IN THE SUPREME COURT OF GUAM

LESTER L. CARLSON, JR., and DAVID H. SASAI,
Petitioners-Appellants,

vs.

GERALD S.A. PEREZ, Administrator, Guam Economic Development and Commerce Authority, TOM MICHELS, FONG WU, LAURA LYNN DACANAY, DONNA KLOPPENBURG, and JOSEPH CRISOSTOMO, in their capacities as members of the Board of Directors of the Guam Economic Development and Commerce Authority, and the GUAM ECONOMIC DEVELOPMENT AND COMMERCE AUTHORITY,
Respondents-Appellees.

Supreme Court Consolidated Case Nos.: CVA05-012 and CVA05-013
Superior Court Case No.: SP0005-04

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on July 25, 2006
Hagåtña, Guam

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BEFORE: FRANCES M. TYDINGCO-GATEWOOD, Presiding Justice[1]; ROBERT J. TORRES, JR., Associate Justice; JOHN MANGLONA, Justice *Pro Tempore*.

TORRES, J.:

[1] Lester L. Carlson, Jr. ("Carlson") and David H. Sasai ("Sasai") each appeal from the Superior Court's denial of the First Amended Petition for Alternate and Peremptory Writs of Mandate ("the Petition").[2] The Petition sought to compel the Guam Economic Development and Commerce Authority ("GEDCA")[3] to void and dismiss adverse actions which terminated Carlson's and Sasai's employment with GEDCA. In denying the Petition, the Superior Court held that Carlson and Sasai, who filed separate appeals of their termination with the Guam Civil Service Commission ("CSC"), had a plain, speedy and adequate remedy at law because they appealed to the CSC and could have sought judicial review of the CSC's decisions to dismiss their claims. The Superior Court held since Sasai and Carlson "did not avail themselves of the remedy of appealing the CSC decision as a matter of law for judicial review . . . mandamus is not the appropriate relief. . . ." Appellant's Excerpts of Record ("ER"), tab 28, p. 12 (Decision and Order, June 2, 2005). We affirm.

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[1] Associate Justice Frances M. Tydingco-Gatewood, as the senior member of the panel, was designated Presiding Justice and heard oral argument in this case. Prior to the issuance of this Opinion, she was sworn in as Chief Judge of the District Court of Guam. John A. Manglona, Associate Justice of the CNMI Supreme Court, sits as Justice *Pro Tempore*.

[2] The appeal filed by Carlson, Supreme Court Case No. CVA 2005-012, and the appeal filed by Sasai, Supreme Court Case No. CVA 2005-013, were consolidated by order of this court in accordance with Guam Rule of Appellate Procedure 3(b). The parties had also earlier stipulated to allow Sasai "to join [the Superior Court] proceedings as co-petitioner." Appellant's Excerpts of Record ("ER"), tab 6 (Stip. and Order). Sasai's joinder filed with the Superior Court appears to be a separate petition containing Sasai's claims and a separate prayer of relief. For ease of reference, the term "Petition" collectively includes the First Amended Petition for Alternative and Peremptory Writs of Mandate filed by Carlson and the joinder filed by Sasai.

[3] In March 2002, the Guam Economic Development Authority ("GEDA") was reorganized as the "Guam Economic Development and Commerce Authority" ("GEDCA"). Guam Pub. L. 26-76:34 (March 12, 2002).

I.

[2] Carlson was hired by the Guam Economic Development Authority ("GEDA") in August 1991 as a "Special Assistant to the Administrator." In June 1994, his title was changed to "Special Projects Coordinator." He was later promoted to "Financial Services Manager," and a few years thereafter, his title was changed to "Special Assistant to the Administrator." Subsequently, he was promoted to the position of "Business Development Manager." On December 15, 2003, Carlson was appointed "Acting Administrator" during the scheduled period of absence of then-administrator Gerald S.A. Perez.

[3] Sasai was hired by GEDA in 1996 as "Economic and Public Finance Manager." Less than one year later, he was made "Chief Financial Officer" of GEDA. In 2003, Sasai was transferred from GEDCA to the Department of Administration where he was the Chief Financial Officer.

[4] On December 19, 2003, Carlson and Sasai each received a confidential memorandum from John Dela Rosa, representing himself as the Acting GEDCA Administrator, notifying them that their employment with GEDCA was terminated effective immediately. The memorandum stated that Carlson and Sasai had abused the privilege and trust bestowed on a public employee authorized to use a credit card in violation of the Department of Administration's Rules and Regulations Rule 11.303(b). On December 26, 2003, the recently-returned GEDCA Administrator Perez sent a separate letter to Sasai and Carlson confirming their termination but making the termination effective as of the date of the letter from Perez.

[5] On December 30, 2003, Sasai filed a petition with the CSC appealing his termination from GEDCA. One week later, Carlson filed a petition with the CSC likewise appealing his

termination. A little over a week after that, but before the CSC heard the petitions, Carlson filed in the Superior Court of Guam, a Petition for Alternative and Peremptory Writs of Mandate, seeking to compel the admission of Carlson to the use and enjoyment of a right and office to which he was entitled and from which he was unlawfully precluded. Carlson alleged in the writ petition that GEDCA acted in violation of its own personnel rules and regulations, a copy of which had been provided to Carlson by GEDCA's Administrative Services Officer, Loretta Villaverde.[4] Carlson maintained that he was a classified employee entitled to the protections of the merit system set forth in Chapter 4, Title 4 of the Guam Code Annotated and GEDCA failed to comply with the procedural and substantive protections set forth in the statute. The Superior Court granted the Alternative Writ, requiring GEDCA to show cause to the court why Carlson's writ should not be granted.

[6] GEDCA almost immediately filed a motion to dismiss, arguing Carlson failed to exhaust his administrative remedies and had a plain, speedy and adequate remedy at law. GEDCA asserted that Carlson should first pursue the appeal of his dismissal with the CSC before seeking judicial review, since he alleged he was a classified employee. Carlson opposed the motion on the basis that GEDCA was mandated to adopt personnel rules governing the selection,

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[4] This court's examination of the rules that Loretta Villaverde gave to Carlson reveals that they were not rules specific to GEDCA, but rather were the then-current Department of Administration's Personnel Rules and Regulations governing terminations and adverse actions. In his initial Petition for Writ of Mandamus, Carlson alleges, "On or about January 2, 2004, [Carlson] was informally provided with [GEDCA's] personnel rules and regulations (hereinafter the "Personnel Rules"). Loretta Villaverde, [GEDCA's] Administrative Services Officer, informally confirmed to [Carlson] that the personnel rules provided to [Carlson] were the rules that are applicable to [GEDCA]. . . . The relevant provisions of the personnel rules and regulations provided to Petitioner substantively mirror the provisions of the Department of Administration's personnel rules and regulations." ER, tab 1, pp. 4-5 ¶ 11. In fact, the regulations quoted in Carlson's Petition for Writ are directly from Chapter 11 of the "Department of Administration's Personnel Rules & Regulations," adopted by the Director of Administration and approved by the CSC, effective October 1, 1996. *See* Exec. Order No. 96-24 (promulgating the "Department of Administration Rules and Regulations."). There is no dispute in this appeal that GEDCA had not adopted its own personnel rules at the time GEDCA sought to terminate Carlson and Sasai.

promotion, evaluation, suspension and other disciplinary action of its classified employees subject to the criteria established by 4 GCA § 4105, but failed to do so. Carlson argued that GEDCA's failure to adopt personnel rules, which was only communicated to Carlson after the filing of the original writ petition,[5] left him with no administrative remedy. Carlson further argued that GEDCA had violated the 60-day rule set forth in 4 GCA § 4406[6] and therefore, his dismissal was illegal and void.

[7] At the initial writ hearing before Superior Court Judge Manibusan, Carlson's counsel acknowledged that Carlson was pursuing a simultaneous appeal of his termination before the CSC. Transcript ("Tr."), Vol. 1, p. 8 (Hr'g on Ex Parte Application, Jan. 19, 2004). Carlson justified his simultaneous filing of the writ petition with the logic that since the termination was void and Carlson had not been legally terminated, he was not bound to appeal the termination with the CSC. His CSC appeal was filed only to preserve his rights in the event the Superior Court agreed with GEDCA that he failed to exhaust his administrative remedies; the double tracks were "alternative relief," according to counsel. Tr., Vol. I, p. 21 (Hr'g on Ex Parte Application, Jan. 19, 2004). GEDCA argued that the double tracks should not occur. Rather,

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[5] In the Petition for Writ filed in the Superior Court, Carlson alleged he had been given the applicable GEDCA promulgated rules. ER, tab 1, ¶ 11; *see also* n. 4 *supra*. However, in defending the Motion to Dismiss, Carlson changed the characterization of the rules that had been given to him by Villaverde: "During the ex parte hearing, . . . counsel for Respondents hinted that the Authority may not have adopted such personnel rules and regulations . . . . Respondents subsequently informed Petitioner that no personnel rules and regulations were adopted by the Authority. Decl. ¶ 8. However, as provided above, GEDCA 'borrowed' a few from the Department of Administration." ER, tab 4, p. 4.

