$8,415	\$29,627	\$21,212
2017	None Prepared	2	*\$9,428	\$33,673	\$24,246
Total			\$27,497	\$123,510	\$96,013

Sources: Table 3; Table 4.

*These are only estimates because they are dependent on the salary range Port would have granted for the 2016 agency-wide pay adjustment. Despite our requests, Port did not provide us with their detailed policy on how to migrate their employees’ salaries into the pay plan that was first adopted in October 2009.

We refer the above calculation of overpayments to Port’s management for review and final decision.

Legal Remedies Without Seeking Board Ratification by Resolution

Of the five employees covered by our initial audit scope, only one employee’s legal remedies were ratified by a board resolution. Like the other three, Employee Q received back wages, employee

benefits, attorney's fees and legal costs, and an interest charge, totaling \$542K, without management seeking the Board's ratification, via board resolution, of the remedial terms.

According to 12 GCA Chapter 10 §10107(d), Port's GM must approve the payment demands of Port's obligations *within the purposes and amounts authorized by the Board of Directors*. In Port's PRR and enabling legislation, we did not find a requirement for the Board to approve lawsuit remedies, *specifically*. According to Port's incumbent GM, the Board needs to authorize only the amount to be budgeted for the legal remedies.

In the Board's April 2019 meeting, the Board authorized management to pay out Employee Q based on only his base salary while staying within a \$600K budget. Although Port did not exceed this \$600K budget (as shown in Table 1), we found that the Board's authorization of Employee Q's paid back wages did not include paying out the following, such that the:

- Salary increment for 2012 (as a result of the performance evaluation period covering October 2011 through October 2012) was before his termination on December 18, 2012; and
- Salary increments for 2013 through 2017 were partly based on two prior years' (2011 and 2012) performance evaluation ratings that were not approved by the former GM.

Refer to Appendix 7 for the discussion surrounding the Board's authorization of the \$600K budget. Additionally, CSC and the courts' judgments ordered back wages exclusively covering the period during his termination until the date when he was reinstated, as shown in Appendices 3 and 4.

In Public Law (P.L.) 32-076, the Guam Legislature found that full disclosure of decisions made by appointed public officials – on behalf of GovGuam – with individuals, private businesses, or other governments provides an opportunity for review and scrutiny of such decisions. It also found that with full disclosure, public officials and GovGuam are more accountable in aligning settlements with the public's interest, as well as building a climate of public trust. Board resolutions are public records and, as such, will provide the public full transparency of Port's remedial actions on reinstated employees.

The GM needs to seek the Board's ratification when executing judgments that concern personnel compensation because of the potential legal and financial repercussions on Port's operations. More specifically, considering the significant financial impacts of legal remedies paid, we recommend the GM seek the Board's ratification, via board resolution, specifying the composition of total back wages and interest paid to Employee Q.

Legal Remedies Executed Without a Formal Agreement and Liability Release Until After the Final Payment in May 2020

Of the five employees covered by our initial audit scope, only Employee Q did not execute a settlement agreement, or another type of formal agreement specifying the amounts and terms for back wages, benefits, attorney fees, and interest charge Port has to pay, as well as a liability release provision.

Employee Q and Employee V's⁴ cases were similarly appealed, affirmed, and concluded in the judicial courts. In Employee Q's case, Port decided not to appeal further after five years of litigation and appeals. However, Employee V executed a settlement agreement containing provisions on the amounts and terms of back wages and interest charge to be paid with a mutual release from all claims and liabilities.

According to the incumbent GM, the settlement agreements of the four employees (Employee V included) were initiated by the employees themselves, not Port. He further stated that CSC and the courts' judgments are all that is needed to support the remedial payments made to Employee Q and neither a formal agreement or a liability release are required. However, Employee Q voluntarily prepared and signed a liability release letter dated July 23, 2020, after we brought up this issue to Port during our July 14, 2020 virtual meeting.

For the protection of all parties involved, every liability should be accompanied with a document establishing the parties' agreement to the amounts and terms that would end said liability (e.g., an invoice, contract, or agreement). Ideally, this document should have been finalized and signed by both parties before any payouts. Without a valid formal agreement containing relevant and pertinent provisions, most importantly a liability release provision, Port risked the possibility of Employee Q, or his beneficiaries, pursuing further financial demands and litigation on the same termination lawsuit.

Deficiencies in Employee Q's Liability Release Letter

In his liability release letter addressed to Port's DGMA, Employee Q stated that as of July 23, 2020, all the terms and conditions have been fulfilled by Port, and that his case with Port is "closed". In the same letter, Employee Q formally declared that he and Port mutually release all claims and forever discharge one another from any and all liability and claims connected with their employment relationship to date and the recently "closed" adverse action (termination) lawsuit.

However, we found the following in the liability release letter that we refer to Port management for review and consideration:

- In using Port's letterhead, Employee Q signed off as if he was also representing Port in this matter.
- Neither the incumbent GM nor the DGMA (the delegated Port representative), signed this "mutual" release letter.
- Neither a notary or witness signed this letter.
- This letter was written in a manner that implied that all the terms and conditions in Employee Q's February 2020 "remedy request letter" were the same as the conditions of CSC's Decision and Judgment. The remedy request letter contained conditions not required by CSC or the courts' judgments.

Therefore, we recommend the GM execute a comprehensive formal agreement that includes (1) the purpose, amounts, and terms of what Port paid for Employee Q's back wages, benefits, attorney fees, and interest charge; (2) a liability release provision; and (3) the signatures of the relevant parties and witness.

⁴ Our audit results on Employee V's settlement will be issued in a separate audit report.

Different Legal Opinions Resulted in Delay and Certain Unorganized Remedial Actions

According to CSC and the Superior Court’s judgments, Port is required to pay Employee Q back wages starting from his termination (in December 2012) and ending upon his reinstatement (in July 2018). Between July 2018 and late February 2020, Port received significantly different legal opinions from its former contracted Legal Counsel and former “in-house” Staff Attorney, which resulted in delay and certain unorganized remedial actions, as shown in Table 8.

Port’s former Legal Counsel was still representing Port when Employee Q was reinstated on July 30, 2018. Before his reinstatement, Employee Q’s attorney submitted a “declaration letter”, dated July 11, 2018, to Port’s former Legal Counsel. Attached to the letter was his calculation schedule of the back wages and interest to be paid with a notation that Employee Q was entitled to the annual salary increments and Port-wide pay adjustment that occurred during the termination period.

However, the former Legal Counsel opined that any payout to Employee Q would be based on the same pay range as when he was terminated (herein referred to as “base salary”) and without any salary increments, as shown in Appendix 7. The former Legal Counsel held this opinion through to June 2019, when his contract with Port ended.

Then again, Port’s former Staff Attorney (who served from early August 2019 through the end of February 2020) did not find any legal authority to support the former Legal Counsel’s opinion. He rendered an opinion that Employee Q’s back wages *must include salary increments*.

Table 8: What Port Did After Employee Q’s Reinstatement

Year	Date	Port Action	Time Elapsed Since Reinstatement
2018	7/30/2018	Port reinstated Employee Q at base salary and continued to pay his regular wages at base salary until the start of February 2020.	0.0 months
	9/12/2018	Port filed a Motion for the Superior Court to reconsider its Decision to award full back pay and benefits to Employee Q.	1.4 months
2019	2/5/2019	The Superior Court denied Port’s Motion filed on September 12, 2018.	6.2 months
	4/30/2019	In a board meeting, Port's Board appropriated \$600K to pay Employee Q's back wages, based on his base salary, minus the income he earned during his termination, <i>and without any salary increments</i> .	9.0 months

Year	Date	Port Action	Time Elapsed Since Reinstatement
	5/3/2019	Port processed six (6) Notifications of Personnel Action forms (NPA) – five for the termination period, plus one for the October 2012 salary increment (before his termination). 	9.1 months
		<p>These six NPAs reflected errors in which Employee Q's annual base salary was mitigated (reduced) by \$209K for the outside income earned during his termination period. Deducting the outside income amount on the NPA was done under the advice of the General Accounting Supervisor, instead of under the Human Resources Division. <u><i>This appears unorganized.</i></u> As such, these six NPAs were canceled and replaced with new NPAs on February 10, 2020.</p> <p>These six NPAs did not reflect any salary increments or Port-wide pay adjustments, consistent with the former Legal Counsel's opinion.</p>	
	5/10/2019	Port paid \$40K to Employee Q's attorney for attorney's fees and legal costs.	9.3 months
	6/24/2019	Port paid \$243K to Employee Q for his back wages, based on his base salary and mitigated by the outside income. This payment was supported by the six NPAs filed on May 3, 2019. 	10.8 months
	12/3/2019	Port's former Staff Attorney advised the Board of Directors that he found other judgements on similar cases in which reinstated employees were "entitled" to salary increments as part of their back wages.	1.3 years
2020	2/7/2020	Port's Deputy GM of Administration and Finance approved Employee Q's additional terms and conditions listed in the remedy request letter dated February 6, 2020 addressed to him. 	1.5 years
	2/10/2020	Port canceled the six (6) NPAs issued on May 3, 2019 because they were processed incorrectly. These NPAs supported the \$243K payment of back wages made on June 24, 2019.	1.5 years

Year	Date	Port Action	Time Elapsed Since Reinstatement
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Consequently, such payment was without supporting authorization. **This appears unorganized.**

Then, Port replaced the six canceled NPAs with new NPAs that granted Employee Q the following:



- five annual salary increments for the termination period (for 2013 through 2017), in line with the former Staff Attorney’s opinion, plus
- October 2012 salary increment (before his termination).

Each salary increment was calculated at five sub-steps (or 5%) each, as requested by Employee Q and his attorney.

Port processed four (4) additional NPAs that granted Employee Q with the following:

- 2011 salary increment (before his termination),
- 2016 pay adjustment, in line with Employee Q and his attorney’s declaration letter;
- 2018 pay adjustment (after his reinstatement); and
- 2019 salary increment (after his reinstatement).

Note: On November 25, 2020, the incumbent GM provided us with copies of NPAs **already filed in 2013** for Employee Q’s 2011 and 2012 salary increments. Yet, new NPAs were filed in February 2020 for the same salary increments with the same changes in pay range and salary. Port did not provide us with any cancellation documents for the 2011 and 2012 salary increment NPAs already filed in 2013, **thus duplicating these NPAs. This appears unorganized.**

2/21/2020

Port paid \$19K to Employee Q for the difference between the base salary he received (after his reinstatement) and the



1.6 years

Year	Date	Port Action	Time Elapsed Since Reinstatement
		2018 pay adjustment and 2019 salary increment Port granted (on February 10, 2020).	
	4/7/2020	Port paid \$95K to Employee Q as an interest charge on his back wages. 	1.7 years
	5/1/2020	Port paid \$66 to Employee Q's attorney for the unpaid balance of attorney's fees and legal costs. Port paid \$119K to Employee Q for the following: <ul style="list-style-type: none"> \$118.6K for the difference between the base-salaried-back-wages (paid on June 24, 2019) and the salary increments and pay adjustment Port granted (on February 10, 2020) for during the termination period.  \$771 for the difference between the base salary received before his termination and the October 2012 salary increment Port granted (on February 10, 2020). 	1.8 years

Sources: Various Port Documents; Superior Court Decision and Order.

The differences in legal opinions brought significant financial impact on the composition of back wages paid to Employee Q. However, this did not motivate Port management to seek and secure a Board ratification and execute a formal agreement with a liability release provision before final payments were made.

Other Matters

Although not directly related to our audit objective, we became aware of other matters that warrant Port's, and possibly the Guam Legislature's, attention.

Port Unified Existing Employees' Increment Anniversary Dates to Reflect the Dates of Agency-Wide Pay Adjustments

In reviewing the personnel action forms of the five reinstated employees in our initial audit scope, we noticed identical increment anniversary dates among the four of them. When Port implemented its new pay plan's first, agency-wide, pay adjustment in October 2009, it unified the existing employees' increment anniversary dates to reflect the transfer from the Hay Plan to Port's Compensation and Classification Plan. Similarly, when Port implemented the September 16, 2018 agency-wide pay adjustment, the existing employees' increment anniversary dates changed in uniformity to the pay adjustment's effective date.

According to PRR 6.301(C)(1), the pay grade reassignment for classes of positions (Port-wide pay adjustment) will not change increment anniversary dates. Furthermore, the salary increment of all

Port employees shall be based on an annual review of performance (PRR 7.008), and the performance appraisal period is *every 12 months* of service (PRR 7.007(A)).

When Port unified the increment anniversary dates in October 2009, for some employees, it likely shortened the performance appraisal period to less than 12 months. Before the September 16, 2018 agency-wide pay adjustment, we know that at least three of the reinstated employees had an October 13 increment anniversary date. After the 2018 pay adjustment, their increment anniversary changed to September 16, which is 20 workdays (or two pay periods) less than “12 months of service.”

Calculating the potential financial impact of unifying increment anniversary dates is not covered in our audit scope. However, because the unification may have potentially negative financial impacts on Port’s resources, and in compliance with PRR 6.301(C)(1), we recommend that the GM and the Board reconsider their practice of unifying employees’ increment anniversary dates moving forward.

Port’s PRR Does Not Have a Cap on Salary Increments

According to 4 GCA Chapter 6 §6202, employees (autonomous agency employees included) at Steps 7 through 9 are entitled to an increment after 18 months of satisfactory performance, while employees at Steps 10 through 20 are entitled to an increment that is 3.5% of the employee’s base salary after 24 months of satisfactory performance. It was in 1991 when P.L. 21-59 amended §6202 by placing caps (limits) on the salary increments of employees at higher pay steps.

However, Port grants salary increments on an annual basis. According to PRR 7.008, the salary increment of all Port employees shall be based on an annual review of performance, and according to PRR 7.007(A), the performance appraisal period is every 12 months of service. It was in 2009 when the Guam Legislature adopted the PRR into Port’s enabling legislation (12 GCA Chapter 10).

Although salary increment caps were passed by law in 1991, Port’s PRR, adopted in 2009, did not incorporate the relative provisions of 4 GCA §6202, or any other cap, on its salary increments.

It is the GM’s understanding that the salary increment caps required by 4 GCA §6202 were intended for those entities that rely on the General Fund. The GM explained that because Port is autonomous and generates its own income, Port’s employees are not subject to the salary increment caps required in §6202. Combined with Port’s generous salary increment point system (as shown in Table 2), a Port employee’s salary can increase by 2% – 5% each year without a cap. This presents a potentially negative financial impact on Port’s resources.

We recommend the Board comply with Guam Code and provide parity to ratepayers and taxpayers by incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202.

Port Interpreted Superior Court Decision as Employee Q Did Not Have to Mitigate the Wages Earned During His Termination

Port paid Employee Q his back wages, minus \$209K for the outside income he earned during his termination, as indicated in Tables 1, 2, and 7. According to the GM, Port mitigated (reduced) the

back wages because Employee Q *requested* that his back wages be mitigated by his earnings during the period he was terminated. Based on his reading of the Superior Court's September 26, 2016 Decision and Order, it is the incumbent GM's understanding that:

- Port is obligated to pay Employee Q his full reinstated salary *without* mitigation; and that
- Employee Q did not have to mitigate the income he earned in the private sector and, as such, could have insisted that Port pay him his full back pay, in compliance with the Superior Court's order.

See Appendix 4 for a copy of the Superior Court's ruling. The GM's understanding of the Superior Court's ruling in the September 26, 2016 Decision and Order could open up the possibility of Employee Q's supposed entitlement to the \$209K of outside wages he "voluntarily agreed" to be deducted from his back wages. Again, we reiterate our recommendation to execute a comprehensive formal agreement that includes the provisions we previously stated.

Conclusion and Recommendations

Our performance audit of the back wages of the first of nine reinstated Port employees found significant deficiencies in the basis of Port's calculations for Employee Q's back wages, Medicare tax, retirement contribution, and interest charge that resulted in overpayments of at least \$96K in back wages and \$18K in interest for a total of \$114K. While Port's legal remedies with Employee Q were generally made in accordance with administrative and judicial review judgments and orders, we found instances of potential noncompliance with applicable laws, regulations, and internal policies, as well as lapses in Port's internal processes.

Specifically, we found:

- Port adhered to certain terms and conditions of Employee Q's that were not required by CSC or the courts' judgments, such that:
 - The highest number of incremental sub-steps were granted based partly on two (2) prior years' "Outstanding" performance evaluation ratings that were not approved by the former (or any) GM; and
 - A 6% interest charge was paid to Employee Q without any court order requirement, negotiated terms, and proper calculation.
- Successor management approved salary increments that their predecessors did not approve of themselves;
- Legal remedies were executed without seeking the Board of Directors' ratification by resolution and without a formal agreement and liability release until after the final payment in May 2020; and
- Different legal opinions resulted in delay and certain unorganized remedial actions.

We became aware of other matters not related to our audit objective that warrant Port's, and possibly the Guam Legislature's, attention – i.e., the uniformity of existing employees' anniversary dates and no caps on Port's salary increments.

As a result of our audit, we recommended the following:

- The GM and the Board standardize a salary increment process for back wages to include a required performance evaluation report (of the sort) accountable to the incumbent GM who approves the number of sub-steps on the personnel action forms.
- The GM seek the Board's ratification, via board resolution, specifying the composition of total back wages and interest paid to Employee Q.
- The GM execute a comprehensive formal agreement that includes (1) the purpose, amounts, and terms of what Port paid for Employee Q's back wages, benefits, attorney fees, and interest charge; (2) a liability release provision; and (3) the signatures of the relevant parties and witness.
- The GM and the Board reconsider their practice of unifying employees' increment anniversary dates moving forward.
- The Board comply with Guam Code and provide parity to ratepayers and taxpayers by incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202.

