IN THE SUPREME COURT OF GUAM

GUAM FEDERATION OF TEACHERS as agent for MATTHEW RECTOR, individually and on behalf of all those similarly situated,
Petitioner-Appellant,

v.

GOVERNMENT OF GUAM, a political entity, EDWARD J.B. CALVO, Governor of Guam, BENITA A. MANGLONA, Director of Dept. of Administration, JOHN FERNANDEZ, Director of Guam Public School System, JOHN A. RIOS, Director of Bureau of Budget Management Research and DOES 1-10,
Respondents-Appellees.

DEPARTMENT OF EDUCATION,
Petitioner-Appellee,

v.

CIVIL SERVICE COMMISSION,
Respondent-Appellee,

and

ELIZABETH TAIMANAO,
Real Party in Interest-Appellant.

OPINION

Cite as: 2013 Guam 14

Supreme Court Case No.: CVA12-012
Consolidated with CVA12-013
Superior Court Case Nos.: SP0009-07, SP0184-04

Appeal from the Superior Court of Guam
Argued and submitted on February 12, 2013
Hagåtña, Guam

Appearing for Petitioner-Appellant:
Robert P. Kutz, *Esq.*
Law Office of Robert P. Kutz
130 Maleyuc Cir.
Yona, GU 96915

Appearing for Respondents-Appellees:
Fred Nishihira, *Esq.*
Assistant Attorney General
Office of the Attorney General
Civil Division
590 S Marine Corps Dr., Ste. 706
Hagåtña, GU 96910

Appearing for Cross-Appellee:
Sophia Santos Diaz, *Esq.*
Civil Service Commission
Ste. 6A, Phase II, Complex 777
Route 4
Sinajana, GU 96910

BEFORE: ROBERT J. TORRES, Presiding Justice[1]; KATHERINE A. MARAMAN, Associate Justice; ALEXANDRO C. CASTRO, Justice *Pro Tempore*.

TORRES, J.:

[1] Petitioner-Appellant Guam Federation of Teachers ("GFT"), as agent for Matthew Rector, individually and on behalf of all those similarly situated, appeals from an amended judgment entered by the trial court in Superior Court Case Number SP0184-04 ("TAIMANAO/REVIEW case"). The TAIMANAO/REVIEW amended judgment ordered Respondents-Appellees Government of Guam, et al. (collectively "GovGuam"), to pay back wages and benefits allegedly due and owing to affected teachers for the payroll period of August 1, 2003 to August 18, 2003 in accordance with a decision and judgment issued by Cross-Appellee the Civil Service Commission ("the CSC").[2]

[2] GFT also appeals the trial court's decisions denying GFT's petition for an alternative writ of mandate, vacating GFT's previously-issued peremptory writ in Superior Court Case Number SP0009-07 ("RECTOR/MANDATE" case), and dismissing the RECTOR/MANDATE case in its entirety. We issued an order consolidating the TAIMANAO/REVIEW appeal and the RECTOR/MANDATE appeal.

[3] GFT argues on appeal that the trial court erred in holding that the TAIMANAO/REVIEW action could provide monetary recovery against GovGuam without further or alternative proceedings; that the trial court exceeded its jurisdiction by entertaining evidence of a proposed

[1] Associate Justice Robert J. Torres, as the senior member of the panel, was designated Presiding Justice.

[2] Because the cases underlying this opinion have been consolidated, and the parties to the two appellate cases, CVA12-012 and CVA12-013, are not identical, for ease of reference the parties will be referred to by name rather than designation when used in the body of this opinion. When parties' briefs are referenced in citations, however, the parties shall be designated as follows: Guam Federation of Teachers shall be called "Appellant," Government of Guam, et al., shall be called "Appellees," and the Civil Service Commission shall be called "Cross-Appellee."

offset, as presented by the Guam Department of Education ("DOE"); that the trial court erred in issuing an ambiguous judgment incapable of review; and finally, that the trial court erred by failing to award interest, costs, or attorney's fees in its amended judgment.