[6] Title 4 GCA § 4406 (2005) states in relevant part that:

> In no event may an employee in the classified service be given notice and statement of the charges required by this Section after the sixtieth (60th) day after management knew or should have known the facts or events which form the alleged basis for such action. Any action brought by management in violation of this Section is barred and any decision based upon such action is void.

Carlson should first pursue his action with the CSC. If the CSC decision was unfavorable, then he could appeal that particular decision to the Superior Court.

[8] Judge Manibusan, in an oral ruling from the bench, denied GEDCA's motion to dismiss on the rationale that "in the absence of personnel rules," Carlson's ability to proceed before the CSC was in question. Tr., Vol. II, p. 38 (Continued Ex Parte Application, Jan. 22, 2004). The judge did not issue a written Decision and Order denying the Motion to Dismiss but the transcripts reflect the judge said: "If it is questionable whether or not Mr. Carlson can go to the Civil Service Commission, then it really becomes questionable whether or not he has a remedy to CSC which the Court can say he must pursue prior to bringing the action before the Court." Tr., Vol. II, p. 38 (Continued Ex Parte Application, Jan. 22, 2004). "The court finds that it would not dismiss the petition filed by Mr. Carlson [but] . . . if the CSC decides that it desires to continue to hear this matter, the court is not going to prevent it from doing so." Tr., Vol. II, p. 39 (Continued Ex Parte Application, Jan. 22, 2004). "I'm not telling CSC how to decide their case before it." Tr., Vol. II, p. 41 (Continued Ex Parte Application, Jan. 22, 2004). "I'm saying I'm not going to dismiss this case because it appears there may be a question whether there's jurisdiction in Civil Service Commission based on this statute." Tr., Vol. II, p. 40 (Continued Ex Parte Application, Jan. 22, 2004). The court further stated, "if CSC decides it has jurisdiction and . . . makes a determination that Carlson is classified and his rights under the sixty days has been violated, then . . . [GEDCA] can appeal that and come here or [Carlson] can appeal a determination that says [CSC has] jurisdiction." Tr., Vol. II, p. 41 (Continued Ex Parte Application, Jan. 22, 2004). "[T]he intent of today's ruling is not to tell Civil Service that it cannot proceed." Tr., Vol. II, p. 44 (Continued Ex Parte Application, Jan. 22, 2004).

[9] On the same day that Judge Manibusan denied the motion to dismiss, the CSC, having already conducted a post audit of Carlson's claims, held an agency hearing on Carlson's petition before the CSC. Nearly three weeks later, on February 10, 2004, the CSC issued a written decision holding that the CSC had no jurisdiction to hear the matter and Carlson's appeal was denied. The CSC found that (1) Carlson had not competed for his initial and subsequent positions, (2) these positions were not lawfully created by the CSC, and (3) the CSC was prohibited by section 2 of Public Law 26-121 from hearing the appeal because Carlson was not hired through the merit system. Sasai's appeal to the CSC resulted in a nearly identical ruling.

[10] After the CSC's issuance of its Decision and Judgment, Carlson filed the amended petition in the Superior Court, and Sasai filed his joinder. Carlson and Sasai attached their respective Decisions and Judgments from the CSC which found each of them were not hired through the merit system. ER, tab 7, Ex. F (First Amended Petition for Alternative and Peremptory Writs of Mandate); ER, tab 8, Ex. E (Joinder of Co-Petitioner David H. Sasai to First Amended Petition). In their prayers for relief, Carlson and Sasai sought reinstatement and a decree that their respective terminations were void due to violation of personnel rules and regulations. The Petition did not specifically set forth that Carlson and Sasai were appealing the CSC's February 10, 2004 findings that: (1) they did not compete for the initial and subsequent positions each of them held with GEDCA prior to termination, (2) the positions were not lawfully created by the CSC and (3) the CSC did not have jurisdiction to hear the appeals from employees who were not hired through the merit system pursuant to section 2 of Public Law 26-121. The Petition also did not name the CSC as a party.

[11] Judge Manibusan later resigned from the Superior Court to take a federal magistrate position and the case was assigned to Judge Unpingco. Judge Unpingco issued a briefing schedule and held initial hearings on the merits of the Petition, which included an examination of Carlson. GEDCA later filed a Motion for Reconsideration of the decision to proceed with the hearings on the merits of the Petition, arguing that a show-cause hearing had not yet been held in accordance with 7 GCA § 31204[7] and that there were disputed factual issues which required the court to designate the questions to be tried as required by 7 GCA § 31207.[8] Carlson opposed the motion for reconsideration. After oral argument, Judge Unpingco ordered that the previous hearings would be deemed to be the order to show cause hearings why the writ should not issue. He also set a date for a hearing on the merits pursuant to 7 GCA § 31211[9] with specific directions to address whether GEDCA is subject to the civil service laws and whether Carlson and Sasai are entitled to the protections afforded to classified employees in the case of an adverse action. Eventually the parties briefed the issues, oral argument was held, and proposed decisions and orders were submitted to Judge Unpingco.

[12] Judge Unpingco thereafter issued a Decision & Order denying the Petition on the basis that Carlson and Sasai had not exhausted their remedies because judicial review of the CSC

[7] Title 7 GCA § 31204 (2005) provides, in part, that: "The alternative writ must command the party to whom it is directed . . . to do the act required to be performed or to show cause before the court at a specified time and place why he has not done so."

[8] "If an answer be made, which raises a question as to a matter of fact . . . the court may, in its discretion, try the question or order the question to be tried, and postpone the argument until such trial can be had . . . The question to be tried must be distinctly stated in any order for trial. . . ." 7 GCA § 31207 (2005).

[9] Title 7 GCA § 31211 (2005) requires that "[i]f the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case."

decision dismissing their petition was available under 4 GCA § 4406. Judge Unpingco found that Judge Manibusan's previous ruling on the motion to dismiss the petition was not entirely dispositive on whether CSC had jurisdiction or if Carlson and Sasai had exhausted their administrative remedies. Moreover, he concluded that Carlson and Sasai had accepted the CSC's jurisdiction when they each filed a petition for CSC's review.

[13] Carlson and Sasai appealed, contending that Judge Manibusan previously ruled that Petitioners did not have a plain speedy and adequate remedy of law, and this ruling became the law of the case. Since it was the law of the case, Carlson and Sasai argue that Judge Unpingco could not later rule that an adequate remedy, specifically, the appeal to the CSC and judicial review of any CSC decision, was available. Carlson further maintains that he is entitled as a matter of law to a writ because Carlson is a classified employee, and that GEDCA violated the 60-day rule when it purportedly terminated him and GEDCA was now denying him use and enjoyment of his rights and office to which he was entitled. Sasai meanwhile submits that filing a petition for a writ of mandamus is the appropriate manner in which to appeal a decision from the CSC, therefore the Superior Court should not have denied the applications for alternate and peremptory writs but instead should have reached a decision on the merits.

II.

[14] A departure from the doctrine of law of the case is reviewed for abuse of discretion. *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998).

[15] A trial court's decision to deny a writ of mandamus will not be reviewed absent an abuse of discretion. *Haeuser v. Dep't of Law* , 97 F.3d 1152, 1154 (9th Cir. 1996). "A trial court

abuses its discretion when its decision is based on clearly erroneous factual findings or an incorrect legal standard." *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986).

[16] The United States Court of Appeals for the Ninth Circuit, in *Haeuser v. Department of Law*, expressed the standard of review for a denial of mandamus as follows:

> We ordinarily review the denial of mandamus for an abuse of discretion. Whether [one] has met the requirements for the issuance of mandamus, however, is a question of law reviewed de novo. In order for mandate to lie, "the applicant for the writ [must have] a present interest in the remedy he seeks and the respondent [must have] a present duty to perform the acts the applicant seeks to compel." When a petitioner has established compliance with the requirements of a writ, he may be entitled to a writ as a matter of right.

Haeuser, 97 F.3d at 1154-55 (citations omitted). Carlson and Sasai's Petition are based on the assertion that their termination by GEDCA was void, therefore we will review *de novo* the trial judge's decision that Petitioners had not met the requirements for the issuance of mandamus. *Id.*

III.

A. Law of the Case Doctrine

[17] Carlson and Sasai argue that denial of the Petition was in error because Judge Unpingco failed to follow the ruling made by Judge Manibusan when Judge Manibusan denied GEDCA's motion to dismiss. More specifically, Carlson and Sasai assert that the law of case as set forth by Judge Manibusan is that they did not have an adequate remedy based on CSC's lack of jurisdiction. They argue further that if Judge Unpingco failed to follow the law of the case established by Judge Manibusan, then Judge Unpingco would have abused his discretion and denial of the writ would have been inappropriate.