Classification of Monetary Amounts

Finding Description	Questioned Costs	Potential Savings	Unrealized Revenues	Other Financial Impacts	Total Financial Impacts
1. Port Adhered to Certain Terms & Conditions of Employee Q's Not Required by CSC or the Courts' Judgments					
a. Highest Number of Incremental Sub-Steps Granted Based Partly on Prior "Outstanding" Performance Evaluation Ratings Not Approved by Any GM	\$ 96,013	\$ -	\$ -	\$ -	\$ 96,013
b. A 6% Interest Charge Was Paid to Employee Q Without Any Court Order Requirement, Negotiated Terms, and Proper Calculation	\$ 17,822	\$ -	\$ -	\$ -	\$ 17,822
2. Successor Management Approved Salary Increments That Their Predecessors Did Not Approve Themselves	\$ -	\$ -	\$ -	\$ -	\$ -
3. Legal Remedies Without Seeking	\$ -	\$ -	\$ -	\$ -	\$ -

Finding Description		Questioned Costs	Potential Savings	Unrealized Revenues	Other Financial Impacts	Total Financial Impacts
	Board Ratification by Resolution					
4.	Legal Remedies Executed Without a Formal Agreement and Liability Release Until After the Final Payment in May 2020	\$ -	\$ -	\$ -	\$ -	\$ -
5.	Different Legal Opinions Resulted in Delay and Certain Unorganized Remedial Actions	\$ -	\$ -	\$ -	\$ -	\$ -
6.	Other Matters					
	a. Port Unified Existing Employees' Increment Anniversary Dates to Reflect the Dates of Agency-Wide Pay Adjustments	\$ -	\$ -	\$ -	\$ -	\$ -
	b. Port's PRR Does Not Have a Cap on Salary Increments	\$ -	\$ -	\$ -	\$ -	\$ -
	c. Port Interpreted Superior Court Decision as Employee Q Did Not Have to Mitigate the Wages Earned During His Termination	\$ -	\$ -	\$ -	\$ -	\$ -
	Total	\$ 113,835	\$ -	\$ -	\$ -	\$ 113,835

Management Response and OPA Reply

In September 2020, we provided Port's GM with a draft report of our preliminary audit findings and recommendations, as well as met with Port's management. Our preliminary audit findings and recommendations were discussed at length during this September 2020 virtual conference, for which Port management also provided us with additional documentation.

In November 2020, we provided an updated draft report to Port's GM, as well as met with Port's management to discuss our audit findings and recommendations. When Port provided us with their official management response, they also provided us with additional documentation. In Port's official management response, the GM disagreed with the majority of our audit findings and recommendations. In reply, generally, our audit findings and recommendations remained the same.

1. Introduction

Port Response: It is factually incorrect to state, "Port's decision to keep confidential the settlement costs connected with nine previously-terminated employees – salary, employee benefits, and their attorney's fees and costs", without stating that all of the settlements can now be found on the Port's website.

We believe that the statement in the Introduction that indicates "We conducted this audit in response to the public's concern over Port's decision to keep confidential the settlement costs connected with nine previously-terminated employees – salary, employee benefits, and their attorney's fees and costs" is not factual and is misleading. Using Professional Judgment on this matter to include the collective knowledge of the circumstances already acknowledged by the Auditing Team clearly would deem this statement to be misleading and not a true and accurate reflection of all of the circumstances.

OPA Reply: We revised our report to clarify that the audit was **initiated** in response to the public's concern over Port's **prior** decision to keep the settlement agreements confidential. Also, we added in the report that Port posted the settlement agreements on their website after they received the Attorney General's July 2020 opinion.

Port Response: We believe that the statement "The confidential nature in which Port executed these initial five settlements, or remedies, created a climate in which the public appeared suspicious of whether the Port was following the law when executing these settlements or legal remedies " is misleading and that an objective review using Professional Judgment on this matter to include the collective knowledge of the circumstances already acknowledged by the Auditing Team clearly would deem this statement to be misleading and not a true and accurate reflection of all of the circumstances.

OPA Reply: One news article stated, "we question why the board of directors and management of the Port, a government entity and spender of public funds, including federal

funds, committed to making the terms of the agreement confidential.” Another news article stated, “we need a few good government spending watchdogs. [...] to see whether laws were followed to the T on these generous backdated back pay amounts and raises going back several years.”

While both these articles could be interpreted as the public is “suspicious,” we removed this specific adjective from our revised report.

2. Different Legal Opinions Resulted in Delay and Certain Unorganized Remedial Actions

Port Response: This finding is misleading and does not include the collective knowledge of all the factual circumstances. Management does not believe that the remedial actions were unorganized. Instead, it is accurate to say that different legal opinions resulted in delayed remedial actions. Also, this draft statement implies that the Port's corrective actions were unorganized, and such corrective actions **were in contravention to law and the Port's Personnel Rules and Regulations.**⁵

OPA Reply: Under this specific audit finding's section, we made no such statement in the report that implies that Port's actions were in contravention to law or Port's PRR. We sufficiently explained the different legal advice Port received, and in the chronology of events in Table 8, you will see Port's actions as a result of the different legal advice. The fact that Port management had to take “corrective actions” on prior Port actions indicates “unorganized.”

Please refer to the red boxes in Table 8 for Port's specific actions, which we considered unorganized.

3. Legal Remedies Without Seeking Board Ratification by Resolution

Port Response: We again disagree with the auditor's assertion that the Board did not grant authority to process Employee Q's back wages and the Board's recommendation to ratify such action. We stated in our September 25, 2020 response that the Board appropriated \$600,000 in order to comply with the Supreme Court Order relative to Employee Q. Although your auditor stated Board approval was only for Employee Q's base salary, the motion passed by the Board in their April 30, 2019 meeting directed Management to remain within the budget authorized, and any amount over the budget would require Board approval.

OPA Reply: We made no such statement in the report that the Board did not authorize the processing of Employee Q's back wages. We clearly state that the Board's April 2019 authorization **did not include** paying out annual salary increments as part of the back wages. Our report only emphasized the need for the Board's ratification specifying all the payments made to Employee Q, **especially those not covered by CSC and the courts'**

⁵ Emphasis added.

judgments. Based on the documents Port provided, Port paid \$542K for Employee Q's legal remedies.

Refer to Appendix 7 for the discussion surrounding the Board's authorization of the \$600K budget.

Port Response: We respectfully disagree with the assertion that CSC and courts' judgments did not require Port to implement or make retroactive payments on salary increments Employee Q did not receive before he was terminated.

OPA Reply: Employee Q was terminated on December 18, 2012, then reinstated on July 30, 2018. In their judgment/order to fully compensate Employee Q, CSC and the Superior Court **did not mention compensation, back pay, or benefits for periods prior to and after Employee Q's termination.** CSC and the Superior Court of Guam's judgment/orders were already quoted in Table 1 and can be found in Appendices 3 and 4.

4. Legal Remedies Executed Without a Formal Agreement and Liability Release Until After the Final Payment in May 2020

Port Response: We believe the finding which states, "Without a valid formal agreement containing relevant and pertinent provisions, most importantly a liability release provision, Port risked the possibility of Employee Q, or his beneficiaries, pursuing further financial demands and litigation on the same termination lawsuit" is moot, since Employee Q did provide a letter dated July 23, 2020, to the Port stating the terms and conditions outlined in CSC Decision and Judgment were fulfilled and released the Port of any future liability.

We agree that Employee Q should not have used a Port letterhead in releasing the Port of any liability of all claims. However, we do not find it of significant concern because no fraud or abuse was committed, and that the full force and effect of Employee Q's liability release remains in effect, even if such were **written on a napkin.**⁶ Moreover, even though this draft audit states that a notary or witness nor acknowledgment by the GM or DGMA is lacking, the result is Employee Q provided a Port with a letter releasing the Port of any future claims. Therefore, Management believes that this finding is without merit.

OPA Reply: In the report, we acknowledged that Employee Q signed a liability release letter, dated July 23, 2020. However, this finding remains because the liability release should have been executed before the final payment and should have contained other pertinent information, as explained in the report. A liability release letter was not prepared and signed until July 23, 2020, **after we brought up this issue to Port** during our July 14, 2020 virtual meeting.

⁶ Emphasis added.

5. Port Adhered to Employee Q’s Terms & Conditions Not Required by CSC or the Courts’ Judgments

Port Response: It is inaccurate to refer to this as a settlement [...]

OPA Reply: The term “settlement” was already replaced with the term “legal remedies” in our second draft report to Port management.

Port Response: It is inaccurate to [...] imply that the Port "just accepted" all of Employee Q's demands, as continually referred to by this draft audit.

We disagree with your assertion that the Port followed all of the terms and conditions outlined in Employee Q’s attorney's letter of July 11, 2018, and his letter of February 6, 2020, at face value.

OPA Reply: During our **recorded** July 2020 virtual meeting with Port management and staff, we were told that **all** of Employee Q’s terms and conditions were acted upon by Port. However, the incumbent GM’s September 25, 2020 written response stated that “Port did not pay for the medical, dental and life insurance benefits [...]” listed in Employee Q’s remedy request letter. Based on this written response, our report no longer states that Port followed all of Employee Q’s terms and conditions.

Port Response: Such payments were executed because of a Supreme Court order and not because of a settlement agreement.

OPA Reply: As already explained in our report, CSC and the courts’ judgments **did not order** Port to compensate Employee Q with salary increments for periods prior to his termination, nor with a pre-or post-judgment interest. Refer to Appendices 3, 4, and 5 for CSC and the courts’ judgments/orders.

6. Two Prior Years’ Performance Evaluation Ratings Not Approved by Former GM Results in the Lowest Number of Incremental Sub-Steps

Port Response: At issue is Management's recognition of Employee Q's 2011 and 2012 performance evaluation giving the draft audit claim that neither of these documents were signed. We did a further review of Employee Q's performance evaluation reports for 2011 and 2012, and discovered supporting documents. Indeed, we apologize for not offering up the following documents for your review: [...]

OPA Reply: On November 25, 2020, Port resubmitted Employee Q’s 2011 and 2012 performance evaluation reports along with relevant documents. As of November 25, 2020,

both the 2011 and 2012 performance evaluation reports themselves remain unsigned by any Port GM.

Port Response: A copy of the signed performance evaluation for 2011 by the Interim Deputy General Manager is provided for your review. Note that the former General Manager was on leave and did not rescind this action at any time upon her return to work;

OPA Reply: On November 25, 2020, Port resubmitted Employee Q's 2011 and 2012 performance evaluation reports along with relevant documents. As of November 25, 2020, both the 2011 and 2012 performance evaluation reports themselves remain unsigned by the former GM and the former Interim Deputy GM.

If the former GM (GM 4) did not rescind the former Interim Deputy GM's payment authorization of the 2011 salary increment (as asserted by the incumbent GM), we question why the DGMA duplicated the NPA processing of Employee Q's 2011 salary increment.

Port Response: However, there is no written letter denying Employee Q his increment, therefore, Employee Q's increment for 2012 has been effectuated;

However, the former General Manager did not comply with the rule by denying in writing his salary increment. As such, we determined that Employee Q's increment for 2012 was not rejected according to the Port's Personnel Rules and Regulations and recognized for purposes of reconstructing his back wages and current salary. No General Manager should ever be allowed to sit on any pending performance evaluation. **Leaving a performance evaluation, unsigned should not be akin to rejecting it.**⁷ Furthermore, there is no statute of limitation on when to act upon a performance evaluation, [...] We are confident that this audit will have the same conclusion because although no employee is entitled to a salary increment, employees are entitled to due process. Based on this, Table 4 would need to be corrected to reflect both the 2011 and 2012 to be 5 each.

OPA Reply: As stated by the incumbent GM (in Port's management response in Appendix 8), "according to the Human Resources staff, the documents [2012 performance evaluation rating form] **were returned, unsigned by the former General Manager**⁸, in November 2013." We are not in the position to question why none of the former GMs did not sign or did not provide a written notification of denial of, Employee Q's 2011 and 2012 performance evaluation reports. Also, we are not in the position to accept that the absence of a GM's signature, or the absence of a GM's written notification of denial, equates to the GM's acceptance of a performance evaluation. Refer to Appendix 6 for relevant PRR section.

⁷ Emphasis added.

⁸ Emphasis added.

As such, our finding remains and our figures in (now) Table 3 will remain unchanged. Our audit report does not require Port management to request reimbursement from Employee Q. If Port management believes that Employee Q is entitled to the five sub-steps, they should request the Board's ratification.

Port Response: Regarding the statement that Employee Q's performance would not have changed over time seemed unrealistic. This finding is capricious and inconsistent with Employee Q's long-standing record of exemplary performance. [...] To make the finding that his overall evaluation ratings for 2013 to 2017 should have been "marginal satisfactory" based on unsigned performance evaluations for 2011 and 2012 by the former General Manager is troublesome to not only Management, but also Employee Q or any other employee in this type of situation. Again, we are confident that in the justification, we offer as reasons why the 2011 and 2012 were accepted and used to calculate Employee Q's back wages.

OPA Reply: Based on Port management's response (in Appendix 8), we do not dispute Employee Q's "exemplary performance," credentials, or membership in a professional organization. However, audit findings cannot be based on these external factors, but on documented evidence provided by **Port** management. We adhered to Port's PRR, which requires the GM's approval of a performance evaluation report as the basis to process an annual salary increment, which also requires the GM's approval. Refer to Appendix 6 for relevant PRR section. As such, our finding remains.

Port Response: We respectfully disagree with your auditor's assertion that overpayment was made to Employee Q. *[Port's response follows the statement in our report that: "If our audit calculation used the averaged two sub-steps salary increments and excluded the 2012 increment, which performance rating was not approved, Port paid approximately \$96K more in addition to the \$21K overpayment."]*

OPA Reply: As explained in our previous reply, we are not in the position to question why none of the former GMs did not sign or did not provide a written notification of denial of, Employee Q's 2011 and 2012 performance evaluation reports. Also, we are not in the position to accept that the absence of a GM's signature, or the absence of a GM's written notification of denial, equates to the GM's acceptance of a performance evaluation. As such, our finding remains.

7. **Employee Q Was Paid a 6% Interest Charge Without Court Order Requirement and Negotiated Terms**

Port Response: Please elaborate how the Port could be in a position to negotiate the 6% interest when this entire matter resulted from a Supreme Court Order CVA-██████ and

both Port former legal counsel and in-house counsel did not dispute such interest rate with Employee Q's attorney?

OPA Reply: For Supreme Court case no. CVA [REDACTED], Port was **not ordered to pay 6% interest** to Employee Q. Refer to Appendix 5 for the Supreme Court's Judgment concerning Employee Q's termination.

As stated in our report, CSC and the courts **did not specifically order Port to pay a 6% interest charge** to Employee Q. Refer to Appendices 3 and 4 for CSC and the Superior Court's judgments/orders.

Also stated in our report is the law that allows "for a rate of interest **not exceeding** the rates of interest specified in 14 GCA."

8. Annual Salary Increments Included Without Performance Evaluation Reports Approved by and Accountable to the GM

Port Response: This finding is baseless. The Port does have a standardized salary increment process provided for in the Port's Personnel Rules and Regulations. Such rules were followed to reconstruct the back wages for Employee Q.

OPA Reply: Our audit finding does not question why the salary increments within the termination period were included in Employee Q's back wages. Our audit finding questions why salary increments were processed without duly accomplished performance evaluation reports to serve as the basis of increment calculation in the NPAs. Refer to Appendix 6. Our finding remains unless Port can provide performance evaluation reports duly signed by the incumbent GM, in compliance with Port's PRR.

9. Back Wages Included Three Pay Raises Not Covered by CSC or the Courts' Judgments and Retroactive to Their Authorization Dates

Port Response: We disagree with your auditor's assertion that the retroactive payment of raises were not covered under the judgments. As explained above and in our September 25, 2020 letter, although judgment or decision did not expressly state salary increments and pay adjustments, Employee Q is entitled to salary increments and market percentile implementations.

OPA Reply: Our audit finding does not question why the salary increments and agency-wide pay adjustment within the termination period were included in Employee Q's back wages. Clearly explained in the report, we question the retroactive payments of salary increments that were **due before** Employee Q's termination.

However, our audit no longer questions the retroactive processing and payment of Employee Q's 2018 pay adjustment and the 2019 salary increment because Port was factoring in the salary increments previously denied by Port's former Legal Counsel.

10. Interest Charge Paid Without Considering Time in the Calculation

Port Response: We respectfully disagree that Employee Q was overpaid in his interest payment. Based on our recalculation, the Port underpaid him \$4,729.26.

According to staff, who was a former employee of your agency, she noted OPA used network days and hourly rate per year to compute the estimated annual salary and used the number of days for the interest payment. With this method of calculation, it would show the Port did overpay Employee Q by \$17,000. However, the Port's review notes that when interest was paid to Employee Q, a significant balance in salary payable was not settled. As such, the Port underpaid Employee Q \$4,729.26. Because Employee signed a document releasing the Port from any future liability, how are we now supposed to reconcile this finding of an underpayment?

OPA Reply: Port agreed with our calculation for interest covering the period of December 19, 2012 through September 15, 2018. For the same period, Port also agreed that they overpaid Employee Q by \$17,822 (which our report rounds up to \$18K). Based on documents provided by Port, the last remedial payment made to Employee Q was in May 2020. During our recorded July 2020 virtual meeting with Port management and staff, we were told that the 6% interest charge to Employee Q was fully paid.

The additional \$4,729.76 that Port asserts to owing Employee Q results from a subsequent calculation in which Port continued to accrue the 6% interest beyond the period excluded in Port's original calculation. Port's continued accrual of interest until May 2020 does not change our audit finding.

The additional \$4,729.76 that Port asserts to owing Employee Q does not need to be reconciled because Port's management response clearly reminded us that Employee Q's July 23, 2020 letter released Port of any future liability connected with his termination appeal. Also, as stated in our report, Employee Q's July 23, 2020 letter acknowledged that his case with Port is "closed."

11. Port's PRR Does Not Have a Cap on Salary Increments

Port Response: Moreover, we are perplexed that this is even a finding? This audit should focus on a determination if the law and rules and regulations applicable to the Port were followed in the execution of complying with Supreme Court Order No. CVA [REDACTED].

OPA Reply: This is not an audit finding, but a matter we wished to bring to the attention of Port management, our report readers, and the Guam Legislature.

Given the concept of accountability for use of public resources and government authority, evaluating a government environment or program is not restricted to only violations of laws. These other matters may be significant enough to impact the public, our lawmakers, or those charged with governance.

While the purpose of a performance audit is to answer the audit objectives determined by the auditors, generally accepted government auditing standards⁹ (GAGAS) do not restrict our reporting of other matters relevant to the auditee and worth commenting on. The auditee may suggest or add audit objectives, but cannot dictate the objective, scope, or results of our audit.

Port Response: We do not agree with this recommendation. Public Law 30-43, which approved the Port's Compensation and Classification Plan, also codified our Personnel Rules and Regulations into the Guam Code Annotated. As such, the Board does not have the unilateral authority to simply incorporate into the Port's Personnel Rules and Regulations the provisions of 4 GCA Chapter 6, Section 6202 moving forward.

OPA Reply: Given the concept of accountability for use of public resources and government authority, this may be significant enough to impact the public, our lawmakers, or those charged with governance.

12. Port Interpreted Superior Court Decision as Employee Q Did Not Have to Mitigate the Wages Earned During His Termination

Port Response: This finding is moot since Employee Q's back wages included mitigation, and also since Employee Q submitted his liability release to the Port on July 23, 2020.