[4] GFT further argues that the trial court erred in denying GFT's petition for an alternative writ of mandate, in vacating GFT's previously-issued peremptory writ in the RECTOR/MANDATE case, and in dismissing the RECTOR/MANDATE case in its entirety.

[5] In opposition, GovGuam contends that the amended judgment adopting an offset for double payment of teachers was correctly issued, and that the trial court properly dismissed the RECTOR/MANDATE case. GovGuam also argues that the CSC lacked jurisdiction to hear a furlough appeal; that if the CSC did have jurisdiction, it failed to follow its established rules of procedure for furlough appeals; that the CSC improperly determined that some teachers are employed on a continuous basis; and that the CSC was not authorized to hear a class action claim.

[6] Finally, the CSC argues that it properly exercised its jurisdiction over the Taimanao case, and that teachers who opted for a twenty-six pay period cycle were furloughed when their pay was delayed by one pay period.

[7] We hold the CSC lacked jurisdiction to hear the Taimanao matter. We primarily discuss arguments raised in the TAIMANAO/REVIEW case as it is dispositive of both cases.

I. FACTUAL AND PROCEDURAL BACKGROUND

[8] In June of 2003, Elizabeth Taimanao, a DOE teacher, filed a personnel action with the CSC alleging that the decision of the Guam Education Policy Board ("Board") to delay the start of the 2003-2004 school year ("SY04") resulted in an involuntary furlough during which time she lost approximately two weeks of compensation.

[9] Thereafter, DOE filed a petition for alternative writ of prohibition to ask the trial court to command the CSC to refrain from further proceedings in the Taimanao matter, arguing that the CSC lacked jurisdiction to review the case. The trial court ultimately concluded that the CSC had jurisdiction and denied DOE's petition for an alternative writ of prohibition. According to GFT, no judgment was issued on that decision and order.

[10] DOE continued to oppose the CSC proceeding, arguing that the Board had the right to change the school year as a matter of discretion and that no illegal furlough transpired. At a post-audit presentation, DOE's counsel argued that if Taimanao and others similarly situated were entitled to pay for missing two weeks of the 2003-2004 school year ("SY04"), then DOE was entitled to an offset due to an overpayment issued at the start of the 1998-1999 school year ("SY99") as a result of another schedule adjustment made in the 1997-1998 school year ("SY98") to accommodate the 1999 South Pacific Games.

[11] After reviewing the Taimanao matter, the CSC issued a decision and judgment upholding its post-audit report and mandating that DOE pay Taimanao and other similarly situated employees compensation owed for the alleged SY04 furlough. As part of its decision, the CSC directed DOE to investigate the matter and take "appropriate steps" to determine whether the SY98 schedule adjustment entitled DOE to an offset or reimbursement. Taimanao RA, tab 53, Ex. 4 at 1-9 (Pet'r's Supp. Ex. re: DOE Countercl., Feb. 2, 2011).

[12] Following the CSC's decision and judgment, DOE sought a writ of review in the Superior Court on the grounds that the CSC had exceeded its jurisdiction when ordering retroactive pay for all affected teachers. The parties have denominated the resulting case, SP0184-04, as the TAIMANAO/REVIEW case.

[13] The TAIMANAO/REVIEW case was submitted on briefs that were limited to furlough and jurisdictional issues and did not expressly include the offset arguments DOE's counsel had previously made, though overlapping or double payments from SY98 were mentioned in passing. The trial court issued a decision affirming the CSC's action and ordered DOE to pay the affected teachers. GFT admits that no judgment was issued on that decision at that time.

[14] Before judgment was secured in the TAIMANAO/REVIEW case, Guam's Superintendent of Education wrote a letter to the Governor of Guam acknowledging the trial court's decision holding DOE liable for violating furlough rules in SY04 and requesting funding to comply with the trial court's decision.

[15] Subsequently, GFT filed a class action for payment of wages along with a writ of mandate to compel payment, naming Matthew Rector as the petitioner-representative because he had succeeded Elizabeth Taimanao as GFT's president. The parties have denominated this case, SP0009-07, as the RECTOR/MANDATE case.