[18] GEDCA argues that Judge Manibusan never ruled that the CSC lacked jurisdiction to hear Carlson and Sasai's appeal to the CSC or that an appeal to the CSC was an inadequate

remedy. Instead, Judge Manibusan only ruled that he would not dismiss the writ petition because the CSC and the court proceedings were mutually proceeding. Thus, GEDCA contends that Judge Unpingco's later decision to deny mandamus was not contrary to the law of the case.

[19] "Under the 'law of the case' doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *People v. Orallo*, 2006 Guam 8 ¶ 5. A court may, in its discretion, depart from the law of the case if: (1) the earlier decision is clearly erroneous; (2) an intervening change in law has occurred; (3) evidence on remand is substantially different; (4) other changed circumstances exist; or (5) manifest injustice would otherwise occur. *People v. Hualde,* 1999 Guam 3 ¶ 13. "Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Id.* There was not a written order issued by Judge Manibusan explaining his denial of the motion to dismiss. Therefore, we must carefully review the transcript of the hearings held before Judge Manibusan to determine exactly what decision was rendered and whether Judge Unpingco was precluded from reconsidering an issue Judge Manibusan already decided.

[20] The hearings at which the law of the case was allegedly created involved GEDCA's motion to dismiss the Petition for Writ of Mandate. GEDCA filed the motion, arguing that Carlson and Sasai did not meet the requirements for issuance of a writ of mandamus since they had a plain, adequate and speedy remedy at law, and had not exhausted their administrative remedies. After the hearings on the motion, Judge Manibusan denied the motion to dismiss and retained jurisdiction of the Petition.

[21] Carlson characterizes Judge Manibusan's ruling at the hearing as follows: "[H]e was asserting jurisdiction to proceed on the Petition due to Carlson's lack of adequate remedy." Appellant Carlson's Opening Brief, p. 12 (April 17, 2006). A closer examination of the hearing transcript, however, does not support Carlson's characterization. Judge Manibusan stated: "[I]t really becomes questionable whether [Carlson] has a remedy to CSC which the Court can say he must pursue prior to bringing the action before the Court." Tr., Vol. II, p. 38 (Continued Ex Parte Application, Jan. 22, 2004). Contrary to Carlson's representations, Judge Manibusan did not hold that Carlson had no remedy. In fact, he acknowledged that Carlson was pursuing a simultaneous appeal of his dismissal to the Civil Service Commission. Judge Manibusan commented on the simultaneous appeal: "[I]f the CSC decides that it desires to continue to hear this matter, the Court is not going to prevent it from doing so because you have filed a petition in that forum." Tr., Vol. II, p. 39 (Continued Ex Parte Application, Jan. 22, 2004).

[22] From the record, it appears the trial court declined to dismiss the case because GEDCA had not adopted rules designed to protect its classified employees. Judge Manibusan said, "it appears based on the fact that GEDCA has no personnel rules, that it doesn't require Mr. Carlson to go there in the first instance to present an appeal for his termination." Tr., Vol. II, pp. 38-39 (Continued Ex Parte Application, Jan. 22, 2004). Judge Manibusan never explicitly ruled, however, that Carlson did not have an adequate remedy at law. Instead, he apparently denied GEDCA's motion to dismiss because of his belief that without GEDCA's promulgation of personnel rules, Carlson may not be required to proceed first with the CSC but may be able to directly pursue his claims in the Superior Court. The reason for his denial of the motion to dismiss was clearly "based on the fact that GEDCA has no personnel rules" such that Carlson

was required by law to "go there in the first instance." Tr., Vol. II, pp. 38-39 (Continued Ex Parte Application, Jan. 22, 2004).

[23] Carlson and Sasai *did,* however, avail themselves of an appeal to the CSC in the first instance. The CSC initially accepted their petitions, conducted a post audit on their claims regarding termination, heard the appeals, and ruled they were not hired through the merit system, and therefore, pursuant to section 2 of Public Law 26-121, the CSC did not have jurisdiction. Carlson and Sasai had an available administrative remedy, and in fact the two aggrieved employees voluntarily chose to pursue this remedy by petitioning the CSC.[10] Carlson and Sasai were not prevented from enjoying the procedural protections of the merit system, particularly the right to appeal their dismissal to an independent CSC. They could appeal the adverse employee action; the established mechanism for a classified employee was to file a petition with the CSC.

[24] Carlson's main argument on appeal relies on Judge Manibusan's statements on the bench, and Judge Unpingco's failure to follow them as "law of the case." Carlson argues Judge Unpingco himself seems to have interpreted Judge Manibusan's ruling as holding that Petitioner had no adequate remedy at law. Judge Unpingco said: "To my understanding Judge Manibusan made a ruling on [GEDCA's] motion to dismiss, from the bench, . . . den[ying] the motion . . . because GEDA had no operating rules and regulations and so therefore it was his contention . . . [that] there is no plain and adequate remedy available. . ." Tr., p. 3 (Petition for Alternative and Peremptory Writs of Mandate, Sept. 7, 2004). But this statement was simply Judge Unpingco's understanding of Judge Manibusan's previous ruling, and a careful examination of the record

[10] Whether the petitions to the CSC were adequate and met the due process requirements of Guam law will be further examined in subsection B, *infra.*

reveals that Judge Manibusan never held that there was not an adequate remedy at law.[11] Judge Manibusan stated: "If CSC decides it has jurisdiction and . . . makes a determination that Carlson is classified and his rights under the sixty days has not been violated then [GEDCA] can appeal that and come here or [Carlson] can appeal a determination that says [CSC has] jurisdiction." Tr., Vol. II, p. 41 (Continued Ex Parte Application, Jan. 22, 2004). "[T]he intent of today's ruling is not to tell Civil Service that it cannot proceed." Tr., Vol. II, p. 44 (Continued Ex Parte Application, Jan. 22, 2004). Judge Unpingco himself in his Decision and Order later clarified that Judge Manibusan's ruling was not entirely dispositive of whether the CSC could assume jurisdiction. Judge Unpingco's extraneous oral statement that Judge Manibusan did not dismiss the case because "there is no plain and adequate remedy available. . ." Tr., p. 3 (Petition for Alternative and Peremptory Writs of Mandate, Sept. 7, 2004), is not a holding upon which we place any weight and therefore we reject Carlson's argument that based on the prior ruling by Judge Manibusan, the parties agreed CSC had no jurisdiction to proceed.

[25] From the record before us, we cannot say it was law of the case that Carlson and Sasai had no adequate remedy at law, and their reliance on the law of the case doctrine is misplaced. If the court did not adopt the position of the plaintiff or the defendant, a position cannot be treated as law of the case: "This Court did not adopt the Plaintiff's position, neither did it adopt the defendant's. There is no law of the case in this regard." *S.J. Gargrave Syndicate at Lloyds v. Black Constr. Corp.,* Docket No. CV-03-00009, 2006 WL 1815735, *2 (D. Guam, June 29, 2006). The law of the case doctrine may apply only if the position was adopted by the court. In

[11] There can also be no detrimental reliance by Sasai and Carlson on Judge Unpingco's understanding since the period for seeking judicial review of the CSC decision expired before Judge Unpingco even made his statement.

this case, Judge Manibusan did not expressly rule that there was no adequate remedy at law or that the CSC did not have jurisdiction, so this proposition did not become the law of this case.

[26] In fact, on the very same day that Carlson and Sasai were arguing their lack of remedy to the Superior Court, they were availing themselves of an available remedy before the CSC. Carlson maintains the CSC hearing was nonetheless an inadequate remedy. He argues, without citation of authority, that "[t]he fact that an agency may desire to act outside its jurisdiction is not equivalent to providing an adequate remedy." Appellant Carlson's Opening Brief, p. 13 (April 17, 2006). 0 Appellant Carlson's Opening Brief, p. 13 (April 17, 2006). Moreover each of them had a further legal remedy that was available, namely a judicial review of the CSC decision.

B. GEDCA's Failure to Adopt Personnel Rules

[27] Carlson and Sasai next argue that the Superior Court erred in denying the Petition for failing to exhaust administrative remedies, pointing to the fact that GEDCA had not yet adopted personnel rules pursuant to 4 GCA § 4105.[12] They assert that the failure to adopt rules results in a lack of "guidelines to govern the selection, promotion, performance, evaluation, demotion, suspension and other disciplinary action of classified employees." Appellant Carlson's Opening Brief, p. 19 (April 17, 2006).

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[12] Section 4105 of Title 4 provides,

> Rules subject to criteria established by this Chapter governing the selection, promotion, performance, evaluation, demotion, suspension and other disciplinary action of classified employees shall be adopted by the . . . Board of Directors for the Guam Economic Development Authority . . . with respect to personnel matters. . . .
>
> Such rules shall, to the extent practicable, provide standard conditions for entry into and the other matters concerning the government service. The personnel rules adopted for the Guam Economic Development Authority . . . shall require that all their classified employee appeals be heard by the Civil Service Commission ('Commission').