OPA Reply: This is not an audit finding, but a matter we wished to bring to the attention of our report readers.

We evaluated Port management's responses to our audit findings and find that Port management needs to carefully read and understand our findings, which we presumed was well understood, based on our two virtual meetings with Port's GM.

Port management repeatedly questioned our professional judgment as auditors and the integrity of our audit process. We stand by our professional judgment, which under GAGAS, includes a questioning mind and critical assessment of evidence. As such, we offer our report readers appendices containing the documents to which Port management repeatedly interprets. While certain records provided by Port are protected by our enabling legislation, the previously mentioned appendices are of documents already publicly posted by Port, CSC, or the courts.

The auditee is free to agree or disagree with our audit findings and recommendations.

We will not compromise our objectivity based on Port's current and prior management's view of Employee Q. Under GAGAS, we adhere to the validity, reliability, relevance, and sufficiency of our audit evidence, which is comprised of the records presented to us by Port management, as well as the pertinent judgments and orders obtained on CSC and the Judiciary

⁹ Issued by the Comptroller General of the United States.

of Guam's websites. These records, judgments, and orders formed the basis of our audit findings and conclusion. As such, Part A of our audit series is complete, and thus, this audit report needs to be issued.

Refer to Appendix 8 for Port's official management response.

The legislation creating the Office of Public Accountability requires agencies to prepare a corrective action plan to implement audit recommendations, document the progress in implementing the recommendations and endeavor to have implementation completed no later than the beginning of the next fiscal year. Accordingly, we will be contacting Port to provide us with a target date and title of the official(s) responsible for implementing the recommendations.

We appreciate the cooperation and assistance from the staff and management of Port.

OFFICE OF PUBLIC ACCOUNTABILITY



Benjamin J.F. Cruz
Public Auditor

Appendix 1: Objective, Scope, & Methodology

Objective

To determine whether Port’s settlements, or legal remedies, with reinstated employees were properly accounted for and paid in accordance with applicable laws, regulations, and administrative and judicial review judgments.

Scope

Part A of our audit series is focused on the audit results of only one of the nine reinstated employees – “Employee Q”. Part A covered the court orders and judgments, Port documents, and other documents relevant to Port’s calculations and payments to Employee Q’s legal remedies during our audit engagement (i.e., October 2010 through November 2020).

The results of our audit on the other eight employees’ settlements will be issued in the next series of our audit reports.

Methodology

To accomplish our objective, we performed the following pertaining to the legal remedies Port paid to Employee Q:

- Identified and analyzed applicable laws, rules and regulations, and policies.
- Identified and analyzed prior audits and official publications.
- Met with Port officials to gain an understanding of the documentation and calculations they provided us regarding Employee Q’s legal remedies.
- Identified and analyzed all documents relevant to Port’s calculations and payments to the five reinstated employees covered in our initial audit scope.
- Verified Port’s calculations by analyzing and recreating calculations based on all relevant documents.
- Met with Port management to discuss our preliminary and updated audit findings.

We conducted this performance audit in accordance with generally accepted government auditing standards issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

THE CONTENT OF THIS LETTER IS INADMISSIBLE PURSUANT TO GUAM
RULE OF EVIDENCE 408

[REDACTED]

February 6, 2020

[REDACTED]
Deputy General Manager, Admin and Finance
Port Authority of Guam
1026 Cabras Highway, Ste. 201
Piti, GU 96925

**RE: Civil Service Commission ADVERSE ACTION APPEAL CASE -
NO: [REDACTED]-DECISION AND JUDGMENT**

Dear [REDACTED]

In July 30, 2018, I returned back to work in the Port Authority of Guam (PAG, Port) after the Port's Legal counsel, [REDACTED] informed my lawyer in June of 2018 that the Port Authority will no longer appeal the Supreme Court of Guam's decision. The Supreme Court's decision, which was originally released in February 2018, affirmed the Superior Court and Civil Service Commission's (CSC) decision in my favor. The CSC ordered the Port in May of 2013 to fully compensate me for all the time following my termination on December 18, 2012 until the date of reinstatement. The compensation shall include all employer's contribution to the Government of Guam Retirement Fund as well as the accumulation of vacation and sick days for all the pay periods between December 18, 2012 and the reinstatement date.

After almost 1 year since my return to the Port, personnel actions were issued to me in May 2019, which indicates my original base pay when I was terminated minus income I received in my work during my separation to the Port. The base pay used in each of the personnel action did not take into consideration any increments that was owed to me. Although the acting Personnel Administrator initially provided me the salary calculation with increments that was owed to me from the time that I was terminated to the reinstatement date, management made the decision to use the base pay listed in my termination personnel action despite two increments were owed to me from prior years' performance evaluation.

2. Medical, Dental and Life Insurance Benefits reinstated from GGRF to PAG with no break in benefit coverage.
3. Reinstatement of *all* Annual and Sick Leave accrued for the period of December 18, 2012 to July 30, 2018.
4. Remit Define Contribution Plan (DC Plan) Retirement Member and Government of Guam Contributions:
5. Any remaining unpaid balance of attorneys fees by the 5th working day after the date of management approval.
6. A 6% interest charge per day is effectuated. Payment to be made by the 60th day of management approval.

My terms and conditions are reasonable as they are in accordance with CSC's May 13, 2013 Decision & Judgment, Supreme Court of Guam's February 7, 2018 Judgment and Guam Law.

Thank you for your prompt attention to this matter. I am looking forward to discussing this matter with you in the very near future. I may be reached at [REDACTED].

Respectfully,

[REDACTED]
[REDACTED]

Approved by:

[REDACTED]
[REDACTED]

Deputy General Manager- Admin and Finance

2/7/2020
Date

Appendix 3:
CSC's May 13, 2013 Decision and Judgment

671-647-1867

07:56:21 p.m. 08-13-2013

1/5

Office of the Legislative Secretary
Senator Tina Rose Mufia Barnes

Date 8-14-13
8:40



BEFORE THE
GUAM CIVIL SERVICE COMMISSION



IN THE MATTER OF:

[Redacted]

Employee,

vs.

PORT AUTHORITY OF GUAM,

Management.

ADVERSE ACTION APPEAL
CASE NO. [Redacted]

DECISION AND JUDGMENT

32-13-687
CSC Speaker
Justice Wilson Pat. Ed. B.

Date 8-14-13

Time 2:11

Received by [Signature]

This matter came before the Civil Service Commission (the "Commission") at its regularly scheduled meeting on June 6, 2013, at its office located at Suite 6A, Sinajana. Present were Employee [Redacted] (hereafter "Employee [Redacted]") and his attorney, [Redacted] Management Port Authority of Guam (hereafter "the Port") was represented by [Redacted] as legal counsel for the Port and Acting General Manager [Redacted]

I. ISSUE

Was there a procedural defect to justify granting of Employee [Redacted]'s Motion to Dismiss Adverse Action for Violation of 4 Guam Code Annotated Section 4406?

II. HOLDING

By a vote of 4-1 with 1 abstention, the Commission granted Employee [Redacted]'s Motion to Dismiss Adverse Action for Violation of 4 Guam Code Annotated Section 4406. (hereafter "Motion")

687

1
[Redacted] vs. Port, Case No. [Redacted]
Decision and Judgment

ORIGINAL

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III. JURISDICTION

The jurisdiction of the Civil Service Commission is based on upon the Organic Act of Guam and 4 G.C.A. § 4401 *et. sec.*

IV. FACTS

The Port terminated Employee [REDACTED] on December 18, 2012. Employee [REDACTED] filed his Motion claiming Management violated the sixty (60) day rule on February 13, 2013. Management filed its Opposition to Employee [REDACTED]'s Motion on February 21, 2013. Neither party requested to present live testimony at the hearing on the motion as required by CSC AA R 9.2. The hearing on the motion was held on June 6, 2013. At the hearing, the Commission granted Employee [REDACTED]'s motion by a vote of 4-1 with one abstention.

Pursuant to the final adverse action served on Employee [REDACTED] the Port contended that on October 16, 2012, Employee [REDACTED] signed documents certifying the availability for medical treatment and travel related to a worker's compensation claim filed by another employee of the Port. Management further stated in the final adverse action that Employee [REDACTED] knew that the Port had budgeted thirty thousand dollars (\$30,000.00) for the Port's worker compensation expenses and that the costs of the travel and medic cost was nearly one hundred thousand dollars (\$100,000.00). The documents signed by Employee [REDACTED] were presented to the General Manager of the Port, [REDACTED] on ~~December~~ ^{OCTOBER} 16, 2012. the Final Adverse Action was served on Employee [REDACTED] on December 18, 2012; after 62 days after the documents were presented to the Port General Manager.

Employee [REDACTED] contended in his motion that when the documents certifying the availability of the funds were presented to the Port General Manager on December 16, 2012, the sixty (60) days in which Management must serve an employee and adverse action pursuant to 4

1 G.C.A. § 4406 began to run because the Port General Manager knew or should have known that
2 the amount of the medical treatment and travel Employee [REDACTED] certified as being available
3 exceeded the budgeted amount of the Port for worker's compensation related claims. Employee
4 [REDACTED] claimed in his Motion the Port General Manager was aware of the size of the Port's
5 worker's compensation budget on December 16, 2012 when she received the certification of
6 funds. Employee [REDACTED] claims this assertion was supported by a document entitled "Finding
7 of Facts and Conclusions of Law 12/4/12" prepared by the Port's legal counsel and attached to
8 Employee's Motion to Dismiss as Attachment 3. In the document prepared by the Port's legal
9 counsel, legal counsel writes:

10 **Further, [REDACTED] admitted in the October 19th meeting at**
11 **counsel's office and the October 25th Board meeting that she routinely**
12 **disregarded the Port's self-imposed budget of \$30,000 per year for**
13 **worker's compensation. Aside from routinely exceeding this budget,**
14 **the Port has no legal basis by which to expend travel, medical care or**
15 **other expenses on worker's compensation claims.**

16 Employee [REDACTED] further referenced to the Final Adverse Action Exhibit 36 filed by
17 Management to establish the size of the expenditures related to the worker's compensation claim.
18 Employee [REDACTED] also attached a copy of the Travel Request Authorization and Routing Sheet
19 for the Travel Request showing the document had been received and signed by the General
20 Manager on October 16, 2012.

21 Management in its opposition contended that the sixty (60) days did not begin on October
22 16, 2012, because it is not possible to know that Management knew on October 16, 2012.
23 Management also asserted that statements made by Employee [REDACTED] during and October 25,
24 2012, Board meeting either constituted a new date for the start of the sixty (60) day rule.

25 In the alternative, Management argued that if the October 16, 2012 date did begin the
sixty (60) day period for the service of a final adverse action on Employee [REDACTED] that the
service of the action on the 62nd day was in fact within the requirements of the law.

1 Management asserts that because it served the proposed adverse action on Employee [REDACTED] on
2 December 5, 2012 and were required to provide Employee [REDACTED] ten (10) days to respond, and
3 could not render a final decision until the ten (10) days had expired, and the tenth day fell on a
4 Saturday, they could not, pursuant to 1 G.C.A. § 709, require Employee [REDACTED] to serve his
5 response on that day. However, on page 2 of Management's Opposition to Employee's Motion,
6 Management notes Employee [REDACTED] had filed his response on Friday, December 14, 2012.
7 Management goes on to say that Management extended the reply time for Employee [REDACTED] to
8 Monday, December 17, 2012. Management then claimed the filing on December 18, 2012 was
9 therefore in keeping with the statutory requirements and Civil Service Precedent.

10 Management failed to serve the final adverse action on Employee [REDACTED] within sixty
11 (60) days when Management knew or should have known the facts that Management alleges
12 forms the grounds for the adverse action. The date when Management knew or should have
13 known facts which form the basis of the adverse action is October 16, 2012. The alleged
14 statements made by Employee [REDACTED] on October 16, 2012. The statements but a continuation
15 of the conduct alleged to have begun on October 16, 2012. The statements allegedly made on
16 October 25, 2012 do not constitute acts of fraud or concealment because they in no way
17 prevented Management from discovering or investigating the alleged misconduct.

18 **V. CONCLUSION**

19 By a vote of 4-1 with 1 abstention, the Commission finds Management failed to serve
20 Employee [REDACTED] with his final adverse action within sixty (60) days. The Commission further
21 finds none of the explanations provide by Management are legal justification for failing to
22 comply with the statutory mandate of 4 G.C.A. § 4406. Therefore, the adverse action taken
23 against Employee [REDACTED] is null and void.

24 The Port Authority of Guam is hereby ordered to immediately reinstate Employee [REDACTED]

Appendix 3:
CSC's May 13, 2013 Decision and Judgment

671-647-1867

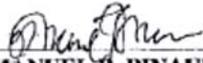
07:57:20 p.m. 08-13-2013

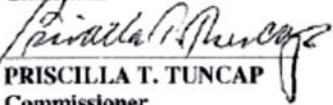
5/5

1 [REDACTED] to his prior position of employment. The Port Authority of Guam is further ordered to
2 fully compensate Employee [REDACTED] for all the time following his termination on
3 December 18, 2012 until the date he is reinstated to his prior position of employment. The
4 compensation shall include all employer's contributions to the Government of Guam Retirement
5 Fund as well as the accumulation of vacation and sick days for all the pay periods between
6 December 18, 2012 and the date Employee [REDACTED] is reinstated.

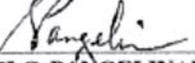
7 The Port Authority of Guam is further ordered to pay the attorney's fees incurred by
8 Employee [REDACTED] during the appeal of the December 18, 2012, adverse action in the
9 amount of \$9,380.95.

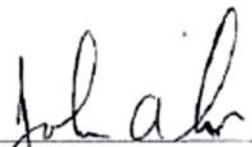
10 So ordered this 13th day of May, 2013 *nunc pro tunc* to June 6, 2013.

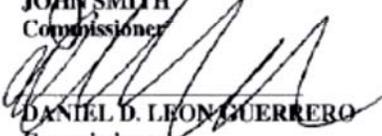
11
12 
13 MANUEL R. PINAUIN
14 Chairman

14 
15 PRISCILLA T. TUNCAP
16 Commissioner

16 
17 LOURDES HONGYEE
18 Commissioner

18 
19 EDITH C. PANGELINAN
20 Commissioner

14 
15 JOHN SMITH
16 Commissioner

16 
17 DANIEL D. LEON GUERRERO
18 Commissioner

<p>1 2 3 4 5 6</p> <p>RECEIVED</p> <p>SEP 27 2016 Law Offices [REDACTED]</p> <p>FILED SUPERIOR COURT OF GUAM 2016 SEP 26 PM 1:16 CLERK OF COURT BY: _____</p> <p>IN THE SUPERIOR COURT OF GUAM</p>	
<p>7 8 9 10 11 12 13 14 15 16</p> <p>PORT AUTHORITY OF GUAM, Petitioner, vs. CIVIL SERVICE COMMISSION, Respondent, and [REDACTED] Real Party in Interest.</p>	<p>SPECIAL PROCEEDINGS CASE NO. [REDACTED]</p> <p>DECISION AND ORDER</p>
<p>17 18 19 20 21 22 23 24 25 26 27 28</p> <p style="text-align: center;">INTRODUCTION</p> <p>This matter came before the Court on June 24, 2016, for a hearing on Petitioner's challenge of the Civil Service Commission's granting to the Real Party in Interest [REDACTED] [REDACTED] full back pay from the date of his termination until Petitioner PORT AUTHORITY OF GUAM (hereafter "Petitioner PAG") allows [REDACTED] to return to work as ordered by the Civil Service Commission and upheld by this Court in the Court's July 2, 2015 order. Petitioner PAG was represented by the law offices of [REDACTED] Respondent CIVIL SERVICE COMMISSION (hereafter "Respondent CSC") was represented by [REDACTED] and Real Party in Interest [REDACTED] (hereafter [REDACTED]) was represented by the law offices of [REDACTED]</p>	
<p>Port Authority of Guam vs Civil Service Commission and [REDACTED] Case No. [REDACTED] Decision and Order</p> <p style="text-align: center;">Page 1 of 3</p>	

FACTUAL BACKGROUND

1 [REDACTED]
2 [REDACTED] was the only witness at the evidentiary hearing held on June 24, 2016.
3 [REDACTED] testified that prior to his termination, he was employed by Petitioner PAG as the
4 [REDACTED] [REDACTED] testified that at the time of his termination his annual
5 salary was in excess of Seventy-Nine Thousand Dollars (\$79,000). [REDACTED] further testified
6 the position of [REDACTED] had as benefits sick leave, paid vacation, retirement
7 benefits and protection as a classified employee. [REDACTED] also testified when employed by
8 Petitioner PAG, he was responsible for supervising other employees.

9 [REDACTED] testified that since his termination by Petitioner PAG in December of 2012,
10 until his testimony that there had not been any positions that were equivalent or substantially
11 similar to his previous position as the [REDACTED]. His testimony was all of the
12 positions offered a substantially lower salary and involved the supervision of substantially fewer
13 employees. [REDACTED] testified that since his termination, he had applied for a number of jobs
14 even though they were not substantially similar to his previous position. During his testimony,
15 he listed eight specific jobs that he had applied for. He further testified that he had received
16 interviews for several of those jobs but had not been offered any of the jobs he testified he
17 applied for. [REDACTED] testified that he remained ready and willing to work if he were offered
18 a job.

DISCUSSION

19
20 The controlling Guam Supreme Court case regarding the issue of the employee's need to
21 mitigate damages in regards to a claim of back wages due is Hauser v. Department of Law,
22 2005 Guam 14. When determining if an employee is qualified for full back pay, the Guam
23 Supreme Court established a three-prong test. First, the Court must decide if substantially
24 equivalent jobs were available for the employee to apply for during the time period in question.¹
25 Substantially similar employment is employment which affords virtually identical
26 compensation, job responsibility and promotional opportunities.² The second prong of the test

27
28 ¹ Hauser, 2005 Guam 14, ¶ 14

² Id. at ¶ 34.

1 is that there must be evidence that the employee could have obtained one of the substantially
2 similar positions that were available. The third prong of the Hauser test is did the employee use
3 reasonable diligence in seeking one of the substantially equivalent jobs that were available
4 during the time in question.³

5 The testimony of [REDACTED] was there have been no substantially equivalent jobs
6 available on Guam during the time period in question. As there was no testimony or evidence
7 to contradict this testimony, the Court finds that there were no substantially equivalent jobs on
8 Guam during the period in question for [REDACTED] to apply for. In Hauser, the Guam Supreme
9 Court ruled an employee is not required to seek or accept a lesser or dissimilar job from the
10 employee's previous position for the purpose of mitigating damages in regards to back pay.⁴ As
11 there were no substantially equivalent jobs available to apply for, there was no evidence that
12 [REDACTED] could have obtained a substantially equivalent job no matter how diligent he was in
13 seeking employment. [REDACTED] testified he applied for jobs that were not substantially
14 equivalent jobs simply because he desired to work.