4 GCA § 4105(a).

[28] Although GEDCA admits it had not adopted its own personnel rules at the time GEDCA sought to terminate Carlson and Sasai, this failure alone does not determine the rights of Carlson and Sasai. The existence or non-existence of personnel rules does not define the rights of a classified employee. Rights of a classified employee emanate not only from whatever statutory or regulatory provisions are in place, but also from the United States Constitution and the law interpreting it. *See Board of Regents v. Roth,* 408 U.S. 564 (1972); *see also* 48 U.S.C. §§ 1421b(e) and 1421b(u); *People v. Angoco*, 2006 Guam 18 ¶ 1 n.2 (stating that the Fourteenth Amendments of the Constitution of the United States . . . [is] made applicable to Guam by 48 U.S.C. § 1421(b)(u)).

[29] There is no doubt that GEDCA attempted to use the Department of Administration's Personnel Rules and Regulations (DOA Rules) when it initially sought to terminate Carlson and Sasai. The focus should not be on whether GEDCA adopted its own personnel rules, but whether GEDCA's use of the DOA Rules violated any of Carlson's and Sasai's due process rights if Carlson and Sasai were deemed to be classified employees. The question is whether Carlson and Sasai were deprived of due process when they appealed their termination to the CSC.

[30] As an issue of law, we conduct a *de novo* review whether the use by GEDCA of the DOA Rules and appeal to the CSC by Carlson and Sasai provided the due process guarantees required for classified employees. *Haeuser*, 97 F.3d at 1154-55 (citations omitted). If state law grants a claim of entitlement to continued employment absent sufficient cause for discharge, that state employee has been granted a property interest that demands the procedural protections of due process. *Woodard v. Andrus*, 419 F.3d 348. 354 (5th Cir. 2005); *see also Bd. of Regents v. Roth,*

408 U.S. 564 (1972) ("[O]ne cannot be deprived of a property right or a liberty interest without due process of law").

[31] The Ninth Circuit has interpreted Guam's Organic Act right to a merit system as "designed to secure adequate protection to public career employees from political discrimination." *Haeuser v. Civil Serv. Comm'n*, 97 F.3d 1152, 1156 (9th Cir. 1996) (quoting *State ex rel. Murtagh v. Dep't of City Civil Serv.*, 42 So. 2d 65, 70 (1949)). The *Haeuser* case adopted a definition of the government of Guam's merit system from *Webster's II: New Riverside University Dictionary* 743 (1988) as '"[a] system of promoting and appointing civil service personnel on the basis of merit, determined by competitive examinations." *Haeuser*, 97 F.3d at 1155. Therefore, the key to the government of Guam's merit system, as with most merit systems, is competitive hiring.

[32] The Guam Legislature incorporated competitive hiring as an integral part of Guam's merit system in sections 4101 and 4106 of Title 4 Guam Code Annotated. Section 4101(a) states: "All personnel actions, including appointments and promotions, shall be based, insofar as practicable, on competitive practical tests and evaluations." 4 GCA § 4101 (2005). Section 4106 states: "The personnel rules provided for in § 4105 of this Chapter shall provide procedures for their employment of persons on the basis of merit, and shall include an orderly and systematic method of recruitment and the establishment of qualified lists for employment purposes." 4 GCA § 4106 (2005). Under Guam's merit system, if one is hired by competing with other eligible persons for the position, that person has been hired as a classified employee (unless hired in the excepted service as specified in 4 GCA § 4102).[13] Hiring through a

[13] Once hired into the classified service, one cannot be deprived of such status by additional conditions,

competitive process is an acknowledgment that all qualified persons should be given a right to apply for a position for which they may qualify.

[33] An employee who has been hired through the competitive hiring procedures may appeal an adverse action taken to suspend, demote or dismiss the classified employee to the CSC.[14] 4 GCA §§ 4105, 4403, and 4406; *see also* "Rules of Procedure for Adverse Action Appeals"(herein referred to as "CSC Rules"), effective March 5, 2002. Employees from the classified service retain a right to appeal their dismissal to the CSC "to secure adequate protection . . . from political discrimination." *Haeuser v. Civil Serv. Comm'n*, 97 F.3d 1152, 1156 (9th Cir. 1996). The CSC is designed as part of the merit system to ensure that there is notice and an opportunity to be heard, as provided by the Fourteenth Amendment Due Process clause of the Constitution. Due process protection is an integral part of the merit system. "[I]f employees are exempted from the procedural protections of the merit system-particularly the right to appeal their dismissal to an independent civil service commission-the unenforceable, abstract right not to be fired without cause does little good." *Id.* at 1157.

[34] However, as the *Haeuser* court noted, "an employee who is exempted from the classified service has no property interest to be protected and thus no right to judicial review if

such as the one imposed in the case of *Roberto v. Bordallo*, 839 F.2d 573 (9th Cir. 1988), in which the governor of Guam attempted to de-classify a government of Guam employee who competed for her position and was thus classified. The Ninth Circuit in that case held that 4 GCA § 4102 lists all unclassified positions for the government of Guam, and if the position is not enumerated therein, a person who competed for that position would be a classified employee. *Roberto*, 839 F.2d at 574. "The statute contains no further requirements for qualifying as a person in the classified service." *Id.*

[14] Among those employees specifically excepted from appeal to CSC are judicial branch classified employees and academic personnel of the Guam Community College and the University of Guam. *See* 4 GCA § 4105 (b) and § 4403 (h).

terminated." *Haeuser*, 97 F.3d at 1158 n.3.[15] An appeal of a demotion, dismissal or suspension to the CSC is a right vested only in classified employees. *See* 4 GCA § 4403 ("the jurisdiction of [CSC] shall not extend . . . to any position or person, appeal or proceeding of whatever kind or description if the position is denominated 'unclassified' . . . ").

[35] In order to deprive an employee of a job secured in the civil service through competition, the employee must be afforded some kind of hearing and his dismissal must satisfy the due process requirements that have been set out by the United States Supreme Court in such cases as *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge,* 424 U.S. 319 (1976). The latter case requires that a court consider three factors in determining whether requirements of due process have been invoked:

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

[36] *Mathews*, 424 U.S. at 335. The specific requirements of a hearing are not also set in stone; "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Conn.*, 401 U.S. 371, 378 (1970).

[37] If we apply the *Mathews* test to ascertain whether the "borrowed" use of the DOA Rules by GEDCA meets due process requirements, an initial consideration is whether there is a risk of

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[15] Public Law 26-121 (August 16, 2002), which instructs that the Civil Service Commission is not to have jurisdiction over unclassified employees, merely codifies what case law already held – that without classification status, the employee who has not competed for his job cannot force an administrative body to provide him with the extra layer of protection provided to classified employees.

an erroneous deprivation of a property interest.[16] The DOA Rules contain a panoply of rights for employees who are suspended, demoted or dismissed, specifically, Rules 11.000 to 11.500. We cannot say that there is a risk of an erroneous deprivation, given the duties and responsibilities of the CSC set forth in Title 4 and the DOA Rules and the procedural safeguards contained within the CSC Rules. Likewise, application of any additional or substantive procedural safeguards would likely not be of significant value given the breadth and detail of the existing DOA Rules and CSC Rules. Examination of the government's interest in the processes allowed under the "borrowed" rules also suggests a due process violation is not implicated. The fiscal and administrative burden entailed with adopting substitute or additional procedures militates in favor of finding that due process was satisfied when GEDCA borrowed the DOA Rules and the CSC adhered to the CSC Rules. Consideration of the three factors set forth in *Mathews* instructs that the requirements of due process have been satisfied.

[38] GEDCA's "borrowed" use of the DOA rules, while not ideal, did not provide Carlson and Sasai with less due process than they would have received were they forced to proceed under different rules. Carlson and Sasai were themselves permitted to utilize the "borrowed" DOA Rules to their benefit, i.e., they were able to file their appeals with the CSC based on these Rules.

[39] We are not persuaded by the argument that Carlson and Sasai were deprived of due process of law because even in the absence of GEDCA-adopted personnel rules, Carlson and Sasai have failed to show how they have suffered from a lack of due process. In considering the petitions filed by Carlson and Sasai appealing their terminations, the CSC utilized properly

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[16] A property interest is present if Carlson and Sasai were hired through a competitive process; but if they were not hired competitively, then there is "no property interest to be protected and thus no right to judicial review if terminated." *Haeuser,* 97 F.3d at 1158 n.3 (citing *United States v. Fausto,* 484 U.S. 439 (1988)).

promulgated rules and regulations, which afforded Carlson and Sasai the due process protections of any other classified employee in the government of Guam. Carlson and Sasai have not alleged, and the record does not show, that these regulations deprived them of any right that may have been afforded to them under the due process guarantees of the Fourteenth Amendment of the U.S. Constitution.