15 **CONCLUSION**

16 Based on the uncontroverted testimony of [REDACTED] the Court finds that [REDACTED]
17 complied with his duty pursuant to Hauser and upholds the Civil Service Commission's Order
18 awarding [REDACTED] full back pay and benefits from the date of his termination until Petitioner
19 PAG complies with the Commission's Order and allows [REDACTED] to return to work.

20 IT IS SO ORDERED, this 26th day of September, 2016.

21
22 I do hereby certify that the foregoing
23 is a full true and correct copy of the
original on file in the office of the
clerk of the Superior Court of Guam.

24 SEP 26 2016

25 **Alfred A. Santos**
26 Deputy Clerk, Superior Court of Guam

Original's
27 **HON. VERNON P. PEREZ**

28 **HONORABLE VERNON P. PEREZ**
Judge, Superior Court of Guam

³ Id. at ¶ 14.

⁴ Id. at ¶ 25.

Personnel Rules and Regulations for Maritime Positions Unique to Port Operations and
Certified, Technical and Professional Positions

1. the pay grade for a class or classes of positions have been reassigned;
2. pay adjustments from statutory amendments to the pay grade schedule;
3. detail appointment;
4. transfer from one position to another of the same or related class of position while retaining the same salary rate upon transfer;
5. involuntary demotion for other than adverse or disciplinary reasons;
6. reclassification to a class of the same pay grade or lower while the employee retains the same salary rate;
7. salary increment freeze; and
8. other situations as may be determined by the Board.

D. Voluntary Demotion to the Same or Related Class of Positions:

The employee's next salary increment shall include the period served prior to the voluntary demotion; and provided that work performed is satisfactory.

E. Creditable Service Upon Reemployment:

Permanent classified employees who separated with the Port in good standing shall be credited for time served in the increment held prior to separation when exercising their reemployment rights.

6.302 Salary Increment - Procedure

Employees entitled to an increment increase shall be based on an annual review of performance as outlined in Chapter 7. As part of the appraisal process, an employee's performance will be assessed against a performance range of zero (0) to six (6) sub-steps. As sub-steps (within the pay schedule) increase by one percent (1%) the performance (and resulting salary increment) range from zero (0), or a nil increase, through up to six percent (6%).

The salary increment will be granted upon certification by the General Manager that satisfactory service has been rendered for the performance rating period preceding such increase.

Personnel Rules and Regulations for Maritime Positions Unique to Port Operations and
Certified, Technical and Professional Positions

When a division head determines that a particular employee shall not be granted a salary increment, the division head shall notify the General Manager of such denial prior to the employee's anniversary date. If the General Manager does not receive a performance report or a notification of denial of an employee's salary increment, no action will be taken to adjust the employee's pay.

6.400 ONE-STEP MERIT PAY INCREASE – DR. PEDRO SANCHEZ SCHOLARSHIP GRADUATES

- A. Employees are eligible for a mandatory pay merit increase upon graduation from the Pedro "Doc" Sanchez Scholarship Program. The employees entered into the program, as evidenced with the awarding of an undergraduate or graduate degree in Public Administration or Business Administration by the University of Guam shall be entitled to receive one-step merit pay raise from the Port effective Fiscal Year 2008 following certification by the University of Guam that the employee has completed all degree requirements.
- B. Employees who were enrolled in the Pedro "Doc" Sanchez Scholarship Program and graduated with a degree between the enactment of Public Law 23-111 (effective July 23, 1996) and the enactment of Public Law 29-137 (January 30, 2009) who would otherwise have received the one-step merit pay raise, shall be entitled to the same incentive benefit, provided that the employee is an active employee at the time of enactment of Public Law 29-137 and the merit pay increase shall not be retroactive. Awarding of the one-step merit pay raise shall be subject to the availability of funds.

6.500 TRANSMITTAL OF PERSONNEL ACTIONS TO COMMISSION

6.501 Filing of Personnel Actions:

All personnel actions regarding the classified service shall be filed with the Commission within twenty (20) days after their effective date. The Commission may set aside and declare null and void any personnel action if the Commission finds that it was taken in violation of personnel laws or rules, except for those personnel actions for adverse actions, such null and void must be in accordance with the Adverse Action Appeals and Hearing Procedures.

6.502 Agency Response

Prior to declaring any personnel action null and void, the Commission shall provide written notice of the alleged violation to the General Manager. The General Manager shall respond within ten (10) days after receipt of the notice to the Commission's proposed action.

Personnel Rules and Regulations for Maritime Positions Unique to Port Operations, and
Certified, Technical and Professional Positions

7.007 Performance Appraisal Period

- A. Supervisors shall evaluate and submit the employee's work performance for every twelve (12) months of service to the General Manager.
- B. Performance appraisal reports must be prepared and submitted for processing to the General Manager no sooner than thirty (30) days prior to above period.
- C. Supervisors are required to conduct mid-term performance appraisal for all of their subordinates.
- D. No later than the end of the probationary period for those employees serving original probationary appointments, including those probationary periods that have been extended. The final Probationary Performance Appraisal Report shall be submitted and received by the General Manager no later than (10) work days prior to the probationary due date.

7.008 Salary Increment

The salary increment of all Maritime Positions Unique to Port Operations and Certified, Technical and Professional Positions shall be based on an annual review of performance as outlined in this Chapter. As part of the appraisal process an individual's performance will be assessed against a performance range of zero (0) to six (6) sub-steps. As sub-steps (within the pay schedule) increase by one percent (1%) the performance (and resulting salary increment) range from zero (0), or a nil increase, through up to six percent (6%).

All salary increments will require the approval by the General Manager.

7.009 Performance Appraisal for Original Probationary Employees

- A. An overall performance rating of at least a **Satisfactory** shall be necessary before an employee serving an original probationary period may receive a permanent appointment in the class of position he occupies.
- B. When an employee serving an original probationary period receives an overall performance rating of **Marginal**, the probationary period shall be extended for a minimum period of sixty (60) days during which the employee has the opportunity to improve work performance, provided the total probationary period does not exceed twelve (12) months. The Division Head must justify, in writing, to the General Manager stating specific reasons for the request for extension based on the duties and responsibilities associated with the employee's current position description and job standard. No extension beyond twelve (12) months may be granted.

Personnel Rules and Regulations for Maritime Positions Unique to Port Operations, and
Certified, Technical and Professional Positions

- C. When an employee, serving an original probationary period, receives an overall performance rating of **Unsatisfactory**, the employee serving the original probationary period shall be terminated from the Port. A probationary employee who is dismissed has no recourse to file a grievance or appeal his release from employment unless the release from employment is a result of discriminatory action by management.

7.010 Approval of Performance Appraisal

A Division Head shall submit, on a twelve (12) month basis, a written recommendation to the General Manager regarding the performance appraisal of every employee occupying a maritime position unique to Port operations and certified, technical and professional position. The General Manager shall make a final performance appraisal accepting or rejecting said recommendation and make the corresponding salary adjustments.

7.100 APPEAL PROCEDURES FOR RE-DETERMINATION OF PERFORMANCE APPRAISAL

7.101 Purpose

This procedure outlines the responsibilities and procedures to be followed by management and employees in handling performance appraisal appeals.

7.102 Coverage

Employees occupying maritime positions unique to Port operations and certified, technical, and professional positions covered by these procedures are those employees who have satisfactorily completed their original probationary period and have attained permanent status with the Port. Such employee who believes he was unjustly rated may request for redetermination of the performance rating. Original probationary period performance ratings are not appealable under this procedure.

7.103 Representation

An employee has the right to present an appeal with or without representation. He also has the right to be accompanied, represented, and advised by a representative of his choice at any step of the appeal proceeding.

7.104 Freedom of Reprisal or Interference

An employee and his representative shall be free to appeal a performance rating without restraint, interference, coercion, discrimination, or reprisal.

Appendix 7:
Excerpt of Port Board's April 30, 2019 Meeting Minutes

PAG Board of Directors Regular Meeting
April 30, 2019
Page 4 of 7

UNRELATED SECTION

3. **Superior Court SP Case No. [REDACTED]** The DGMA stated that at the previous meeting, Port Legal Counsel was instructed by the Board to work with the defendant's counsel on the final numbers. Atty. [REDACTED] mentioned that aside from June 2, 2018, there has not been any communication with opposing counsel. During that time, opposing counsel presented numbers that was claimed by the employee through its counsel but understands there to be a higher amount and there's no justification for that. The DGMA recalled from the previous Board meeting that Port counsel was to reach out to opposing counsel to come up with a final number for payout. She expressed concern that the Port continues to accrue interest daily which is quite extensive. The DGMA understands the position of legal counsel in that any payout would be based on the employee's base salary at that time the employee left the Port which does not include increments; however, opposing counsel disagrees in that his client is entitled to the increment. She mentioned that that is the question that is holding up this case and had anticipated for this matter to be resolved since the last Board meeting. Atty. [REDACTED] mentioned that it is still counsel's position that the payout would be the base pay at the time the employee left the Port without any increments. She suggested that the base pay less the amount the employee has worked be paid out to include retirement, but without any increments. Atty. [REDACTED] said anything above and beyond will be negotiated between parties. The DGMA requested for Board action for payout as this is an unbudgeted item that is approximately \$600,000.00.

Director [REDACTED] made motion to authorize management to payout the settlement based on the base pay in the case of Superior Court SP Case No. [REDACTED] staying within budget authorized and that any amount over the budget requires Board approval. Motion was seconded by Director [REDACTED] and was unanimously approved.

VI. NEW BUSINESS

UNRELATED SECTION

Appendix 8: Port Management Response

Page 1 of 37



PORT OF GUAM
ATURIDAT / PUETTON GUAHAN
Jose D. Leon Guerrero Commercial Port
1026 Cabras Highway, Suite 201, Piti, Guam 96925
Telephone: 671-477-5931/35 Facsimile: 671-477-2689/4445
Website: www.portguam.com



Lourdes A. Leon Guerrero
Governor of Guam
Joshua F. Tenorio
Lieutenant Governor

November 25, 2020

The Honorable Benjamin J. Cruz
Public Auditor
Office of Public Accountability
Suite 401 DNA Building
238 Archbishop Flores Street
Hagatna, Guam 96910

Subject: Draft Report – Port Authority of Guam Back Wages Series, Part A

Dear Mr. Public Auditor:

Hafa Adai! We are in receipt of your draft report dated November 6, 2020, Subject: Port Authority of Guam Back Wages Series, Part A. This letter is to supplement our response, dated September 25, 2020, which we are also enclosing with the exhibits. We are concerned with your auditors' assertions of noncompliance with applicable laws, regulations, and internal policies, as well as lapses in the Port's internal processes. This letter, together with all of its supporting documents, will clear up any concerns raised in this draft audit.

Please note that our responses are in *italics*, and, in those instances where it is pertinent, we will restate what was already provided to your office by way of our September 25, 2020 letter.

Introduction

This report presents the results of our performance audit on the Port Authority of Guam's (Port) execution of settlements, or legal remedies, with one of the nine reinstated employees based on resolved Civil Service Commission (CSC) cases. We conducted this audit in response to the public's concern over Port's decision to keep confidential the settlement costs connected with nine previously-terminated employees—salary, employee benefits, and their attorney's fees and costs.

Response: *It is factually incorrect to state, "Port's decision to keep confidential the settlement costs connected with nine previously-terminated employees—salary, employee benefits, and their attorney's fees and costs", without stating that all of the settlements can now be found on the Port's website. Granted, these settlements were uploaded sometime after the development of this draft audit, we are requesting that a notation be made to reflect that all the settlements can be found on the Port's website. Although these settlements were uploaded to the Port's website for the general public to view a few months after your audit began, an objective review of the circumstances which were acknowledged in our meeting on November 20, 2020 show that the Port was following the advice of counsel which was to not disclose the settlements. The Port General*

Draft Report - PAG Back Wages Series, Part A
(PAG Response to OPA's Draft Report of November 6, 2020: Employee Q)
Page 1 of 37

Port of Guam, Jose D. Leon Guerrero Commercial Port is an Equal Employment Opportunity Employer.
Complaints of discrimination should be sent to the Human Resources Division.

Manager then requested that the OPA seek an opinion on this issue as the General Manager wanted to disclose but could not as the only standing legal advice prohibited those actions. Once the Attorney General opined that it was legal to release the settlements, the Port immediately uploaded all agreements to the website for full public transparency and released copies to all media who requested for hard copies as well. We believe that the statement in the Introduction that indicates "We conducted this audit in response to the public's concern over Port's decision to keep confidential the settlement costs connected with nine previously-terminated employees—salary, employee benefits, and their attorney's fees and costs" is not factual and is misleading. Using Professional Judgment on this matter to include the collective knowledge of the circumstances already acknowledged by the Auditing Team clearly would deem this statement to be misleading and not a true and accurate reflection of all of the circumstances.

Our audit objective was to determine whether Port's settlement, or legal remedies, with nine reinstated employees were properly accounted for and paid in accordance with applicable laws, regulations, and administrative and judicial review judgments. However, this specific report (Part A) focused on the audit results of only one of the nine reinstated employees, herein referred to as "Employee Q". A separate report was necessary because of the significant amount of Employee Q's legal remedies and the manner in which Port executed his payments.

In Part A, our audit scope covered the court orders and judgments, Port documents, and other documents that contributed to Port's calculations and payments to Employee Q's legal remedies during our audit engagement (i.e., October 2010 through October 2020).

Our audit results on the other eight employees' settlements will be issued in separate audit reports. We detailed the objective, scope, and methodology in Appendix 1.

Background

Port is a public corporation and autonomous Government of Guam (GovGuam) agency, for which primary revenues are derived from providing services to major shipping line customers, tariffs, and rentals of equipment and spaces related to ocean commerce, recreational and commercial boating, and navigation. Since fiscal year (FY) 2016, Port revenues averaged \$54.4 million (M) a year. On average, 98% of Port's revenues were derived from the tariffs and rentals paid by Port customers (ratepayers). Port prides itself in dedicating all of its profit to the upgrading of its equipment and facilities and the continued growth of Guam's seaport.

Confidential Settlements of Multiple, Employee Termination Lawsuits

Port has been a defendant in nine employees' adverse action (termination) lawsuits. All nine of these employees were reinstated to their original employment position and paid (or will be paid) back wages. Back wages represent the salaries owed to an employee for the period following their unlawful termination until they are reinstated. Port provided other legal remedies such as reimbursement for attorney's fees and legal costs related to the employee's lawsuit, and interest for the delay and loss of use of back wages as ordered in a court's decision.

Our initial audit scope included only five reinstated employees with whom Port already executed settlement, or legal remedy, payments. With five reinstated employees set to receive back wages

around the same time, the public demanded for transparency. The confidential nature in which Port executed these initial five settlements, or remedies, created a climate in which the public appeared suspicious of whether the Port was following the law when executing these settlements or legal remedies.

***Response:** We would like to make it clear that it was not Port management that created a climate of non-transparency when executing these settlements. As you are aware, in March 2020, Port management requested the Public Auditor to reconcile a legal opinion issued by Port’s in-house staff attorney that settlement agreements are not subject to public disclosure because it is part of an on-going litigation. On July 22, 2020, the Attorney General issued an opinion stating when settlement agreements are finally adjudicated, it is open for public inspection under Guam’s Freedom of Information Act (FOIA). In a press release issued by the Port on July 22, 2020, we responded that we are pleased with the recent opinion by the Attorney General, which clarifies whether settlements are considered public documents. For the record, I, as General Manager, disagreed with the opinion issued by former Port legal counsel and former in-house counsel that settlements were not public documents and not subject to disclosure under the FOIA. Immediately following this AG opinion, Port management uploaded all signed settlement agreements, all of which can be found on the Port’s website. We believe that the statement “The confidential nature in which Port executed these initial five settlements, or remedies, created a climate in which the public appeared suspicious of whether the Port was following the law when executing these settlements or legal remedies” is misleading and that an objective review using Professional Judgment on this matter to include the collective knowledge of the circumstances already acknowledged by the Auditing Team clearly would deem this statement to be misleading and not a true and accurate reflection of all of the circumstances.*

Results of Audit

Our audit found the Port paid \$542 thousand (K) for Employee Q’s back wages, Medicare tax, retirement contribution, interest charge, and attorney’s fees and legal costs. See Figure 1.

Figure 1: What Port Paid as a Result of Employee Q’s Termination Lawsuit

\$381K	\$20K	\$6K	\$40K	\$95K
Back Wages	Retirement	Medicare Tax	Attorney Fees & Legal Costs	Interest Charge

Source: Port’s Check and Deposit Documents

Based on the data and documents provided by Port, we determined that Port’s legal remedies with Employee Q were generally made in accordance with administrative and judicial review judgments. However, we found instances of potential noncompliance with applicable laws, regulations, and internal policies, as well as lapses in Port’s internal processes in executing Employee Q’s legal remedies. See Table 1. Specifically, we found:

- Different legal opinions resulted in unorganized remedial actions;
- Legal remedies were not ratified by a board resolution;
- Legal remedies were executed without a formal agreement and liability release until after the final payment in May 2020;

- Adherence to Employee Q's terms and conditions that were not required by CSC or the courts' judgments; and
 - Highest number of incremental sub-steps were granted based on prior "outstanding" performance evaluation ratings.
 - Two prior years' performance evaluation ratings were not approved by the former General Manager, which results in the lowest number of incremental sub-steps.
 - "A 6% interest charge *per day*¹ is effectuated. Payment to be made by the 60th day of management approval."
 - ¹ Emphasis added.
 - The 6% interest charge was not negotiated.
- Significant deficiencies in the basis of calculations for back wages and interest that resulted in overpayments.
 - Summary of overpayments of back wages, benefits, and interest charge.
 - Annual salary increments were included without performance evaluation reports approved by and accountable to the GM.
 - Back wages included three pay raises not covered by CSC or the courts' judgments and retroactive to their authorization dates.
 - Interest charge was paid without considering time in the calculation.

Also, we identified other matters where:

- Port unified existing employees' increment anniversary dates to reflect the dates of agency-wide pay adjustments.
- Port's Personnel Rules and Regulations (PRR) do not have a cap (limit) on salary increments.
- Port interpreted Superior Court Decision as Employee Q did not have to mitigate the wages he earned during this termination.

Table 1: What Port Paid Employee Q and Its Basis

Remedy	What Port Paid	Judgment/Order	Rendered by
Back Wages – Base Salary, plus Pay Raise Changes, minus \$209K of Outside Income	\$361,476	“The Port Authority of Guam is further ordered to fully compensate Employee [Q] for all the time following his termination on December 18, 2012 until the date he is reinstated to his prior position of employment.”	Civil Service Commission
		“[...] upholds the Civil Service Commission’s Order awarding [Employee Q] full back pay and benefits from the date of his termination until Petitioner PAG complies with the Commission’s Order and allows [Employee Q] to return to work.”	Superior Court of Guam
Pay Raise Changes after Reinstatement	\$19,273	<u>Not</u> ordered or required by CSC or judicial courts’ judgments, regulations, or laws.	
Pay Raise Changes before Termination	\$771	<u>Not</u> ordered or required by CSC or judicial courts’ judgments, regulations, or laws.	
Total Back Wages	\$381,520		
Retirement Contribution on Back Wages	\$18,548	“The compensation shall include all employer [Q’s] contributions to the Government of Guam Retirement Fund [...] for all the pay periods between December 18, 2012 and the date Employee [Q] is reinstated.”	Civil Service Commission
		“[...] upholds the Civil Service Commission’s Order awarding [Employee Q] full back pay and benefits from the date of his termination until Petitioner PAG complies with the Commission’s Order and allow [Employee Q] to return to work.”	Superior Court of Guam
Retirement Contribution on Pay Raise Changes after Reinstatement	\$1,186	Result of payout <u>not</u> ordered or required by CSC or judicial courts’ judgments, regulations, or laws.	
Retirement Contribution on Pay Raise Changes before Termination	\$39	Result of payout <u>not</u> ordered or required by CSC or judicial courts’ judgments, regulations, or laws.	
Total Retirement Contribution	\$19,773		

Remedy	What Port Paid	Judgment/Order	Rendered by
Medicare Tax on Back Wages	\$6,028	Result of... "The Port Authority of Guam is further ordered to fully compensate Employee [Q] for all the time following his termination on December 18, 2012 until the date he is reinstated to his prior position of employment."	Civil Service Commission
		Result of... "[...] upholds the Civil Service Commission's Order awarding [Employee Q] full back pay and benefits from the date of his termination until Petitioner PAG complies with the Commission's Order and allows [Employee Q] to return to work."	Superior Court of Guam
Medicare Tax on Pay Raise Change after Reinstatement	\$279	Result of payout not ordered or required by CSC or judicial courts' judgments, regulations or laws.	
Medicare Tax on Pay Raise Changes before Termination	\$11	Result of payout not ordered or required by CSC or judicial courts' judgments, regulations or laws.	
Total Medicare Tax	\$6,318		
Attorney Fees & Legal Costs	\$40,043	"The Port Authority of Guam is further ordered to pay the attorney's fees incurred by Employee [Q], during the appeal of the December 18, 2012 adverse action in the amount of \$9,380.95" <i>Judgment passed on May 13, 2013.</i>	Civil Service Commission
		"The Court hereby Orders that Real Party in Interest [Employee Q] is awarded the amount of Twenty-Two Thousand Eight Hundred Ten Dollars and Ninety-five Cents (\$22,810.95) as reimbursement for attorney's fees and costs Real Party in Interest [Employee Q] has incurred in his prosecution of his appeal of his termination." <i>Order passed on September 29, 2016.</i>	Superior Court of Guam
Interest Charge	\$94,621	Not ordered or required by CSC or judicial courts' judgments, regulations or laws.	
Total Remedy Cost	\$542,175		

Sources: Port's Check and Deposit Documents; CSC Orders and Judgments; Superior Court Orders and Judgments.

Differing Legal Opinion's Resulted in Unorganized Remedial Actions

According to CSC and the Superior Court of Guam's (SC) judgments, Port is required to pay Employee Q back wages starting from his termination (in December 2012) and ending upon his reinstatement (in July 2018). Between July 2018 and late February 2020, Port received significantly different legal opinions from its former contracted Legal Counsel and former "in-house" Staff Attorney, that resulted in unorganized remedial actions, as shown in Table 2.

Port's former Legal Counsel was still representing Port when Employee Q was reinstated on July 30, 2018. Prior to his reinstatement, Employee Q's attorney submitted a letter (herein referred to as "declaration letter"), dated July 11, 2018, to Port's former Legal Counsel. Attached to the letter was his calculation schedule of the back wages and interest to be paid with a notation that Employee Q was entitled to the annual salary increments and Port-wide pay adjustment that occurred during the termination period.

However, the former Legal Counsel opined that any payout to Employee Q would be based on the same pay range as when he was terminated (herein referred to as "base salary") and without any salary increments. The former Legal Counsel held this opinion through to June 2019, when his contract with Port ended.

Then again, Port's former Staff Attorney (who served from early August 2019 through the end of February 2020) did not find any legal authority to support the former Legal Counsel's opinion. He rendered an opinion that Employee Q's back wages must include salary increments.

Table 2: What Port Did After Employee Q's Reinstatement

Year	Date	Port Action	Time Elapsed Since Reinstatement
2018	7/30/2018	Port reinstated Employee Q at base salary and continued to pay his regular wages at base salary until the start of February 2020.	0.0 months
	9/12/2018	Port filed a Motion for the Superior Court to reconsider its Decision to award full back pay and benefits to Employee Q.	1.4 months

Year	Date	Port Action	Time Elapsed Since Reinstatement
2019	2/5/2019	The Superior Court denied Port's Motion filed on September 12, 2018.	6.2 months
	4/30/2019	In a board meeting, Port's Board appropriated \$600K to pay Employee Q's back wages, based on his base salary, minus the income he earned during his termination, <i>and without any salary increments.</i>	9.0 months
	5/3/2019	Port processed six (6) Notifications of Personnel Action forms (NPA) - five for the termination period, plus one for the October 2012 salary increment (before his termination). Under the General Accounting Supervisor's guidance (instead of under the Human Resources Division's role), Employee Q's annual base salary was mitigated (reduced) by \$209K for the outside income earned during his termination period. These NPAs did not reflect any salary increments or Port-wide pay adjustments, consistent with the former Legal Counsel's opinion.	9.1 months
	5/10/2019	Port paid \$40K to Employee Q's attorney for attorney's fees and legal costs	9.3 months
	6/24/2019	Port paid \$243K to Employee Q for his back wages, based on his base salary and mitigated by the outside income. This payment was supported by the six NPAs filed on May 3, 2019.	10.8 months
	12/3/2019	Port's former Staff Attorney advised the Board of Directors that he found other judgments on similar cases in which reinstated employees were "entitled" to salary increments as part of their back wages.	1.3 years

Year	Date	Port Action	Time Elapsed Since Reinstatement
2020	2/7/2020	Port's Deputy GM of Administration & Finance approved Employee Q's additional terms and conditions listed in the remedy request letter dated February 6, 2020 addressed to him.	1.5 years
	2/10/2020	<p>Port canceled the six (6) NPAs issued on May 3, 2019 because they were processed incorrectly. These NPAs supported the \$243K payment of back wages made on June 24, 2019. Consequently, such payment was without supporting authorization.</p> <p>Then, Port replaced the six canceled NPAs with new NPAs that granted Employee Q the following:</p> <ul style="list-style-type: none"> • five annual salary increments for the termination period, in line with the former Staff Attorney's opinion, plus • October 2012 salary increment (before his termination). <p>Each salary increment was calculated at five sub-steps (or 5%) each, as requested by Employee Q and his attorney.</p> <p>Port processed four (4) additional NPAs that granted Employee Q with the following:</p> <ul style="list-style-type: none"> • 2011 salary increment (before his termination); • 2016 pay adjustment, in line with Employee Q and his attorney's declaration letter; • 2018 pay adjustment (after his reinstatement); and • 2019 salary increment (after his reinstatement). 	1.5 years
	2/21/2020	Port paid \$19K to Employee Q for the difference between the base salary he received (after his reinstatement) and the pay raises Port granted (on February 10, 2020) for his 2018 pay adjustment and 2019 salary increment.	1.6 years

Year	Date	Port Action	Time Elapsed Since Reinstatement
2020	4/7/2020	Port paid \$95K to Employee Q as an interest charge on his back wages. Port paid \$66 to Employee Q's attorney for the unpaid balance of attorney's fees and legal costs.	1.7 years
	5/1/2020	Port paid \$119K to Employee Q for the following: <ul style="list-style-type: none"> • \$118.6K for the difference between the base-salaried-back-wages (paid on June 24, 2019) and the pay raises Port granted (on February 10, 2020) for the salary increments and pay adjustment during the termination period. • \$771 for the difference between the base salary received before his termination and the October 2012 salary increment Port granted (on February 10, 2020). 	1.8 years

Sources: Various Port Documents; Superior Court Decision and Order.

The differences in legal opinions brought significant financial impact on the back wages paid to Employee Q. However, this did not motivate Port management to secure a Board ratification and execute a formal agreement with a liability release provision before final payments were made.

Response: *This finding is misleading and does not include the collective knowledge of all the factual circumstances. Management does not believe that the remedial actions were unorganized. Instead, it is accurate to say that different legal opinions resulted in delayed remedial actions. Also, this draft statement implies that the Port's corrective actions were unorganized, and such corrective actions were in contravention to law and the Port's Personnel Rules and Regulations. We are providing you with several conflicting legal guidance's that the Board and Management received relative to the inclusion of increments as part of wages and benefits when an employee is reinstated after termination which will give great insight and additional collective knowledge as to the delay of remedial action:*

1. *Email between our former legal counsel to former Deputy General Manager, Administration & Finance, dated November 25, 2019, Subject: Payment of Back Wages: former legal counsel opined they are unable to find any authority to include in the back wages, salary increments. Former legal counsel provides specific statutes which prohibits unappropriated expenditures.*
2. *Emails between the former in-house counsel and former Deputy General Manager for Administration and Finance on the following:*

- A. November 26, 2019 email to former in-house Staff Attorney forwarding former Legal Counsel's November 25, 2019 email, Subject: Payment of Back Wages.
- B. November 29, 2019 email from former in-house Staff Attorney, Subject: Payment of Back Wages, states below:
- i. "...when the situation is not a termination-reinstatement, in other words continuous civil service employment without adverse action-interruption, Port Personnel Rules 6.302 applies to require (a) employee's work performance; (b) performance review, (c) recommendation by the reviewing manager, and (d) certification by the GM that there is sufficient basis for giving the employee an incremental increase in his or her wage. However, that situation does not expressly cover termination-reinstatements after a judgment, lawful order, or other unlawful act.
 - ii. "The normal rule for consequential damages is whether they are (a) reasonably certain and (b) measurable...While there is no binding Civil Service Commission case on the issue from the Supreme Court of Guam...every case that I have reviewed from several other states made the civil servant-employee whole, including increments...Applied to the Port, increments are promised to be given according to the rules. At bottom, it does not appear likely that Superior Court of Guam or the Supreme Court of Guam will give a different rule other than to make the employee whole including increments because of the unanimity of the decisions from states. If Management decides not to give the increase, and the employee were to file a grievance or seek clarification of a judgment, he or she would at end be awarded increments given the unanimity of state law on public employees being entitled to increments after wrongful termination..."

Former in-house counsel stated that in order for the increments to be included, there should be a judgment from the Commission or judicial courts. That is why Port management included increments, based on the 1984 and 2016 CSC decisions provided below which ordered Government of Guam departments/agencies to pay back benefits, including salary increments for reinstated employees.

1. CSC Decision dated March 12, 1984, *Juan Q. Lizama vs. Port Authority of Guam*: CSC reversed the termination of this employee on March 12, 1984 and ordered the Port to:
 - i. Reinstatement the employee to his position of Port Operations Manager effective September 12, 1983;
 - ii. Restore all salary deprived him from the date of his termination to the date of his reinstatement;
 - iii. Restore all benefits, rights and privileges deprived him because of the termination; and
 - iv. Report compliance to CSC within 5 work days from date the decision is received.

A review of this employee's personnel jacket revealed:

- 1. Port had cancelled his termination action effective September 13, 1983; and*
- 2. Granted the employee a pay adjustment effective October 15, 1983 as a result of Public Law 17-26.*

Both personnel actions were processed on March 15, 1984 with retroactive dates of September 12, 1983 and October 15, 1983 to comply with CSC's orders.

- A. CSC decision and judgment dated August 30, 2016, Eric SN. Santos vs Department of Corrections. The decision mandated Department of Corrections to restore the employee to his position; to receive all back-pay and benefits, including, but not limited to retirement and all forms of increments; and all leave owed to him since his termination on October 5, 2013, up to and including the date he is restored to his prior position of employment with Department of Corrections.*

We are also attaching to our response CSC's Administrative Law Judge email affirming the Port's decision in ensuring Employee Q acquires his back benefits lawfully due to him:

- 1. Email dated November 9, 2020, from CSC Administrative Law Judge Eric Miller regarding the Commission's authority only to affirm, revoke or modify an adverse action appeal.*

We would like to state that Employee Q's payment of back wages, including benefits, was not due to the terms and conditions outlined in his and attorney's letters as continually referred to by your auditor, but such payment was because of CSC and judicial decisions rendered.

We would like to point out and request it be included in the report that after 1 year, 8 months and 7 days when the Port's last motion to not pay Employee Q his back wages was denied by Superior Court, the Port finally complied with decisions issued by Civil Service Commission (CSC and judicial courts (Superior and Supreme)).

We again disagree with the auditor's assertion that the Board did not grant authority to process Employee Q's back wages and the Board's recommendation to ratify such action. We stated in our September 25, 2020 response that the Board appropriated \$600,000 in order to comply with the Supreme Court Order relative to Employee Q. Although your auditor stated Board approval was only for Employee Q's base salary, the motion passed by the Board in their April 30, 2019 meeting directed Management to remain within the budget authorized, and any amount over the budget would require Board approval. As we demonstrated in our September 25, 2020 letter, the Board was advised by former in-house counsel that Employee Q's back wages include increments. As shown in Table 1, the Port stayed within the \$600,000 allocation, including salary increments, retirement contributions, Medicare tax, attorney fees, and interest payment.

We respectfully disagree with the assertion that CSC and courts' judgments did not require Port to implement or make retroactive payments on salary increments Employee Q did not receive before he was terminated.

In our September 25, 2020 response, we provided you with a chronological event showing to you factors contributing to the delay in issuing the correct payments due to Employee Q. We are restating such event as shown below:

- 1. On June 1, 2018, former legal counsel informed Employee Q's attorney that the Port decided not to appeal the judicial decisions and prepared to facilitate his reinstatement. In the letter, he requested a statement indicating the amount of back pay and benefits owed to Employee Q. Such letter was provided to former legal counsel on July 11, 2018. Also, there were two executive sessions and a regular meeting where the Board authorized former legal counsel and in-house Staff Attorney to engage with Employee Q's attorney on the terms and conditions of his back wages and benefits;*
- 2. On July 25, 2018, the Board was informed by former legal counsel of Supreme Court's decision (CVA16-018) dated April 17, 2018, affirming the Superior Court's decision (SP0125-13), which upheld the Civil Service Commission's decision of May 13, 2013, on the reinstatement of Employee Q. According to the Commission's decision, Employee Q is to be reinstated to his prior position of Financial Affairs Controller, fully compensate him for all the time following his termination until the date he is reinstated. Such compensation shall include all employer's contributions to the Government of Guam Retirement Fund and the accumulation of vacation and sick days. Based on the executive session minutes, the Board was briefed by in-house counsel on his recommendation to reinstate Employee Q at the salary he separated with an effective date of July 30, 2018 with the understanding that appropriate compensation will be paid when his attorney has provided a calculation of back wages and benefits;*
- 3. On July 11, 2018, Employee Q's attorney submitted his back wage and benefit calculations to the Port's former legal counsel, including the interest rate. His attorney stated the final calculation included a 6% pre-judgment interest as allowed by law. This was never contested by the Port's former legal counsel;*
- 4. On July 30, 2018, Employee Q was reinstated to his position of Financial Affairs Controller. However, his division was divided into three divisions; he was not granted his full responsibilities as a Financial Affairs Controller by prior Management and was told by the previous Port General Manager that he only supervises the Budget Section of the Port's Finance Division;*
- 5. On August 22, 2018, Superior Court Judge Vernon Perez issued a decision to award Employee Q full back pay and benefits from the date of his termination until the day he is allowed to return to work, along with attorney fees;*
- 6. On March 29, 2019, the Port's former legal counsel reported to the Board the back wages and benefits entitled to Employee Q are in accordance with the Supreme Court decision. The Board authorized former legal counsel to work with Employee Q's attorney;*
- 7. On April 30, 2019, the Board appropriated \$600,000 for the back wages of Employee Q;*
- 8. Despite the fact that Employee Q had provided his calculation of back wages and benefits to the Port's former legal counsel and was reinstated to his position effective July 30, 2018, personnel actions reflecting his back wages and benefits were not processed until May 3,*

- 2019—ten months after his reinstatement. Based on these personnel actions, checks payable to Employee Q were processed on June 24, 2019;
9. On December 3, 2019, former in-house counsel advised the Board that his review of other judicial decisions of similar cases found reinstated employees were entitled to salary increments despite former legal counsel's opinion that Employee Q was not eligible for salary increments as part of his reinstatement;
 10. On February 10, 2020, the Port canceled in its entirety personnel actions dated May 3, 2019, because of errors in Employee Q's salary and re-issued new personnel actions reflecting the correct salaries;
 11. On February 19, 2020, and April 24, 2020, the Port issued checks payable to Employee Q for back wages due to him as a result of the errors in his salary;
 12. On April 7, 2020, the Port issued a check payable to Employee Q for interest payment due to him; and
 13. On July 23, 2020, Employee Q provided a letter to the Deputy General Manager, RE: Supplemental Document; Settlement Agreement, stating the terms and conditions outlined in CSC Decision and Judgment were fulfilled and released the Port of any future liability.

We factually reconstructed how prior Port management delayed the rightful processing of Employee Q's back wages almost ten months after his reinstatement and only issued his first payment two months after the personnel actions were signed and executed. This is the reason why it took one year and ten months for Employee Q to be made whole and to eventually be reinstated as if though he never left the Port.