[40] Carlson's argument that, "as a matter of law, the failure of GEDCA to adopt personnel rules and regulations eliminated in its entirety any finding or argument that Carlson was removed in accordance with the laws of Guam and GEDCA's enabling legislation" is also rejected. (Appellant Carlson's Opening Brief, p. 26, April 17, 2006). We know of no law dictating that a GEDCA employee's removal from employment must be pursuant to GEDCA specific legislation or regulations. The statement that the power to terminate a GEDCA employee is expressly conditional on GEDCA's adoption of personnel regulations pursuant to 4 GCA §§ 4105 and 4106 is not plausible. The plain language of 12 GCA § 50104(i)[17] does not require retention of employees absent the promulgation of these regulations. *See Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23 ("In cases involving statutory construction, the plain language of the statute must be the starting point."). Title 12 GCA § 50104(q)(2005) further provides that GEDCA has the

[17] The full text of 12 GCA § 50104(i) (2005) reads:

> (i) To employ such employees to provide such clerical and technical assistance as may be necessary for the conduct of the business of the Corporation; to delegate to them such powers and to prescribe for them such duties as may be deemed appropriate by the Corporation; to fix and pay such compensation to them for their services as the Corporation may determine without regard to the provisions of the personnel and compensation law; to require bonds from such of them as the Corporation may designate, the premiums therefor to be paid by the Corporation, and to remove and discharge such employees and other clerical and technical assistants, pursuant to the provisions of the personnel regulations adopted pursuant to the provisions of 4 GCA § 4105 and § 4106.

power "[t]o take such action and carry on any other operations and do all that may be necessary or appropriate to carry out the powers and duties herein or hereafter specifically granted to or imposed upon it." The plain language of the statute must be the starting point of any statutory construction. There is nothing contained within section 50104 that prevents GEDCA from terminating any employees absent the promulgation of GEDCA's personnel rules. Indeed it is inconceivable that a public employer who has the right to hire an employee would not have the concomitant right to terminate that employee for cause simply because the agency employer failed to adopt personnel rules. The law requires that a public employee who enjoys merit system protection is entitled to due process of law before the property right of their job is taken from them. *See Roth,* 408 U.S. 564. The law does not require that such employee cannot be terminated in the absence of adopted rules by the employing agency. There has been no showing that Carlson and Sasai were denied due process protection.

[41] If Carlson and Sasai were classified employees, then section 4105 requires that their appeals be heard by the CSC: "[GEDCA] shall require that all their classified employee appeals . . . be heard by the Civil Service Commission," so a hearing pursuant to the CSC's Rules and Procedures for adverse action appeals would have sufficed under the Supreme Court tests for due process set forth in *Boddie* and *Roth.*[18] Adoption or non-adoption of rules by GEDCA would also not have conferred jurisdiction on the CSC if Carlson and Sasai were unclassified. If these

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[18] The CSC's post audit concluded that neither Carlson nor Sasai were classified because they had not been hired through a competitive process. Specifically, the CSC found: "Employee [Carlson] did not complete for his initial and subsequent positions that he has held with GEDCA prior to his termination." ER, tab 7, p. 2 (Decision and Judgement of the Civil Service Commission in Personnel Action Appeal Case No. 0401-AA01); "Employee [Sasai] did not compete for his initial and subsequent positions that he has held with GEDCA prior to his termination." ER, tab 8, p. 2 (Decision and Judgement of the Civil Service Commission in Personnel Action Appeal Case No. 0312-AA26). We have not been asked to review this finding (as will be elucidated *infra*), but Guam's

employees were unclassified, the existence or non-existence of GEDCA personnel rules and regulations would be irrelevant. Therefore, there is no support to the argument that the lack of GEDCA personnel rules and regulations prevented Carlson and Sasai from having to first appeal their dismissals to the CSC.

[42] Judge Manibusan's denial of the motion to dismiss because of GEDCA's failure to adopt personnel rules was neither compelled nor prejudicial. The fact that GEDCA personnel rules did not exist was an unnecessary basis to determine whether Carlson and Sasai "had a remedy to CSC which . . . [they] must pursue prior to bringing the action before the court." Tr., Vol. II, p. 38 (Continued Ex Parte Application, Jan. 22, 2004). However, this court can affirm a trial court's decision if the result was correct but made on the wrong basis. *Koyo Seiko Co., Ltd., v. United States*, 95 F.3d 1094, 1099 (Fed. Cir. 1996); *Spokane County v. Air Base Housing Inc.*, 304 F.2d 494, 497 (9th Cir. 1962); *Lum Wan v. Esperdy*, 321 F.2d 123, 125-26 (2d Cir. 1963).

[43] There was not a compelling reason for Judge Manibusan to believe that Carlson and Sasai may not have an adequate remedy at law. This is particularly true because Carlson and Sasai were simultaneously pursuing their remedy at law – the administrative appeal of their terminations to the CSC. Therefore, Judge Manibusan's statement regarding the questionable appeal to the CSC – and whether it must be pursued first – was not necessary. Judge Manibusan's statement was not even conclusive, since he himself conceded that the CSC may well have jurisdiction, even while he declined to dismiss the case, saying: "[I]f the CSC decides that it desires to continue to hear this matter, the Court is not going to prevent it from doing so because you have filed a petition in that forum." Tr., Vol. II, p. 39 (Continued Ex Parte

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merit system is clear that if a public employee does not compete for the position, classified status is not endowed

Application, Jan. 22, 2004). Carlson and Sasai also took advantage of the right to appeal their dismissal to an independent CSC, which undertook a post audit on their claims and found they did not compete for their positions.

[44] We acknowledge the prior Guam case of *Brown v. Civil Service Commission,* both the opinion of the District Court of Guam Appellate Division, Docket No. CV-85-0081A, 1984 WL 48861 (D. Guam App. Div. October 22, 1984) and the Ninth Circuit opinion, 818 F.2d 706 (9th Cir. 1987). In *Brown*, the school board failed to adopt personnel regulations as required under the same law requiring GEDCA to do so, 4 GCA § 4105. The Appellate Division case stated that an agency's personnel rules must be "scrupulously adhered to," even if those rules are more generous than what the Constitution requires. *Brown*, 1984 WL 48861 *3. In analyzing the principle that an agency must adhere strictly to its own rules, the Appellate Division concluded that later school board regulations adopted by Executive Order were null and void, leaving the previously promulgated regulations in effect. *Id.* at *2.

[45] The Ninth Circuit took a different approach in its review of *Brown*, reaching the same result: regulations which were not properly promulgated may be disregarded. However, the Ninth Circuit reasoned that later-promulgated regulations (governing the appeal of termination of employment) were irrelevant as unrelated to the facts. Under the facts, the only regulations invoked were those promulgated under section 4105, governing terminating the employment in the first place. For these reasons, the Ninth Circuit affirmed the Appellate Division.

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upon that employee.

[46] We also recognize the District Court of Guam Appellate Division case *Miles v. Borja*, wherein the Appellate Division stated that it is illegal for an agency to not promulgate regulations when required by law: "The use of the term 'shall' in § 4106 contains a clear legal mandate for the appellants to promulgate regulations governing resignation. This affirmative obligation imposes therefore an explicit duty on appellants to issue regulations and policies on this matter." *Miles v. Borja*, Docket No. CV-85-0081A, 1986 WL 68917 *3 (D. Guam App. Div. 1986). The violation emanating from the failure to adopt regulations is not, however, automatically a violation of due process: "It has been recognized that a permanent employee has a claim of entitlement to his employment beyond a mere expectancy and thus is entitled to due process rights upon termination." *Id.* In order to come before a court to seek redress based on an agency's failure to promulgate rules, the aggrieved must allege a violation of those due process rights. Failure of an agency to adopt regulations is not actionable absent some damage from the due process violation, and none is alleged here. Carlson and Sasai always had the right to appeal the CSC decisions to the Superior Court of Guam. Carlson and Sasai were not deprived of that right, and the failure of GEDCA to promulgate personnel rules had no effect on that right. Carlson and Sasai have not alleged a lack of due process through the use of the "borrowed" rules and regulations, only at the failure of GEDCA to have their own.

C. The Petition as an Appeal of the CSC Decision

[47] In denying the Petition, Judge Unpingco found that "Petitioners have not yet appealed the ruling of the CSC decision, more than a year later. Yet they have provided no showing as to why they were unable to do so, or why appellate review of the CSC decision here would have been inadequate." ER, tab 28, p. 11 (Decision and Order, June 2, 2005). Judge Unpingco ruled that

mandamus should issue only when there is not a plain, speedy and adequate remedy and "because the petitioners did not avail themselves of the remedy of appealing the CSC decision as a matter of law for judicial review, mandamus is not the appropriate relief." *Id.* p. 12. Quoting from our decision in *Bondoc v. Workers' Compensation Commission*, 2000 Guam 6, Sasai asserts that a writ of mandate is the appropriate vehicle for relief from a decision rendered by the CSC and, therefore, the court's decision as a matter of law was erroneous. GEDCA submits that the Petition should not be considered an appeal of the CSC decision because the CSC is not a party to the writ action and the Petition does not specifically request review of the CSC Decision and Judgment.[19] Moreover, the classification system set forth in 4 GCA § 4102 is not even applicable since Carlson and Sasai are employees of GEDCA and not the government of Guam. We must therefore address whether the merit classification system applies to GEDCA employees and if Judge Unpingco erred in not treating the Petition as a petition for judicial review of the CSC decision.