Thank you for the opportunity to go over this audit's draft findings and allow Management to submit additional supporting documents. At issue is Management's recognition of Employee Q's 2011 and 2012 performance evaluation giving the draft audit claim that neither of these documents were signed. We did a further review of Employee Q's performance evaluation reports for 2011 and 2012, and discovered supporting documents. Indeed, we apologize for not offering up the following documents for your review:

1. Performance evaluation period from October 13, 2010 to October 12, 2011:
 - i. Employee Q's performance evaluation report was signed by his supervisor, the Corporate Services Manager, and Employee Q. Overall evaluation rating is Outstanding. The Human Resources staff reviewed the report on December 31, 2012;
 - ii. Notice of Results of Performance Evaluation Report dated December 31, 2012, which reflected the Overall Rating as Outstanding was presented to the most immediate former General Manager;
 - iii. Port's Human Resources worksheet stating his salary will be \$83,900.00 per annum;
 - iv. Memorandum dated February 6, 2013, from Interim Deputy General Manager, Mr. Felix R. Pangelinan, Subject: Salary Increment; Ref: [REDACTED] and [REDACTED] [REDACTED] addressed to Acting Financial Affairs Controller and Acting Corporate Services Manager. The memorandum authorizes payment in accordance with Section 7.008 of the Personnel Rules and Regulations;

- v. *A copy of the signed performance evaluation for 2011 by the Interim Deputy General Manager is provided for your review. Note that the former General Manager was on leave and did not rescind this action at any time upon her return to work; and*
- vi. *Notification of Personnel Action No. 317-13 dated January 9, 2013, Effective Date of October 13, 2011, Remarks: Approved by the Board of Directors in their regular meeting of December 14, 2012.*

2. *Performance evaluation period from October 13, 2011 to October 12, 2012:*

- i. *Performance evaluation report was signed by his supervisor, Corporate Services Manager. Employee Q signed the evaluation on December 26, 2012. Overall evaluation rating is Outstanding. The report was reviewed by the Human Resources staff on August 20, 2013;*
- ii. *Port's Human Resources performance evaluation point worksheet;*
- iii. *Notice of Results of Performance Evaluation Report dated February 22, 2013, which reflected the Overall Rating as Outstanding. The document was not signed by the General Manager. However, there is no written letter denying Employee Q his increment, therefore, Employee Q's increment for 2012 has been effectuated; and*
- iv. *Notification of Personnel Action No. 652-13 dated August 16, 2013, Nature of Action: Salary Increment; Effective Date: October 13, 2012, salary to: \$88,180.00 per annum.*

As shown above, other factors, aside from the differences in legal opinions, were major reasons why Employee Q was not provided his entitled back wages, including salary increments. Again, this is the reason why it took one year and ten months for Employee Q to be made whole and to eventually be reinstated as though he never left the Port.

Legal Remedies Executed Without a Formal Agreement and Liability Release Until After the Final Payment in May 2020

Of the five employees covered by our initial audit scope, only Employee Q did not execute a settlement agreement, or other type of formal agreement specifying the amounts and terms for back wages, benefits, attorney fees, and interest charge Port has to pay, as well as a liability release provision.

Employee Q and Employee V's² cases are similarly appealed, affirmed and concluded in the judicial courts. In Employee Q's case, Port decided not to appeal further after five years of litigation and appeals. However, Employee V executed a settlement agreement containing provisions on the amounts and terms of back wages and interest charge to be paid with a mutual release from all claims and liabilities.

(²Our audit results on Employee V's settlement will be issued in a separate audit report.)

For the protection of all parties involved, every liability should be accompanied with a document setting the parties' agreement to the amounts and terms that would end said liability (e.g., an invoice, contract, or agreement). Ideally, this document should have been finalized and signed by both parties before any payouts. Without a valid formal agreement containing relevant and pertinent provisions, most importantly a liability release provision, Port risked the possibility of

Employee Q, or his beneficiaries, pursuing further financial demands and litigation on the same termination lawsuit.

***Response:** As stated in our September 25, 2020 response to the draft audit report, former legal counsel was authorized to engage with Employee Q's attorney to facilitate his reinstatement because the Port decided not to appeal the judicial decisions. In the June 1, 2018 letter, former legal counsel asked for a statement indicating the amount of back pay and benefits owned to Employee Q, which was provided on July 11, 2018.*

There were two executive sessions (July 25, 2018 and March 29, 2018) and a regular Board meeting (April 30, 2019) where the Board authorized former legal counsel and in-house counsel to engage with Employee Q's attorney on the terms and conditions of his back wages and benefits.

In July 25, 2018, the Board was informed by former legal counsel that Employee Q is to be reinstated to his prior position of Financial Affairs Controller and to fully compensate him for all the time following his termination until the date he is reinstated. Such compensation shall include all employer's contributions to the Government of Guam Retirement Fund as well as the accumulation of vacation and sick days. Based on the executive session minutes, the Board agreed to reinstate Employee Q at the salary he separated with an effective date of July 30, 2018, with the understanding that appropriate compensation will be paid when his attorney has provided a calculation of back wages and benefits.

On July 11, 2018, the attorney for Employee Q submitted his back wage and benefit calculations to the Port's former legal counsel, which included the interest rate. His attorney stated the final calculation included a 6% pre-judgment interest as allowed by law.

On March 29, 2019, the Port's former legal counsel reported to the Board the back wages and benefits entitled to Employee Q are in accordance with the Supreme Court decision. The Board authorized former legal counsel to work with Employee Q's attorney on the matter.

On April 30, 2019, former legal counsel verbally stated at the Board meeting that Employee Q is not entitled to salary increments. The former Deputy General Manager for Administration and Finance informed the Board that Employee Q's attorney disagreed with the former legal counsel's position. Former legal counsel was instructed to continue to work with Employee Q's attorney.

At the April 30, 2019 meeting, the Board appropriated \$600,000 for the back wages of Employee Q. Payments were issued to Employee Q on June 24, 2019.

On December 3, 2019, former in-house counsel advised the Board his review of other judicial decisions of similar cases found that reinstated employees are entitled to salary increments despite former legal counsel's comment that Employee Q was not eligible for salary increments as part of his reinstatement.

February 19, 2020, April 7 and 24, 2020, the Port issued checks payable to Employee Q to include salary increments in accordance with the former in-house counsel's opinion.

On July 23, 2020, Employee Q provided a letter to the Deputy General Manager, RE: Supplemental Document; Settlement Agreement, stating the terms and conditions outlined in CSC Decision and Judgment were fulfilled and released the Port of any future liability.

We believe the finding which states, "Without a valid formal agreement containing relevant and pertinent provisions, most importantly a liability release provision, Port risked the possibility of Employee Q, or his beneficiaries, pursuing further financial demands and litigation on the same termination lawsuit" is moot, since Employee Q did provide a letter dated July 23, 2020, to the Port stating the terms and conditions outlined in CSC Decision and Judgment were fulfilled and released the Port of any future liability. As such, Employee Q or his beneficiaries cannot pursue further financial demands and litigation on this termination lawsuit.

Deficiencies in Employee Q's Liability Release Letter

In his liability release letter addressed to Port's Deputy GM of Administration and Finance (DGMA), Employee Q stated that as of July 23, 2020, all the terms and conditions have been fulfilled by Port, and that his case with the Port is "closed." In the same letter, Employee Q formally declared that he and Port mutually release all claims and further discharge one another from any and all liability and claims connected with their employment relationship to date and the recently "closed" adverse action (termination) lawsuit.

However, we found the following in the liability release letter that we refer to Port management for review and consideration:

- In using Port's letterhead, Employee Q signed off as if he was also representing the Port in this matter.
- Neither the incumbent GM, nor the DGMA (the delegated Port representative), signed this "mutual" release letter.
- Neither a notary or witness signed this letter.
- This letter was written in a manner that implied that all the terms and conditions in Employee Q's February 2020 "remedy request letter" were the same as the conditions of CSC's Decision and Judgment. The remedy request letter contained conditions not required by CSC or courts' judgments.

Therefore, we recommend the GM execute a comprehensive formal agreement that includes (1) the purpose, amounts, and terms of what Port paid for Employee Q's back wages, benefits, attorney fees, and interest charge; (2) a liability release provision; and (3) the signatures of the relevant part is and witness.

Response: *We agree that Employee Q should not have used a Port letterhead in releasing the Port of any liability of all claims. However, we do not find it of significant concern because no fraud or abuse was committed, and that the full force and effect of Employee Q's liability release remains in effect, even if such were written on a napkin. Moreover, even though this draft audit states that a notary or witness nor acknowledgment by the GM or DGMA is lacking, the result is Employee Q provided a Port with a letter releasing the Port of any future claims. Therefore, Management believes that this finding is without merit.*

Regarding the draft audit's recommendation that the Port executes a formal agreement, Employee Q's payment of back wages, including increments and benefits, was not a result of terms and conditions outlined in letters from his and attorney's letters. It is inaccurate to refer to this as a settlement or imply that the Port "just accepted" all of Employee Q's demands, as continually referred to by this draft audit. Such payments were executed because of a Supreme Court order and not because of a settlement agreement. We also stated that the former in-house counsel accepted the terms and conditions in Employee Q's Attorney's letter and provided legal guidance relative to the process of payment for Employee Q's back wages.

Port Adhered to Employee Q's Terms and Conditions Not Required by CSC or the Courts' Judgments

Port calculated Employee Q's back wages based on CSC and the courts' judgments, as well as on the terms and conditions requested by the employee. These terms and conditions were communicated through the following:

- Employee Q's Attorneys declaration letter, dated July 11, 2018 and addressed to Port's former Legal Counsel; and
- Employee Q's remedy request letter, dated February 6, 2020 and addressed to and approved by the DGMA.

Employee Q's Attorney's Declaration Letter

With the attorney's declaration letter, he attached his calculation schedule of back wages and interest to be paid to his client, Employee Q. The calculation schedule contained terms, which are similar to the additional terms in Employee Q's remedy request letter. The terms contained the following statements, in which the attorney rendered several opinions regarding his client, Employee Q:

1. "Before termination of [Employee Q] on December 18, 2012, he received a performance evaluation from his supervisor, which entitles him [to] an increase [...]. Based on the prior years' performance evaluation[s] [...], his rating [was] Outstanding since 2005. This entitles him to receive the highest points or percentile on the subsequent years. The number of sub-steps for Outstanding ratings is 5 [five] sub-steps."
2. "In 2016, the Port Board approved a new pay scale increasing each position's pay range to match [the] 25% market percentile. This pay schedule is not showing [on] the Port's website. Therefore, [Employee Q's] salary range increased and it should affect [Employee Q's] calculation from the effective date of the new pay schedule to the work date prior to the official starting date he goes back to work at the Port."
3. "The final calculation also includes [a] six percent (6%) pre-judgment interest as allowed by law."

Employee Q's Remedy Request Letter

In his remedy request letter, Employee Q indicated that his terms and conditions were reasonable because they were in accordance with CSC and the Supreme Court of Guam's judgments and Guam law. According to Port, they followed all of Employee Q's terms and conditions, including the following statements, which were not specified in CSC or the courts' judgments, nor in Guam law:

1. "That [Employee Q's] reinstatement includes **all** salary increments that were due for the period of December 18, 2012 to the current date [February 6, 2020] using the last performance appraisal rating on record of "Outstanding" to adjust [his] salary accordingly."
2. "A 6% interest charge **per day**³ is effectuated. Payment to be made by the 60th day of management approval."

³emphasis added

Response: *We disagree with your assertion that the Port followed all of the terms and conditions outlined in Employee Q's attorney's letter of July 11, 2018, and his letter of February 6, 2020, at face value. As explained in our letter of September 25, 2020, I recused myself on the litigation of the Port 7 employees and designated the former Deputy General Manager for Administration and Finance, Mrs. Connie J. Shinohara, to convene a task force to determine if it is in the Port's best interest to continue all on-going personnel cases whose appeals were before the Civil Service Commission or in the judicial courts.*

In our September 25, 2020 letter, we explained that despite Employee Q's reinstatement of July 30, 2018, his personnel actions to be used to compute his back wages were not processed until almost ten months after his reinstatement. His first payment was not issued to him until two months after the former General Manager signed the personnel actions.

One year and ten months after Employee Q received his first payment, and his release of liability was still pending, the Deputy General Manager for Administration and Finance and the Personnel Services Administrator reviewed the initial personnel actions. They discovered the salary reconstruction for Employee Q was done in error. Consequently, the Port canceled the first personnel actions and issued new personnel actions on February 10, 2020, reflecting the salaries that Employee Q was entitled to per the former in-house counsel's presentation to the Board during the December 19, 2019 Board meeting.

Regarding his salary increments for 2013 to 2017, we went back three years (2010, 2011, and 2012) from the time Employee Q was employed at the Port, and took his overall performance rating for each year and simply averaged it. He received outstanding ratings during all those periods, and as such, the average sub-steps for each year he was entitled to a salary increment was five. As noted in our response above, we are providing you with a copy of the documents pertaining to Employee Q's 2011 increment.

In regards to the 6% interest charge, Employee Q conferred with his attorney on his letter of February 6, 2020, and was advised to include the interest rate as part of his calculation, which the Port's former legal counsel did not dispute. The 6% interest was initially included in his attorney's letter dated July 11, 2018, to former Port legal counsel. This 6% is a pre-judgment interest, allowed by law and included in the calculations. Based on a review of the documents related to Employee Q's case, both the former Port legal counsel and in-house counsel did not dispute this interest rate.

Additionally, we took into consideration how prior Port management continued to place salt on Employee Q’s wounds and delay the administration of justice by:

- 1. Reinstating him at the salary he left—rather than reconstructing his salary as if though he never left the Port, a principle upheld following the Civil Service Commission’s judgment;*
- 2. Not giving him his full certification authority as a Financial Affairs Controller, which we corrected when we came on Board in January 2019;*
- 3. Not processing his initial personnel actions until ten months after he was reinstated;*
- 4. Not processing his back wage checks for almost two months after his initial personnel action; and*
- 5. Erroneously processing the initial personnel actions, which had to be corrected almost eight months later.*

Highest Number of Incremental Sub-Steps Granted Based on Prior “Outstanding” Performance Evaluation Ratings

Port’s Annual Salary Increment System

On performance evaluation alone, the highest a Port employee’s salary increment can increase is up to five sub-steps (or 5%) every year. According to Port’s PRR 6.302, salary increments are based on an annual performance evaluation, for which the employee is given zero to five points for every performance factor evaluated. According to interim procedures approved by then Port GM in October 2010, employees are eligible to the increment sub-steps that correspond with the total points their overall performance earned, as shown in Table 3.

Table 3: Salary Increment Point System

Total Points	Overall Performance Rating	Sub-Steps
0-25	Unsatisfactory	0
26-34	Satisfactory (Marginal)	2
35-49	Satisfactory	3
50-59	Satisfactory (Highly)	4
60-65	Outstanding	5

Source: Port Inter-Office Memorandum, October 11, 2010.

PRR 6.302 also states that the salary increment will be granted by the GM’s certification (signature) that satisfactory service was rendered for the performance-rating period preceding such (incremental) increase.

Under Port’s salary increment point system, an employee’s salary increment can increase up to five sub-steps (or 5%) every year, as opposed to a more common *one*-step salary increment widely used by the rest of GovGuam.

An “outstanding” rating is immaterial under the one-step salary increment system widely used by the rest of GovGuam. However, the annual salary increase of five sub-steps (or 5%) that

corresponds to an “outstanding” rating under Port’s salary increment point system is financially significant.

Response: We would like to clarify that the annual salary increment system was approved by the Board of Directors in their meeting of September 13, 2010.

Two Prior Years’ Performance Evaluation Ratings Not Approved by Former GM Results in the Lowest Number of Incremental Sub-Steps

During our September 2020 meeting with the GM and the DGMA, the incumbent GM insisted that Port determined the five-sub-step salary increments by averaging the overall performance ratings of Employee Q’s last three years actively employed at Port (2010, 2011 and 2012). Upon review of the three performance evaluations that Port based the paid back wages on, we noted that the overall performance rating for all three periods was “outstanding.” However, we found that, of the three performance evaluations, two (for the 2011 and 2012 annual increments) did not bear the former GM’s signature to indicate her certification (or approval) of the overall performance rating.

It is the incumbent GM’s understanding that the GM is required to reject a performance rating recommendation “in writing and provide justification” as to why he/she does not want to grant a salary increment. Additionally, he stated that “Employee Q should not be penalized for prior Port management’s failure to adhere to the [PRR] and process his salary increment due to him [...] on a timely basis prior to his termination on December 2012.”

However, we found at least three sections in Port’s PRR explaining that the GM has the final say on all salary increments, as follows:

- All salary increments will require the GM’s approval (PRR 7.008).
- The salary increment will be granted by the GM’s certification (signature) that satisfactory service was rendered for the performance rating period preceding such increase (PRR 6.302).
- A Division Head shall submit a written recommendation to the GM regarding the performance appraisal of every employee. The GM shall make a final performance appraisal accepting or rejecting said recommendation and make the corresponding salary adjustments. (PRR 7.010).

Based on the same sections of the PRR, Employee Q was not eligible to receive a salary increment for years 2011 and 2012 because the corresponding performance evaluations were not approved by the former GM. See Table 4 for what Port granted versus what Employee Q was eligible for.

Table 4: What Port Granted vs. What Employee Q Was Eligible For

Performance Rating Period Ending	Overall Performance Rating*	GM's Signature Approval**	Increment Sub-Steps	
			What Port Granted	What Employee Was Eligible For
10/12/2012	Outstanding	X	5	0
10/12/2011	Outstanding	X	5	0
10/13/2010	Outstanding	√	6	6
Average			5	2

Sources: Employee Q's Performance Evaluation Reports; Notifications of Personnel Actions; Port Inter-Office Memorandum, October 11, 2010; PRR.

* Division Head's written recommendation to the GM regarding the employee's performance appraisal.

**The GM's final performance appraisal accepting or rejecting said recommendation for the corresponding salary adjustment.

When averaging the sub-steps allowable under Port's PRR and salary increment point system, Employee Q would be eligible for only "2" sub-steps (as shown in Table 4) or a "marginal" satisfactory rating (as shown in Table 3). Employee Q's eligibility for increments of only *two sub-steps* results from the prior 2011 and 2012 performance evaluations that were not signed by the former GM. The absence of such signature signifies that there was no valid basis for granting Employee Q the highest number of incremental sub-steps to be applied to the five-year termination period.

Response: *In our response stated earlier, we explained that during a further review of Employee Q's performance evaluation reports, we found the following documents and apologize for not making this available for your review earlier:*

1. *Performance evaluation period from October 13, 2010 to October 12, 2011:*
 - i. *Employee Q's performance evaluation report was signed by his supervisor, the Corporate Services Manager, and Employee Q. Overall evaluation rating is Outstanding. The Human Resources staff reviewed the report on December 31, 2012;*
 - ii. *Notice of Results of Performance Evaluation Report dated December 31, 2012, which reflected the Overall Rating as Outstanding was presented to the most immediate former General Manager;*
 - iii. *Port's Human Resources worksheet stating his salary will be \$83,900.00 per annum;*
 - iv. *Memorandum dated February 6, 2013, from Interim Deputy General Manager, Mr. Felix R. Pangelinan, Subject: Salary Increment; Ref: [REDACTED] and [REDACTED] [REDACTED] addressed to Acting Financial Affairs Controller and Acting Corporate Services Manager. The memorandum authorizes payment in accordance with Section 7.008 of the Personnel Rules and Regulations;*

- v. *A copy of the signed performance evaluation for 2011 by the Interim Deputy General Manager is provided for your review. Note that the former General Manager was on leave and did not rescind this action at any time upon her return to work; and*
- vi. *Notification of Personnel Action No. 317-13 dated January 9, 2013, Effective Date of October 13, 2011, Remarks: Approved by the Board of Directors in their regular meeting of December 14, 2012.*

As noted in the exhibits, the 2011 salary increment was signed by the former Interim Deputy General Manager, who was at that time Acting General Manager because of the General Manager's absence during that period, and note that the former General Manager at that time did not revoke that action upon her return to work.

2. *Performance evaluation period from October 13, 2011 to October 12, 2012:*

- i. *Performance evaluation report was signed by his supervisor, Corporate Services Manager. Employee Q signed the evaluation on December 26, 2012. Overall evaluation rating is Outstanding. The report was reviewed by the Human Resources staff on August 20, 2013;*
- ii. *Port's Human Resources performance evaluation point worksheet;*
- iii. *Notice of Results of Performance Evaluation Report dated February 22, 2013, which reflected the Overall Rating as Outstanding. The document was not signed by the General Manager. However, there is no written letter denying Employee Q his increment, therefore, Employee Q's increment for 2012 has been effectuated; and*
- iv. *Notification of Personnel Action No. 652-13 dated August 16, 2013, Nature of Action: Salary Increment; Effective Date: October 13, 2012, salary to: \$88,180.00 per annum.*

According to the HR staff, the performance evaluation rating for 2012 and Notification of Personnel Action were returned unsigned by the former General Manager in November 2013. And, the former General Manager did not submit a written letter denying Employee Q his increment.

Under Section 6.302 – Salary Increment – Procedure states: “When a division head determines that a particular employee shall not be granted a salary increment, the division head shall notify the General Manager of such denial prior to the employee’s anniversary date. If the General Manager does not receive a performance report or a notification of denial of an employee’s salary increment, no action will be taken to adjust the employee’s pay.”

For the 2012 salary increment, Employee Q’s immediate supervisor, who was also a division head, submitted his performance evaluation rating in December 2012. The overall evaluation rating was Outstanding. The Human Resources staff, based on the documents accompanying the 2012 performance evaluation rating form, processed and forwarded to the General Manager on August 16, 2013. According to the Human Resources staff, the documents were returned, unsigned by the former General Manager, in November 2013.

According to Section 6.302, his division head did comply by submitting his performance evaluation. However, the former General Manager did not comply with the rule by denying in writing his salary increment. As such, we determined that Employee Q's increment for 2012 was not rejected according to the Port's Personnel Rules and Regulations and recognized for purposes of reconstructing his back wages and current salary. No General Manager should ever be allowed to sit on any pending performance evaluation. Leaving a performance evaluation, unsigned should not be akin to rejecting it. Furthermore, there is no statute of limitation on when to act upon a performance evaluation, and once the performance evaluation is acted on, then there is a retroactive application to the date the respective increment is effective. In fact, the Port's PRR, Section 7.010 mandates that "The General Manager shall make a final performance appraisal accepting or rejecting said recommendation and make the corresponding salary adjustments." We are confident that this audit will have the same conclusion because although no employee is entitled to a salary increment, employees are entitled to due process.

Based on this, Table 4 would need to be corrected to reflect both the 2011 and 2012 to be 5 each.

Comparison of Annual Salary Increments Based on the Last Performance Rating

In our initial discussion, in July 2020, the DGMA explained that, although not stated in CSC's judgment, it is implied that Port will apply the last performance evaluation rating to the entire termination period's back wages. The DGMA, Employee Q's immediate supervisor, further stated the Port assumed Employee Q's performance evaluations would have been consistently rated "outstanding" had he not been unlawfully terminated. He further emphasized that Port's performance standards have not changed.

We acknowledge the immediate supervisor's determination to grant Employee Q an "outstanding" performance rating, however, his assumption that an employee's performance would not, or could not, have changed over time seemed unrealistic. It is possible for an employee's work performance to change because of external or internal factors that could influence a person's behavior. Even if an employee maintained the same quality of work performance, it is still possible for the performance evaluation rating to change if the evaluator or the evaluator's perception changed.

In apply his prior "outstanding" rating to five non-working (inactive) years, Port granted Employee Q the highest number of incremental sub-steps on the assumption that his work performance could not have possibly changed. See Table 5 for a comparison of the annual salaries using the different performance ratings.

Table 5: What Port Assumed vs. Eligible Satisfactory

Effective Date of Salary Increment	Port's Assumed Outstanding *****			Eligible "Marginal Satisfactory" **			Variance
	Pay Grade /Step	Annual Salary	Hourly Rate	Pay Grade /Step	Annual Salary	Hourly Rate	
10/13/2013	N 11D	\$92,678	\$44.56	N 8C	\$81,432	\$39.15	\$11,246
10/13/2014	N 13A	\$97,405	\$46.83	N 9A	\$83,069	\$39.94	\$14,336
10/13/2015	N 14B	\$102,374	\$49.22	N 9C	\$84,739	\$40.74	\$17,635
10/13/2016	NN 9D	\$109,808	\$52.79	NN 4B*	\$88,220	\$42.41	\$21,588
10/13/2017	NN 11A	\$115,410	\$55.49	NN 4D*	\$89,993	\$43.27	\$25,417
Total		\$517,675			\$427,453		\$90,222

Sources: Notifications of Personnel Actions; Port's Pay Plan.

*These are only estimates because they are dependent on the salary range Port would have granted for the 2016 agency-wide pay adjustment. Despite our requests, Port did not provide us with their detailed policy on how to migrate their employees' salaries into the pay plan that was first adopted in October 2009.

Under *Port's Assumed "Outstanding"* column, the October 2013 increment's pay range increased based on the five-sub-step pay ranges Port granted for years 2011 and 2012. Under the *Eligible "Marginal Satisfactory"* column, we did not factor in the 2011 and 2012 increments' pay ranges because their supporting evaluations lacked the former GM's signature approvals, as required by Port's PRR. If Port used the "marginal satisfactory" rating (or averaged "2" sub-step) in its calculation of annual increments, it would save approximately \$90K, as shown in Table 5.

While we acknowledge Port management's efforts to provide Employee Q with all the expected benefits "to make the employee whole" as if he was not terminated, we refer this calculation for Port's management's review and consideration.

Response: *As explained in our September 25, 2020 letter, the Port took the last three years of his performance evaluation ratings and averaged it. As noted in our responses above, the 2011 salary increment was signed by then Interim Deputy General Manager in the absence of the former General Manager who was on leave status. For 2012, because the former General Manager did not reject the performance evaluation of Employee Q, he is eligible for the salary increment.*

Regarding the statement that Employee Q's performance would not have changed over time seemed unrealistic. This finding is capricious and inconsistent with Employee Q's long-standing record of exemplary performance. We informed your auditors that during the time period, he earned his master's degree in public administration with the University of Guam, received the Professional Master Business Certification from the Association of Government Accountants in 2017, and held the position of Regional Vice President of the Pacific Rim for the Association of Government Accountants for June 2017 to June 2018. Through his discussions with his former

employers, Employee Q was praised for his work ethics and professionalism. To make the finding that his overall evaluation ratings for 2013 to 2017 should have been "marginal satisfactory" based on unsigned performance evaluations for 2011 and 2012 by the former General Manager is troublesome to not only Management, but also Employee Q or any other employee in this type of situation. Again, we are confident that in the justification, we offer as reasons why 2011 and 2012 were accepted and used to calculate Employee Q's back wages.

Employee Q Paid a 6% Interest Charge Without Court Order Requirement and Negotiated Terms

Port paid Employee Q \$95K in interest for the period of December 19, 2012 through September 15, 2018. According to 18 GCA Chapter 47 §47106, the legal rate of interest is 6% per year on accounts "after demand or judgment rendered in any court of the territory." Section 47106 further states that *it is acceptable for the parties involved to contract in writing an interest rate that does not exceed* the interest rates specified in 14 GCA, the Uniform Consumer Credit Code.

Interest Charge Paid Without Court Order Requirement

Neither CSC or the courts ordered Port to pay a 6% interest charge (or \$95K) to Employee Q. Yet, Port did not exercise its option to negotiate an interest rate lower than 6%, as allowed by 18 GCA §47106. According to the incumbent GM, Port's former contracted Legal Counsel and Port's former "in-house" Staff Attorney did not dispute the 6% interest rate.

Interest Charge Paid Without Negotiated Terms

In his February 2020 remedy request letter, Employee Q requested a 6% interest charge *per day* (or 2,190% per year). Upon approving such letter immediately, the following day, the DGMA apparently accepted the following issues surrounding this interest charge, as shown in Figure 2:

- Interest at 6% per day is effectuated. A daily 6% interest rate translates into interest of 2,190% per year, which is exceptionally above the legal rate. However, Port applied and paid the 6% interest on, generally⁴, an annual basis.
- The principal amount to be charged with interest was not stated and fixed.
- The time, or period (start and end date), in which interest was to be charged was not stated and fixed.

⁴This is further explained under the sub-header, "Interest Charge Paid Without Considering Time in the Calculation."

Figure 2. What Port Accepted vs. Simple Interest Formula

What Port Accepted	vs.	Simple Interest Rate Formula
? x 2,190% x ? = /[]\$		\$ x % x month/day = /[]\$
Principal x Rate x Time = Interest		Principal x Rate x Time = Interest

Source: Employee Q's Remedy Request Letter.

Port's \$95K payment is based on an interest calculation schedule containing the following note, (disclosure) which reads as if Employee Q could still claim nine more months of interest.

“Interest calculation was from December 19, 2012 to September 15, 2018. Initial check payments for the salaries owed during my absence was cut on June 24, 2019. **Any interest owed from unpaid salary from September 16, 2018 to June 23, 2019 is not included in the interest calculation⁵.**”

⁵Emphasis added.

Therefore, we reiterate our recommendation to execute a comprehensive formal agreement that includes the provisions we previously stated.

Federal Interest Rates Used for Computation of Back Pay

In the U.S. Office of Personnel Management’s (OPM) chart of annual interest rates used for the computation of back pay⁶, the interest rate gradually increases from 3% to 5% over the time/period Employee Q charged Port. If Port had meant to negotiate the terms of the interest charge and used OPM’s graduating interest rate, the Port could have saved at least 2% a year, based on Table 6.

⁶<https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/interest-rates-used-for-computation-of-back-pay>

Table 6: What Port Accepted vs. OPM Interest Rates

Applicable Period Start	Applicable Period End	Annual Interest Rate Port Accepted	Interest Rate Port Applied	OPM’s Annual Interest Rates
12/19/2012	3/31/2016	2190%	6%	3%
4/1/2016	3/31/2018	2190%	6%	4%
4/1/2018	9/15/2018	2190%	6%	5%
Average		2190%	6%	4%

Sources: Port’s Interest Calculation Schedule; OPM Fact Sheet.

Response: As stated in our September 25, 2020 letter, Employee Q’s attorney in his letter dated July 11, 2018, to the former Port legal counsel included the 6% interest in his calculation of the back wages. His attorney claimed that the interest was a pre-judgment interest as allowed by law. Employee Q conferred with his attorney about his February 6, 2020 letter, and was advised to update the July 11, 2018 calculation of his interest rate. We informed your auditors that both former legal counsel and former in-house counsel did not dispute this interest rate.

Please elaborate how the Port could be in a position to negotiate the 6% interest when this entire matter resulted from a Supreme Court Order [REDACTED] and both Port former legal counsel and in-house counsel did not dispute such interest rate with Employee Q’s attorney?

Significant Deficiencies in the Basis of Port’s Calculations for Back Wages and Interest That Resulted in Overpayments

We found significant deficiencies in the basis of Port’s calculations, which resulted in overpayments of back wages, benefits, and interest charge, as shown in Table 7. We considered the following deficiencies in Port’s calculation basis, such that:

- Annual salary increments were included for the termination period without duly accomplished performance evaluation reports approved by (and accountable to) the incumbent GM.
- Back wages included three pay raises not covered by CSC or the courts’ judgments and retroactive to their authorization dates.
- Interest charge was paid without considering time in the calculation.

Summary of Overpayments of Back Wages, Benefits, and Interest

Based on our audit calculations, Port’s payments to Employee Q resulted in a net overpayment of \$21K, as follows and as shown in Table 7:

- The net \$2K overpayment of total wages is attributed to mainly a difference in the work days and workhours calculated by Port.
- The net \$291 overpayment for retirement and the net \$822 overpayment for Medicare tax are attributed to the overpayment of total wages. Retirement contributions and Medicare tax are dependent on the amount of wages paid. Port might want to consider coordinating with the Government of Guam Retirement Fund, Guam Department of Revenue and Taxation and the U.S. Treasury to address the overpayments.
- The \$18K overpayment of interest is attributed to Port mainly not considering time in its calculation.

As a matter of disclosure, our audit calculations (and the resulting overpayments) in Table 7 did not factor in the averaged two sub-steps (or “marginal satisfactory”) salary increments, as our audit determined.

Table 7: What Port Paid vs. What OPA Calculated

Remedy	What Port Paid	What OPA Calculated	Variance
Back Wages – Base Salary, minus \$209K of Outside Income	\$242,907	\$239,814	\$3,093
Back Wages – Pay Raise Changes during Termination	\$118,569	\$118,402	\$167
Pay Raise Changes after Reinstatement	\$19,273	\$19,135	\$138
Pay Raise Changes before Termination	\$771	\$1,743	-\$972
Total Wages	\$381,520	\$379,094	\$2,426
Retirement Contribution – Back Wages	\$18,548	\$18,208	\$339
Retirement Contribution – Pay Raise Changes after Reinstatement	\$1,186	\$1,186	\$0
Retirement Contribution – Pay Raise Changes before Termination	\$39	\$87	-\$49
Total Retirement Contribution	\$19,773	\$19,482	\$291
Medicare Tax – Back Wages	\$6,028	\$5,194	\$834
Medicare Tax – Pay Raise Changes after Reinstatement	\$279	\$277	\$2
Medicare Tax – Pay Raise Changes before Termination	\$11	\$25	-\$14
Total Medicare Tax	\$6,318	\$5,497	\$822
Attorney Fees & Legal Costs	\$40,043	\$40,043	\$0
Interest Charge	\$94,621	\$76,799	\$17,822
Total Remedy Cost	\$542,275	\$520,915	\$21,360

Source: Port’s Check and Deposit Documents; OPA Analyses.

In our audit calculation used the average two sub-steps salary increments and excluded the 2012 increment, which performance rating was not approved, Port paid approximately \$96K more in addition to the \$21K overpayment. See Table 8.

Table 8: What Port Paid vs. What Employee Q Was Eligible For

Salary Increment Year	Performance Evaluation Deficiency	Eligible Sub-Steps	Eligible Pay Raise Changes	What Port Paid for Pay Raise Changes	Variance
2011	Not Approved	0	\$0	\$0	\$0
2012	Not Approved	0	\$0	\$7,604	\$7,604
2013	None Prepared	2	\$1,602	\$12,584	\$11,253
2014	None Prepared	2	\$3,257	\$17,644	\$14,386
2015	None Prepared	2	\$4,796	\$22,108	\$17,312
2016	None Prepared	2	*\$8,415	\$29,627	\$21,212
2017	None Prepared	2	*\$9,428	\$33,673	\$24,246
Total			\$27,497	\$123,510	\$96,013

Sources: Table 4; Table 5; Table 7.

*These are only estimates because they are dependent on the salary range Port would have granted for the 2016 agency-wide pay adjustment. Despite our requests, Port did not provide us with their detailed policy on how to mitigate their employees' salaries into the pay plan that was first adopted in October 2009.

We refer the above calculation of overpayments to Port's management for review and final decision.

Response: *We respectfully disagree with your auditor's assertion that overpayment was made to Employee Q. Reiterating our September 25, 2020 letter of response, had the Port initially complied with CSC and judicial courts' decisions in reinstating Employee Q to his position as Financial Affairs Controller and awarded him his full back pay and benefits from the date of his termination until the Port complied with the order and judgments, the erroneous initial personnel actions and the re-issuance of the correct personnel actions would not have provided your auditors with the perception that the Port erroneously calculated his back wages.*

In our teleconference with your auditors on September 29, 2020, we stated we would re-look at the calculations and determine if the Port overpaid Employee Q by \$17,000. In our November 13, 2020 teleconference, we informed your auditors that a recalculation was made and it revealed we owe Employee Q approximately \$4,729.26 in interest. According to staff, who was a former employee of your agency, she noted OPA used network days and hourly rate per year to compute the estimated annual salary and used the number of days for the interest payment. With this method of calculation, it would show the Port did overpay Employee Q by \$17,000. However, the Port's review notes that when interest was paid to Employee Q, a significant balance in salary payable was not settled. As such, the Port underpaid Employee Q \$4,729.26.

Because Employee signed a document releasing the Port from any future liability, how are we now supposed to reconcile this finding of an underpayment?

Annual Salary Increments Included Without Performance Evaluation Reports Approved by and Accountable to the GM

Our audit calculation of back wages followed Port's method of compounding the annual increments to the base salary. When there is no work interruption (e.g., termination), this is the regular calculation method for annual increments, which should be supported with a duly accomplished and approved performance evaluation report.

If we consider Employee Q's \$79,828 annual base salary (as of reinstatement) and compare it to the \$126,222 annual salary given for the last pay raise Port included in his back wages, the total salary increase is only \$46,394. However, on the same pay raises, Port paid Employee Q \$139K for the increments alone (without the base salary), because of the cumulative (compounding) method Port applied as if no termination occurred. The prior year's annual increment rate per hour was added to the succeeding year's increment per hour, and the pattern continued until the end of the period set by Port.