[47] GEDCA argues it is not legally an instrumentality of the government of Guam, and the classification system established by the Organic Act is inapplicable to GEDCA employees. GEDCA also made this argument below – that since it is not a public instrumentality, the merit

[19] Rule 11.7.8 of the Rules of Procedure for Adverse Action Appeals of the Civil Service Commission of the government of Guam, effective March 5, 2002 (hereinafter "CSC Rules") allows for "[j]udicial review of the judgment of the CSC . . . by filing appropriate pleadings with the Superior Court of Guam within thirty (30 days) after the last day on which reconsideration can be granted." Rule 11.7.7 of the same Rules provides that the "filing of a motion to reconsider or amend does not affect the time limit imposed by law to file a Petition for Judicial Review with the Superior Court of Guam." GEDCA argues that Carlson and Sasai failed to file "a complaint with the Superior Court within forty to sixty days" after the CSC decision in accordance with Rules 11.7.7 and 11.7.8. Appellees' Opening Brief p. 10 (May 30, 2006). Clearly, if the Petition is deemed to be a Petition for Judicial Review of the CSC decision, the Petition would be timely filed. Carlson's and Sasai's cases were decided by the CSC on February 10, 2004, Carlson filed the Petition on March 1, 2004 and Sasai filed this joinder on March 10, 2004. ER, tab 6. Both of these filings occurred within thirty days of the CSC decision without regard to any period for reconsideration.

system was not meant to extend to them. This court has confirmed that GEDCA is not considered an instrumentality, an agent for agency purposes, of the government of Guam, *Guam Economic Development Authority v. Island Equip. Co., Inc.*, 1998 Guam 7 ¶ 7, relying on *Bordallo v. Reyes*, 763 F.2d 1098, 1103 (9th Cir. 1985) and *Laguana v. Guam Visitor's Bureau*, 725 F2d. 519, 521 (9th Cir. 1984), though GEDCA retains its characteristic as a public corporation (owned by the public).

[48] The Guam Legislature is permitted by the Organic Act to dictate the terms of a merit system for government of Guam employees. *See Haeuser v. Dep't of Law*, 97 F.3d at 1155. Generally, any merit system is based on the recognized maxims set forth in cases such as *Elrod v. Burns,* 427 U.S. 347 (1976). In *Elrod*, eemployees who held a confidential or policy-making position were deemed not to be protected from the vagaries of political life, while those who performed non-confidential or non-policymaking duties could not be ousted from their jobs for political reasons. *Id. at* 367-368. This is how a merit system is generally established. Civil servants are to be protected by the political winds of change in order to provide continuity, but there is a countervailing need to ensure that the elected official is able to carry out policy directives, and for this, the elected official is able to appoint employees at will, whose employment is not meant to be protected by a merit system. Section 1422c(a) of the Organic Act, which directs the government of Guam to establish a merit system, has been interpreted by the Ninth Circuit in *Haeuser*, which stated that "Congress's command to the Guam legislature to set up a merit system for government employees is explicit: the legislature *shall* set up a merit system and, as far as practicable, appointments *shall* be made in accordance with such merit system." *Haeuser*, 97 F.3d at 1156 (emphasis in original).

[49] GEDCA was created by an act of the Guam Legislature, and even though GEDCA is not an instrumentality of the government of Guam for purposes of agency law, the Guam Legislature has the power to legislate a merit system for employees of the non-instrumentality corporations that are owned by the people of Guam, such as GEDCA. One of the ways that the Guam Legislature has exercised that authority is by requiring that even non-instrumentality public corporations extend merit system protection to its classified employees. This directive is found in 4 GCA § 4105, where GEDCA is mandated to adopt rules and regulations to extend merit system protections to its classified employees. The Guam Legislature clearly intended to extend merit system protection to GEDCA employees who are classified, that is, who competed for their job. Therefore, we reject GEDCA's argument that the distinction between classified and unclassified employees is not applicable to GEDCA's employees.

[50] This conclusion does not, however, necessitate a finding that Carlson and Sasai were classified employees or, as Carlson and Sasai argue, that all personnel from GEDCA, other than positions set forth in 4 GCA § 4102(a), are classified. GEDCA is not an instrumentality of the government of Guam and section 4102 expressly applies only to offices and employment in the government of Guam. *Guam Econ. Dev. Auth.*, 1998 Guam 7 ¶ 7; *see also Bordallo v. Reyes,* 610 F. Supp. 1128, 1133 (D. Guam 1984), *aff'd* 763 F.2d 1098 (9th Cir. 1985) (holding that employees of public corporations are not employees of the government of Guam). Because GEDCA employees are not, legally speaking, "government of Guam employees," then the provisions of § 4102[20] do not apply to GEDCA.

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[20] Section 4102 provides in relevant part that: "All offices and employment in the Government of Guam . . . shall be divided into classified and unclassified services as follows:

> (a) The unclassified service shall include [certain enumerated] positions . . .

[51] Nonetheless, section 4105 requires that the autonomous agencies of the government of Guam (as well as the two agencies which have been held as non-instrumentalities, GVB and GEDCA) adopt rules "governing the selection, promotion, performance, evaluation, demotion, suspension and other disciplinary action of classified employees." 4 GCA § 4105 (2005). Section 4105 makes clear that if a merit system is extended to GEDCA employees, it must be accompanied by rules implementing the merit system. We have already addressed the consequences of GEDCA's failure to adopt these rules, and concluded that the failure to adopt them, while not condoned, did not necessarily deprive Carlson and Sasai of due process of law as contemplated by the United States Supreme Court and Constitution. If GEDCA hires employees into the classified service, section 4105 requires that rules be adopted concerning the selection, evaluation, promotion, demotion and suspension of other disciplinary action of such employees, at least to the extent that a classified employee's due process rights are not threatened.[21] However, GEDCA's failure to adopt such regulations does not mean that any classified employees of GEDCA are not protected – this would be unfair and not in compliance with the Guam Legislature's mandate that a merit system be adopted for classified employees. We

(b) The classified service shall include all other positions in the government of Guam.

4 GCA § 4102 (2005).

[21] This conclusion is underscored by the fact that in Public Law 26-76, the Guam Legislature merged non-governmental Guam Economic Development Authority with an agency of the Government of Guam, the Department of Commerce. Certain employees who had been hired by the Department of Commerce were classified government of Guam employees before this merger because the Department of Commerce was a line agency of the government of Guam. As such, they enjoyed the merit system protections afforded to them under the Organic Act and 4 GCA § 4102 for the hiring of classified workers. When Department of Commerce employees were transferred to the reorganized, non-governmental GEDCA, they did not lose their classified status, for to do so would have violated the very rights that the merit system is meant to protect. GEDCA thus absorbed classified workers, and must provide the transferred employees with due process before taking away their property interest. *See Haeuser*, 97 F.3d at 1158; *see also Roberto,* 839 F.2d 573 (9th Cir. 1988) (holding that once classified, an employee cannot lose her classification by a non-voluntary transfer into an agency that is reconstituted in any way).

simply distinguish that section 4102 does not apply to GEDCA, but section 4105 by its express terms does apply.

[52] The CSC determined that Carlson and Sasai did not compete for their initial and subsequent positions with GEDCA and thus were not entitled to an appeal to the CSC. In order to avoid any binding effect of the CSC's decision, Carlson and Sasai must have challenged that decision pursuant to Rule 11.7.8 of the Rules of Procedure for Adverse Action Appeals of the Civil Service Commission and 4 GCA § 4406 (which states that, "[t]he decision of the Commission . . . shall be final, but subject to judicial review"). *See State ex rel. Iowa Dep't of Natural Res. v. Shelley,* 512 N.W.2d 579, 581 (Iowa Ct. App. 1993) (holding that because the aggrieved did not appeal the administrative order within thirty days, it became a final agency action, therefore the order was entitled to *res judicata* effect as if it were a judgment of the court). Accordingly, we now address the argument that the Petition should have been treated as an appeal challenging the CSC's findings.

[53] Carlson and Sasai sought a writ from the Superior Court in the first instance to reverse GEDCA's actions on the basis that they were classified employees and GEDCA failed to comply with its personnel rules and regulations by "fail[ing] to comply with the Authority's specific procedures and policies governing the separation of employees by dismissal" and further "fail[ing] to state the specific facts found upon which Petitioner's termination was based; fail[ing] to inform Petitioner of his right to appeal. . . ." ER, tab 1 ¶ 24 (Petition for Alternative and Peremptory Writs of Mandate.) Prior to seeking the writ, Carlson and Sasai had petitioned the CSC to hear an appeal of their terminations. Thus, Carlson and Sasai pursued two mutually exclusive avenues for relief: (1) an adverse action appeal with the CSC; and (2) a direct petition

to the Superior Court for reinstatement due to the failure to comply with the law and GEDCA personnel rules.