We respect that Port's calculation was based on the understanding that Employee Q's back wages and benefits should be processed using the regular method as if there was no work interruption. However, the annual increments granted for 2013 through 2017 were not supported with duly accomplished performance evaluation reports, which need to be approved by (and accountable to) the incumbent GM in order to standardize the process, in compliance with the PRR. Even without the approved evaluation reports, Port prepared personnel action forms for these annual increments.

In line with the existing PRR for annual increments, we recommend that the GM and the Board standardize a salary increment process for back wages to include a required performance evaluation report (of sort) accountable to the incumbent GM who signs the personnel action forms.

***Response:** This finding is baseless. The Port does have a standardized salary increment process provided for in the Port's Personnel Rules and Regulations. Such rules were followed to reconstruct the back wages for Employee Q.*

Back Wages Included Three Pay Raises Not Covered by CSC or the Courts' Judgments and Retroactive to Their Authorization Dates

Requoted in Table 1 is CSC's order that Port fully compensate Employee Q for all the time *following his termination* on December 18, 2012 *until the date he is reinstated* to his prior position of employment (July 30, 2018).

There were six pay raises within the scope of back wages – five salary increments and one pay adjustment, as shown within Table 9's green box. However, Port paid three pay raises retroactive to their authorization dates even though these were not covered by CSC or the courts' judgments, as shown in Table 9's red boxes.

Table 9: What Port Paid as Back Wages and Retro Base Pay

Effective Date	Pay Raise Type	Eligibility Date	Authorization Date	Time Lapse	Port Paid as Back Wages
10/13/2011	Salary Increment	X	2/10/2020	8.3 years	
10/13/2012	Salary Increment	X	2/10/2020	7.3 years	Paid
10/13/2013	Salary Increment	7/30/2018	2/10/2020	1.5 years	Paid
10/13/2014	Salary Increment	7/30/2018	2/10/2020	1.5 years	Paid
10/13/2015	Salary Increment	7/30/2018	2/10/2020	1.5 years	Paid
10/1/2016	Pay Adjustment	7/30/2018	2/10/2020	1.5 years	Paid
10/13/2016	Salary Increment	7/30/2018	2/10/2020	1.5 years	Paid
10/13/2017	Salary Increment	7/30/2018	2/10/2020	1.5 years	Paid
9/16/2018	Pay Adjustment	9/16/2018	2/10/2020	1.4 years	Paid
9/16/2019	Salary Increment	9/16/2019	2/10/2020	4.8 months	Paid

Sources: Notifications of Personnel Action; Employee Q’s Performance Evaluation Reports; Port’s Check and Deposit Documents; Port’s Calculation Schedules; PRR.

According to 4 GCA Chapter 6 §6218.1, “whenever a classified or unclassified employee of the Government of Guam, including all departments, agencies and instrumentalities, *whether or not autonomous*’, receives an increase in pay resulting from step increase, pay range increase, promotion or any other cause, such increase in pay *shall not be retroactive from the date of its authorization, unless so specified by law.*”⁷

⁷Emphasis added.

⁸Emphasis added.

As a matter of disclosure, we did not consider this law’s application on the retroactive pay raises that resulted from CSC or the courts’ judgments. The retroactive payment of the six eligible pay raises would have been available to Employee Q as early as his reinstatement, but because of differing legal opinions, these six eligible pay raises were not authorized until a year and a half later (as shown in Table 9) or paid until almost two years later (as shown in Table 2). We did not seek a legal opinion on this matter. We plan to cover this issue together with the other reinstated employees in our subsequent reports.

Response: *In our response above, we provided our review regarding Employee Q’s 2011 and 2012 performance evaluation reports. Regarding the three (3) pay raises your auditors are referencing—these are not to be considered pay raises because these salary adjustments for 2016 and 2018 resulted from a market percentile implementation which the Board approved for all Port employees. We respectfully caution against referencing an authority-wide salary correction made due to an authority-wide pay reclassification based on the market percentiles as a pay raise. In reconstructing Employee Q’s salary structure as if he never left the Port, the two times—and not three (3) which your auditors keep referencing—these compensation studies were implemented during the affected period. Therefore, since this is not a pay raise, then there is no illegal retroactive application.*

Retroactive Salary Increments Not Approved by Former GM and Its Domino Effect on Subsequent Years' Salary Increments.

Port authorized the October 2012 salary increment in February 2020, which is seven years after its effective start date and potentially noncompliant with 4 GCA §6218.1. In May 2020 (almost three months after authorizing it in February 2020), Port paid the October 2012 salary increment, retroactive to October 2012.

After Port did not make a retroactive payment for the October 2011 salary increment, the NPA supporting the October 2011 salary increment of five sub-steps had a domino effect on the subsequent years' pay raises. This 2011 NPA because the basis for subsequent pay raises – salary increments of 2012 through 2017, 2016 and 2018 pay adjustments, and the 2019 salary increment. See Table 5 and Table 8 for the financial effect on the salary increments for 2013 through 2017.

To reiterate, the financial effect of the 2011 and 2012 annual salary increments, for which performances were not approved by the former GM, needs to be reviewed by the incumbent management.

Differing Legal Opinions Resulted in Retroactive Payments of Raises Not Covered by Judgments

Also in February 2020, Port authorized and paid the September 2018 pay adjustment more than one year after its effective (and eligibility) date, and the September 2019 salary increment almost five months after its effective date.

Also previously explained, Port received differing legal opinions on which Employee Q's back wages included salary increments for the termination period. Employee Q was reinstated at his base salary without any prior pay raises factored in. Later, when Port's former Staff Attorney opined that back wages did include salary increments, the salary ranges of these eligible pay raises had a domino effect on subsequent pay raises – the 2018 pay adjustment and the 2019 salary increment. As such, Port updated the salary ranges and made retroactive payments on the 2018 and 2019 pay raises.

***Response:** We disagree with your auditor's assertion that the retroactive payment of raises were not covered under the judgments. As explained above and in our September 25, 2020 letter, although judgment or decision did not expressly state salary increments and pay adjustments, Employee Q is entitled to salary increments and market percentile implementations. We are providing you with past CSC decisions, which provides the justification for paying the salary increments and market percentile implementations to Employee Q.*

Interest Charge Paid Without Considering Time in the Calculation

Port's \$95K interest payment (for the period of December 19, 2012 through September 15, 2018) was \$18K over compared to our audit calculation of only \$77K. See Table 7. This overpayment was due to primarily Port's method of using a 6% flat rate regardless of how much time had actually passed, be it 11, 300 or 365 days. Port did not consider time in its interest calculation.

Response: We respectfully disagree that Employee Q was overpaid in his interest payment. Based on our recalculation, the Port underpaid him \$4,729.26.

Other Matters

Although not directly related to our audit objective, we became aware of other matters that warrant Port's, and possibly the Guam Legislature's, attention.

Port Unified Existing Employees' Anniversary Dates to Reflect the Dates of Agency-Wide Pay Adjustments

In reviewing the personnel action forms of the five reinstated employees in our initial audit scope, we noticed identical increment anniversary dates among four of them. When Port implemented its new pay plan's first, agency-wide, pay adjustment in October 2009, it unified the existing employees' anniversary dates to reflect the transfer from the Hay Plan to Port's Compensation and Classification Plan. Similarly, when Port implemented the September 16, 2018 agency-wide pay adjustment, the existing employees' increment anniversary dates changed in uniformity to the pay adjustment's effective date.

According to PRR 6.301(C)(1), the pay grade reassignment for classes of positions (Port-wide pay adjustment) will not change increment anniversary dates. Furthermore, the salary increment of all Port employees shall be based on an annual review of performance (PRR 7.008), and the performance appraisal is **every 12 months** of service (PRR 7.007(A)).

When Port unified the increment anniversary dates in October 2009, for some employees, it likely shortened the performance appraisal period to less than 12 months. Before the September 16, 2018 agency-wide pay adjustment, we know that at least three of the reinstated employees had an October 13 incremental anniversary date. After the 2018 pay adjustment, their increment anniversary changed to September 16, which is 20 workdays (or two pay periods) less than "12 months of service."

Calculating the potential financial impact of unifying increment anniversary dates is not covered in our audit scope. However, because of the unification may have potentially negative financial impacts on Port's resources, and in compliance with PRR 6.301(C)(1), we recommend that the GM and the Board reconsider their practice of unifying employees' increment anniversary dates moving forward.

Response: In our response of September 25, 2020, we did agree with your auditor's statement that the salary increment anniversary dates should not have changed when the Port mitigated into the 2018 market percentile. We explained when we talked to the Human Resources staff about the changes, we were told they were being guided by former Port management to change the employees' salary anniversary dates to reflect the pay adjustment into the 25th market percentile.

Port's PRR Does Not Have a Cap on Salary Increments

According to 4 GCA Chapter 6 §6202, employees (autonomous agency employees included) at Steps 7 through 9 are entitled to an increment after 18 months of satisfactory performance, while employees at Steps 10 through 20 are entitled to an increment that is 3.5% of the employee's base

salary after 24 months of satisfactory performance. It was in 1991 when P.L. 21-59 amended §6202 by placing caps (limits) on the salary increments of employees at higher pay steps.

However, Port grants salary increments on an annual basis. According to PRR 7.008, the salary increment of all Port employees shall be based on an annual review of performance, and according to PRR 7.007(A), the performance appraisal period is every 12 months of service. It was in 2009 when the Guam Legislature adopted the PRR into Port's enabling legislation (12 GCA Chapter 10).

Although salary increment caps were passed by law in 1991, Port's PRR, adopted in 2009, did not incorporate the relative provisions of 4 GCA §6202, or any other cap, on its salary increments.

It is the GM's understanding that the salary increment caps required by 4 GCA §6202 were intended for those entities that rely on the General Fund. The GM explained that because Port is autonomous and generates its own income, Port employees are not subject to the salary increment caps required in §6202. Combined with Port's generous salary increment point system (as shown in Table 3), a Port employee's salary can increase by 2% to 5% each year without a cap. This presents a potentially negative financial impact on Port's resources.

As such, we recommend the Board consider incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202.

***Response:** We do not think this recommendation is feasible as a matter of practical application. The Port's PRR was adopted by statute, so the Board does not have the unilateral authority to simply "incorporate into the Port's Personnel Rules and Regulations the provisions of 4 GCA Chapter 6 §6202 moving forward." Moreover, we are perplexed that this is even a finding? This audit should focus on a determination if the law and rules and regulations applicable to the Port were followed in the execution of complying with Supreme Court Order No. [REDACTED]*

Regarding the salary increment caps in the Department of Administration please check the latest Hay Plan implementation whereby increments do go beyond Step 20.

Port Interpreted Superior Court Decision as Employee Q Did Not Have to Mitigate the Wages Earned During His Termination

Port paid Employee Q his back wages, minus \$209K for the outside income he earned during his termination, as indicated in Tables 1, 2 and 7. According to the GM, Port mitigated (reduced) the back wages because Employee Q *requested* that his back wages be mitigated by his earnings during the period he was terminated. Based on his reading of the Superior Court's September 26, 2016 Decision and Order, it is the incumbent GM's understanding that:

- Port is obligated to pay Employee Q his full reinstated salary *without* mitigation; and that
- Employee Q did not have to mitigate the income he earned in the private sector and, as such, could have insisted that Port pay him his full back pay, in compliance with the Superior Court's order.

See Appendix 2 for a copy of the Superior Court's ruling. The GM's understanding of the Superior Court ruling in the September 26, 2016 Decision and Order could open up the possibility of Employee Q's supposed entitlement to the \$209K of outside wages he "voluntarily agreed" to be deducted from his back wages. Again, we reiterate our recommendation to execute a comprehensive formal settlement agreement that includes the provisions we previously stated.

Response: *In our response letter of September 25, 2020, we went into great detail about the Hauser versus the Department of Law 2005 Guam 14 case when determining if an employee is qualified for full back pay. Based on the Decision and Order by Superior Court Judge Vern Perez on September 26, 2016, he found that there were no substantially equivalent jobs on Guam during the time period in question for Employee Q. It should be noted that Employee Q held positions with his private employers as a Bookkeeper and Accountants, which is not equivalent to his position as Financial Affairs Controller.*

In our exit conference, we also explained that it was Employee Q's attorney who informed him to mitigate his outside wages he earned from 2014 to 2018 in the amount of \$102,748.75, which they did not have to do based on Judge Perez's decision. However, Employee Q submitted his calculations based on mitigation because his attorney advised him to do so.

This finding is moot since Employee Q's back wages included mitigation, and also since Employee Q submitted his liability release to the Port on July 23, 2020.

Conclusion and Recommendations

Our audit found that Port paid \$542K for Employee Q's back wages, Medicare tax, retirement contribution, interest charge, and attorney's fees and legal costs. Port's legal remedies with Employee Q were generally made in accordance with administrative and judicial review judgments. However, our audit calculated a total of \$521K, or a difference of \$21K, following Port's annual salary increment calculation.

Our audit amount did not factor in Employee Q's eligibility for only two sub-steps annual salary increments instead of the five sub-steps Port gave. Port granted five sub-steps based on three prior years of "outstanding" performance evaluation ratings, for which two were not approved by the former GM. If our audit calculation used the average two sub-steps and excluded the 2012 increment, for which the performance evaluation was not approved, Port paid approximately \$96K more in addition to the \$21K overpayment. While we acknowledge Port management's efforts to provide Employee Q with all the expected benefits "to make the employee whole" as if he was not terminated, Port's rules and regulations should be followed to support such a significant payment. As such, we refer this calculation for Port's GM and Board to review and consider.

Moreover, in executing Employee Q's legal remedies, we found instances of potential noncompliance with applicable laws, regulations, and internal policies, as well as lapses in Port's internal processes. These included: a) unorganized remedial actions; b) legal remedies not ratified by the Board; c) legal remedies without a formal comprehensive agreement and liability release; d) highest incremental sub-steps not required by CSC or the courts but based on two "outstanding" performance evaluations that were not approved by the prior GM; e) a 6% interest payment not

required by court order and improperly calculated; f) annual salary increments without performance evaluation reports; and g) apparent retroactive pay raises.

We became aware of other matters not related to our audit objective that warrant Port's, and possibly the Guam Legislature's, attention – i.e., the uniformity of exiting employees' anniversary dates and no caps on Port's salary increments.

As a result of our audit, we recommended the following:

- The GM seek the Board's ratification, via board resolution, on the total back wages and interest paid to Employee Q.

Response: *This recommendation is not necessary as Management believes it complied with statutory authority expressly provided to the General Manager, and wherever it was prudent and necessary, the Board provided the appropriation when it adopted a motion on April 30, 2019, which authorized a payout not to exceed \$600,000.*

- The GM execute a comprehensive formal agreement that includes (1) the purpose, amounts, and terms of what Port paid for Employee Q's back wages, benefits, attorney fees, and interest charge (2) a liability release provision; and (3) the signatures of the relevant parties and witness.

Response: *This recommendation is not necessary. Employee Q submitted his liability release to the Port on July 23, 2020.*

- The GM and the Board standardize a salary increment process for back wages to include a required performance evaluation report (of sort) accountable to the incumbent GM who signs the personnel action forms.

Response: *This recommendation is unnecessary. The Port does have a standardized salary increment process provided for in the Port's Personnel Rules and Regulations. Such rules were followed to reconstruct the back wages for Employee Q.*

- The GM and the Board reconsider their practice of unifying employee's increment anniversary dates moving forward.

Response: *As stated in our response, going forward, an incumbent employee's anniversary date will remain the status quo when the Port implements a market percentile in the future.*

- The Board consider incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202 moving forward.

Response: *We do not agree with this recommendation. Public Law 30-43, which approved the Port's Compensation and Classification Plan, also codified our Personnel Rules and Regulations into the Guam Code Annotated. As such, the Board does not have the unilateral authority to simply incorporate into the Port's Personnel Rules and Regulations the provisions of 4 GCA Chapter 6, Section 6202 moving forward.*

In thinking very analytically of how to conclude our response to this draft audit, we are focusing on your letter of November 6, 2020, and our teleconference of November 13, 2020, wherein your auditors expressed that some documents they requested have yet to be provided by the Port. This revelation is deeply concerning to us, especially since we pride ourselves on being transparent and accountable in our work.

Mr. Public Auditor, please recall that no specifics were provided to us when we inquired during our teleconference on what documents were still pending. As a result of your auditors' non-response and the lack of specificities of outstanding documents, we are conducting an internal review to determine what documents your auditors requested and deemed pending. We have yet to find any non-compliance, but our review is still ongoing. Port employees involved with this particular audit are currently being asked to review all their correspondences with your auditing team.

Our hope and trust are that your audit examines the payments made to nine (9) affected Port employees would encompass a thorough review based on all of the documents surrounding these cases. This letter, therefore, respectfully requests that this draft audit be held in abeyance, so your auditors can provide us with an inventory of documents requested and allow the Port sufficient time to transmit such documents.

There are ethical requirements to produce a full and thorough audit based on all matters' collective knowledge. In order to uphold these ethical standards, a temporary pause is warranted so that your auditors can provide us with an actual inventory of outstanding documents. We are also requesting additional time to compile the migration study documents. Because of the magnitude of this audit and its impact on the subsequent related matters, we believe that it is in the public's best interest that all of the documents needed for your auditing team are before them for consideration.

Should you have any questions, or require additional information, please do not hesitate to contact me directly. *Si Yu'os Ma'ase!*

Respectfully,


Rory J. Respicio
General Manager

Appendix 9:
Status of Audit Recommendations

No.	Addressee	Audit Recommendation	Status	Actions Required
1.	Port General Manager & Port Board of Directors	Standardize a salary increment process for back wages to include a required performance evaluation report (of the sort) accountable to the incumbent GM who approves the number of sub-steps on the personnel action forms.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
2.	Port General Manager	Seek the Board's ratification, via board resolution, specifying the composition of total back wages and interest paid to Employee Q.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
3.	Port General Manager	Execute a comprehensive formal agreement that includes (1) the purpose, amounts, and terms of what Port paid for Employee Q's back wages, benefits, attorney fees, and interest charge; (2) a liability release provision; and (3) the signatures of the relevant parties and witness.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
4.	Port General Manager & Port Board of Directors	Reconsider their practice of unifying employees' increment anniversary dates moving forward.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.
5.	Port Board of Directors	Comply with Guam Code and provide parity to ratepayers and taxpayers by incorporating in its PRR the relative (or similar) provisions of 4 GCA Chapter 6 §6202.	OPEN	Submit a corrective action plan. Implement no later than the beginning of the next fiscal year.

PORT AUTHORITY OF GUAM BACK WAGES SERIES, PART A Report No. 21-03, February 2021

ACKNOWLEDGEMENTS

Key contributions to this report were made by:

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MISSION STATEMENT

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