[54] Subsequently GEDCA admitted it had not adopted its own personnel rules, and the CSC declined jurisdiction, finding that Carlson and Sasai did not compete for their positions and the CSC was prohibited from hearing appeals from employees who were not hired through the merit system. Carlson and Sasai chose not to challenge the CSC's findings. They could have amended their writ petitions to add a prayer for relief that the Superior Court review the CSC decision, or they could have even re-named their petitions as being for Judicial Review and specifically named the CSC as a party. They did not, and instead chose to amend the original petition and file a joinder without specifically invoking their right to appeal the CSC decision.

[55] The failure to name the CSC as a party in a Superior Court case challenging an employment termination has been held to be fatal to the claim that it was an appeal of the CSC decision. In *Rios v. Sgambelluri*, the aggrieved employee first appealed his adverse action with the CSC but lost. *Rios v. Sgambelluri*, Docket No. CV-90-0037A, 1991 WL 336905 at *1 (D. Guam App. Div. June 10, 1991). Subsequently, he "did not appeal the CSC decision; rather, he instituted an action for declaratory relief in the Guam Superior Court." *Id.* Since the aggrieved employee chose not to appeal the CSC decision, he "could not obtain the relief he sought from the parties he chose to sue . . . [a]lso, no claim of any sort was made against the Civil Service Commission, so it could not provide the relief appellant sought." *Id.* at *2. Similarly, in this case, since Carlson and Sasai have not named the CSC as a party to the proceeding, we decline to construe the Petition as an appeal of the CSC decision.

[56] The Petition did not even vaguely reference that the Superior Court should review the decision of the CSC. The Petition did not appeal the CSC's findings: (1) that Carlson and Sasai did not compete for the initial and subsequent positions each of them held with GEDCA prior to termination; (2) that the positions were not lawfully created by the CSC; and (3) that the CSC did not have jurisdiction to hear the appeals from employees who were not hired through the merit system pursuant to section 2 of Public Law 26-121. The Petition does reference the CSC's ruling and also alleges harm due to GEDCA's failure to adopt personnel regulations. However, in the prayer for relief, Carlson asks only that he be reinstated in his position on the basis that he has no adequate remedy for relief in the absence of GEDCA regulations. Sasai did not mention in his joinder that the CSC found he did not compete for his position. Sasai said only, "[t]he [CSC] issued a Decision & Judgment . . . holding that the CSC does not have jurisdiction." ER, tab 8 ¶ 19 (Joinder of Co-Petitioner David H. Sasai to First Amended Petition). While Sasai argues that he is classified, he similarly asked the Superior Court to grant the writ because GEDCA failed to adopt personnel rules and regulations, and the GEDCA Administrator failed to provide a specific statement of the charges. Therefore, he asserted he had no remedy at law and was entitled to relief. Carlson and Sasai did not allege any due process violation and did not join the CSC as a party. There was no visible intention on the part of either Carlson or Sasai to seek Superior Court review of the decision of the CSC. The face of the Petition does not indicate or even suggest an appeal of the CSC's decision.

[57] Sasai nevertheless argues that under *Bondoc v. Worker's Comp. Comm'n*, 2000 Guam 6, a writ of mandate is the appropriate vehicle for relief from a decision rendered by the CSC; therefore, the trial court should have entertained the Petition as such an appeal. We noted in

Bondoc: "We . . . recognize that pursuant to 5 GCA § 9241, a Writ of Mandate was the proper vehicle for relief." *Id.* ¶ 6 n.2. In *Bondoc*, petitioner appealed a decision of the Worker's Compensation Commission by filing a Petition for Writ of Review in the Superior Court, which denied the petition. However, the *Bondoc* court essentially equated a petition for writ of review with a petition for a writ of mandamus, and held its standard of review to be the same. *Id.* ¶ 6. *Bondoc* stated that under 7 GCA § 31201, the "writ of mandamus may be de-nominated a writ of review" and the court reviewed the writ of review under the "same analysis as a 'Writ of Mandamus.'" *Id.* at 6 n.3.

[58] The decision in *Bondoc* to treat the writ of review as a writ of mandamus arose from the conclusion that Worker's Compensation Commission decisions are appealed under Guam's Administrative Adjudication Law, 5 GCA § 9241, which sets forth the procedure for reviewing administrative adjudications under Guam law. The *Bondoc* court applied the review provisions of Guam's Administrative Adjudication Law ("AAL") to its review of the Worker's Compensation Commission Decision and Order, because under the AAL, "*any* agency decision" is subject to judicial review by a party adversely affected by it.[22] 5 GCA § 9240 (2005) (emphasis added). The judicial review procedure of Guam's AAL found at 5 GCA § 9241 provides that "[j]udicial review may be had by filing a petition in the Superior Court for a writ of mandate in accordance with the provisions of the Code of Civil Procedure" found at 7 GCA § 31201 *et seq.* 5 GCA § 9241 (2005). Sasai assumes that since review of an order of the Worker's Compensation Commission is triggered under the AAL by filing a petition for writ of

[22] Title 5 GCA § 9240 (2005) provides: "[j]udicial review may be had of any agency decision by any party affected adversely by it. If the agency decision is not in accordance with law or not supported by substantial evidence, the court shall order the agency to take action according to law or the evidence."

mandate, *Bondoc* requires the filing of a Petition for Writ of Mandate to appeal any other agency action. We decline to follow Sasai's interpretation of *Bondoc*.

[59] Rather, we find that where the agency's specific legislation directs how the agency action is to be judicially reviewed, then that agency's law should govern how one is to seek judicial review of that agency's action. For instance, review of a compensation order under Worker's Compensation law is available if the order is not in accordance with law. 22 GCA § 9122 (2005). In order to suspend or set aside a compensation order, the aggrieved party is directed under section 9122 to initiate a case in the Superior Court "through injunction proceedings, mandatory or otherwise" against the Commissioner. *See generally Fagan v. Dell'Isola*, 2006 Guam 11 ¶ 12 n.5.

[60] In similar fashion to Worker's Compensation Commission appeals, the law establishing the CSC governs appeals to the CSC from adverse actions and provides for judicial review of the CSC decisions. *See* 4 GCA §§ 4105(b), 4403(b), and 4406 (2005). Therefore resorting to Guam's AAL for review procedures is not appropriate in this case. Title 4 GCA § 4406 (2005), entitled "Adverse Action Procedures and Appeals," provides that the "decision of the [CSC] or appropriate entity shall be final, but subject to judicial review."

[61] The exercise of this right of judicial review has developed on Guam in an *ad hoc* manner. When an aggrieved employee sought judicial review of a CSC decision in *University of Guam v. Guam Civil Service Commission*, the Appellate Division noted that section 4406 provides only guidance. The court stated, "the statute is . . . silent on the procedures for obtaining review." *Univ. of Guam v. Guam Civil Serv. Comm'n*, Docket No. CV-94-00018A, 1995 WL 222212 at *1 (D. Guam App. Div. Feb. 10, 1995). In that case, since the statute was silent and CSC had

not adopted regulations for review, the court held that it was appropriate to impose a judicially-created statute of limitations for appeal of a decision of the CSC. "On appeal, we readily acknowledged that the Superior Court had authority to adopt that rule, although we pointed out that it would have been preferable to do so by rule-making" *Univ. of Guam*, 1995 WL 222212 at *3.

[62] The *University of Guam* case relied on the prior CSC case of *Tyndzik v. Guerrero*, Docket Nos. CV-92-00023A & CV-92-00031A, 1992 WL 245889 (D. Guam App. Div. Sept. 11, 1992), which found, in section 187 of the Guam Code of Civil Procedure (now 7 GCA § 7117),[23] authority to judicially adopt a rule. On this basis, the Appellate Division imposed a judicially-created rule that a CSC decision had to be appealed within 30 days of its issuance. *Id.* at *1. In *Tyndzik*, this 30-day deadline was not dispositive because the court refused to apply the 30-day limit retroactively for obvious reasons of due process and *ex post facto* laws. *Id.* at *2. However, *Tyndzik* is significant as the first case to acknowledge that the court has the power to designate "any suitable process or mode of proceedings . . . most conformable to the spirit of this Title." 7 GCA § 7117 (2005).

[63] The CSC later adopted the 30-day rule first promulgated by *Tyndzik* in CSC Rule 11.7.8 through the rule-making process of the AAL. *See* "Rules of Procedure for Adverse Action Appeals," effective March 5, 2002. The CSC Rules adopted establish that judicial review of the judgment of the CSC may be had by filing appropriate pleadings with the Superior Court of

[23] Title 7 GCA § 7117 (2005) provides in pertinent part, "[w]hen jurisdiction is by law conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and . . . if the course of the proceeding be not specifically pointed out by law or by rules of procedure . . . any suitable process or mode of proceedings may be adopted which may appear most conformable to the spirit of this [law]".

Guam. The CSC Rules also refer to the vehicle that an aggrieved party is to use as a "Petition for Judicial Review." CSC Rule 11.7.7.

[64] The development of the "Petition for Judicial Review" is another example of a procedure developed on an *ad hoc* basis. In *Guam Power Authority v. Civil Service Commission*, Docket No. CV-87-00072A, 1988 WL 242617 (D. Guam App. Div. Nov. 17, 1988), the court sanctioned the use of a judicially-created "Petition for Judicial Review" as the appropriate vehicle for review of a CSC decision. *Id.* at *4. The Appellate Division found that this remedy, though not statutorily mandated, was within the court's power to design for its litigants. *Id.*

[65] This court also confirmed that agency personnel decisions are appealed via the use of the "Petition for Judicial Review" in *Perez v. Judicial Council of Guam*, 2002 Guam 12 ¶ 12, where we determined that a petition for a writ of mandate will not lie because the aggrieved party can seek review via a "Petition for Judicial Review." In *Perez*, we relied on prior Appellate Division cases, including *Guam Power Auth.*, 1988 WL 242617, and held that "in order to seek judicial review of a Council personnel decision, a classified employee must file a petition for judicial review within thirty days of the Council's decision." *Id.* While the *Perez* decision was directed to classified employees of the judicial branch, we endorse the findings contained therein, and hold herein that the proper way for classified employees of the government of Guam or any of its instrumentalities, corporations or agencies to utilize the right of judicial review of CSC decisions is by filing a "Petition for Judicial Review." We invoke the power recognized in 7 GCA § 7117, and adopt the rule that for an appeal of a CSC decision, the aggrieved must denominate the Petition as a "Petition for Judicial Review." We so hold because this is the previously accepted form of agency review of personnel decisions, and we do so in the exercise of our power to

designate "any suitable process or mode of proceedings . . . most conformable to the spirit of this Title" found in 7 GCA § 7117.

[66] In this way, we clarify the statements made in *Bondoc*, 2000 Guam 6 ¶ 6 n.2, that appeals of agency decisions proceed via the Guam Administrative Adjudication Law and the Guam writ statutes. We hold that in cases where the agency's statutes require appeal to the CSC, the CSC and its implementing rules and regulations set forth procedures for judicial review of the CSC decision, and the aggrieved party must follow those specified procedures. Further, reliance on the procedures of the writ of mandate is inappropriate because the extraordinary remedy of mandate is discretionary and carries a threshold of satisfying certain statutory requirements, while review of a CSC adverse action decision should be heard as a matter of right, not discretion.

[67] In this case, Carlson and Sasai urge us to treat their respective petitions liberally, and construe them as petitions for judicial review, because of the suggestion in *Bondoc* that a petition for mandate is interchangeable with a petition for judicial review. However, we decline to do so, primarily because neither Carlson nor Sasai indicated in the pleadings that they were appealing the CSC decisions. There is no way to determine from the face of the Petition that Carlson and Sasai were seeking Superior Court review of an agency decision. Instead of pursuing an appeal of the CSC decision, Carlson and Sasai sought a writ of mandamus ordering GEDCA to reinstate them to their positions. The Petition was plainly addressed to the original writ jurisdiction of the Superior Court and complained of action taken by GEDCA outside its authority. The Petition

did not complain of action taken by the CSC within the CSC's authority[24] and cannot be taken as petition for judicial review because that is not what was sought. While the court is mindful of the unfortunate consequences and harsh realities of its ruling, it is fair to say that Carlson and Sasai placed themselves in this position by not naming the CSC as a party and not seeking review of the CSC decisions.[25]

[68] Judge Unpingco did not commit error in denying the Petition on the basis that Carlson and Sasai had an adequate remedy at law. A writ of mandamus may not be issued when there is "a plain, speedy and adequate remedy in the ordinary course of law." 7 GCA § 31203 (2005). This holding reflects a judicial policy of encouraging litigants to exhaust their administrative and legal remedies before seeking a writ. Judge Unpingco stated that "[t]he effect of disregarding the CSC's decision, ignoring the procedural defect Petitioners have made in failing to appeal it, and granting mandamus in this case would be to open the floodgates to immediate judicial review of all civil service commission decisions in progress." ER, tab 28, p. 11 (Decision & Order). Judge Unpingco further reasoned,

> If deference is not given to enacted laws that equip government with mechanisms for the extrajudicial disposition of claims, then such laws will be rendered meaningless, and will inevitably cause the demise of the administrative adjudications that allow our system to efficiently function. Consequently, the courts will be unduly burdened with hearing writ after writ.

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[24] Indeed if the Petition had named the CSC as a party and requested review of the CSC decisions, we would have treated it as an appropriate Petition for Judicial Review notwithstanding its label as a Petition for a Writ of Mandate.

[25] Although only Carlson or Sasai or their counsel know the reason(s) for not naming the CSC as a party and not seeking judicial review of the CSC's adverse decision, one plausible explanation may be the deference required to be given by the Superior Court to the CSC's findings that Carlson and Sasai had not competed for their initial and subsequent positions. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) ("An agency's expertise is superior to that of a court when a dispute centers on. . . regulation[s] . . . [which] the agency is charged with enforcing."); *see also Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002).

ER, tab 28, p. 11 (Decision & Order).

[69] There are several reasons for the exhaustion of remedies doctrine. The basic purpose, as Judge Unpingco recognized, is to "lighten the burden of overworked courts in cases where administrative remedies are available." *Morton v. Sup. Ct.,* 88 Cal. Rptr. 533, 536 (1970). A second justification for upholding the doctrine of exhaustion of administrative remedies is revealed in *Westlake Community Hospital v. Superior Court*, 551 P.2d 410, 416 (Cal. 1976), where it was recognized that even where the administrative remedy may not provide the specific relief sought by a party or resolve all the issues, exhaustion is preferred because agencies have the specialized personnel, experience and expertise to unearth relevant evidence and provide a record which a court may review. If an employee is classified (as these litigants claim they were), then that employee should appeal any adverse action taken by his employer to the CSC, and if dissatisfied with the CSC decision, the employee may seek judicial review in the Superior Court.[26]

[70] Because the right to appeal the CSC decision is an adequate legal remedy which Carlson and Sasai have not exhausted, they are not entitled to invoke the extraordinary relief of mandamus. Their "failure to exhaust [] administrative and legal remedies . . . ha[s] proved fatal to this mandamus action." *Krivitsky v. Town of Westerly*, 849 A.2d 359, 363 (R.I. 2004); *see also Trojan v. Taylor Tp.*, 91 N.W.2d 9, 10 (Mich. 1958) (stating the general rule that judicial relief is not to be granted where the plaintiff can appeal the error). Since Carlson and Sasai were seeking the writ, they must prove entitlement to such relief. The petitioner has the burden of

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[26] If the employee is not classified, while not entitled to merit system protection, such employee has the option of seeking original relief – and not writ relief – in the Superior Court of Guam on other wrongful termination grounds that may be asserted, i.e., termination motivated by invidious or discriminatory practices.

showing that a writ should issue. *People v. Super. Ct. (Bruneman),* 1998 Guam 24 ¶ 3. They were required to show that they did not have a plain, speedy and adequate remedy, but they failed to do so.

[71] We find that the failure to frame the Petition as an appeal of the CSC determination and to name the CSC as a party renders fatal their argument that the Petition should be treated as a petition for judicial review. The Petition was directed to the original jurisdiction of the Superior Court. We hold that the Superior Court did not err in dismissing the case for failure to exhaust administrative and legal remedies.

IV.

[72] In the proceedings below, Judge Manibusan did not hold that Carlson and Sasai did not have a plain, speedy, and adequate remedy or that the CSC was prevented from reviewing their adverse action appeals. Such a proposition was not established as the law of the case, therefore, it was not a departure from the law of the case doctrine or an abuse of discretion for the successor judge, Judge Unpingco, to rule that Carlson and Sasai had an adequate remedy in the ordinary course of law. Although GEDCA is a public corporation and not an instrumentality of the government of Guam, Guam law requires due process before any classified employee may be dismissed. Since Carlson and Sasai have not made a case for a violation of their due process rights, it is not actionable that GEDCA failed to adopt rules governing the selection, promotion, evaluation, demotion, suspension and disciplinary action of its classified employees as required by statute. GEDCA's failure to adopt such rules also does not prevent GEDCA from terminating its classified employees if such employees are afforded due process, since the plain language of the law does not require retention of employees absent the promulgation of these rules. Finally,

Carlson and Sasai failed to properly appeal the ruling of the CSC that they were not hired through the competitive process, because they neglected to name the CSC as a party and did not seek review of the CSC decisions. Carlson and Sasai's petition to the CSC to review their termination and the ability to obtain judicial review of any CSC decision were plain, speedy and adequate remedies, therefore mandamus was not an appropriate relief. We **AFFIRM** the Decision and Order of the trial court.