[16] Thereafter, Rector applied to the trial court *ex parte* for an alternative writ of mandate. The trial court denied the alternative writ.

[17] More than nineteen months later, GFT renewed its petition for writ of mandate under the same SP0009-07 caption, but instead of applying for an alternative writ, this time GFT applied for a peremptory writ of mandate. GovGuam did not file an opposition or return to the peremptory writ of mandate, and between August 2008 and March 2009, counsel for GovGuam failed to appear at three hearings set by the trial court.

[18] The trial court issued a peremptory writ of mandate, compelling DOE to pay wages, interest, costs, and attorney's fees. Rather than complying, GovGuam filed an opposition and denied liability for the payment identified in the peremptory writ of mandate.

[19] More than a year later, GFT and Rector moved to enforce the peremptory writ. The trial court transferred the case to the court presiding over the TAIMANAO/REVIEW case. The transferee court deemed the peremptory writ satisfied because it had been returned and answered with objections and defenses.

[20] At subsequent hearings, the trial court considered GFT's argument that DOE previously admitted to owing money for SY04, and the court also considered DOE's argument that some teachers were overpaid in SY99. DOE's counsel sought the trial court's permission to and did submit an exhibit detailing in columnar fashion the amount of wages allegedly overpaid to teachers in SY99, the amount due to those teachers for the furlough in SY04, and a net result for each teacher, respectively.

[21] Before DOE submitted its exhibit, the trial court had already issued a judgment in the TAIMANAO/REVIEW case, ordering payment to the parties in accordance with the CSC's decision and judgment. A year and a half later, the trial court amended the judgment and seemed to take into account DOE's offset calculations, and the court also omitted any provision for interest, costs, or attorney's fees. On the same day, the trial court dismissed the RECTOR/MANDATE case in its entirety, ruling that the proceedings in mandate and/or for a pseudo-class action were unnecessary because the relief sought was available through resolution of the TAIMANAO/REVIEW case, and a judgment of dismissal was entered on the docket accordingly.

[22] GFT timely appealed the amended judgment issued in the TAIMANAO/REVIEW case. DOE filed a timely cross-appeal from the same amended judgment. GFT also appealed the trial court's decision and order dismissing the RECTOR/MANDATE case in its entirety. This court issued an order consolidating these appeals.

II. JURISDICTION

[23] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-13 (2013)) and 7 GCA §§ 3107(b), 3108(a), and 25102(a) (2005).

III. STANDARD OF REVIEW

[24] Whether a lower tribunal has jurisdiction is a question of law reviewed *de novo*. *See Core Tech Int'l Corp. v. Hanil Eng'g & Constr. Co.*, 2010 Guam 13 ¶ 16. The interpretation of a statute is a question of law reviewed *de novo*. *Lujan v. Lujan*, 2012 Guam 7 ¶ 18; *Apana v. Rosario*, 2000 Guam 7 ¶ 9. Therefore, where jurisdiction depends on statute, review of the lower tribunal's interpretation of that statute is reviewed *de novo*. *See Mesngon v. Gov't of Guam*, 2003 Guam 3 ¶ 8 ("The issue of whether the CSC has jurisdiction is a matter of statutory interpretation, and, therefore, our review is *de novo*.").

[25] An agency's review of a statute is a question of law reviewed *de novo*. *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10 (citing *Conlon v. U.S. Dep't of Labor*, 76 F.3d 271, 274 (9th Cir. 1996)). "In reviewing an agency's construction of a statute, the court must reject those constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement. However, if a statute is silent or ambiguous on a particular point, the court may defer to the agency's interpretation." *Blas v. Guam Customs & Quarantine Agency*, 2000 Guam 12 ¶ 12 (citations omitted).

[26] Whether a plaintiff has exhausted the required administrative remedies is a question of law reviewed *de novo*. *Farrell v. Principi*, 366 F.3d 1066, 1067 (9th Cir. 2004).

IV. ANALYSIS

[27] GovGuam asserts that the CSC lacked jurisdiction over the Taimanao matter because the CSC was not authorized to hear the appeal under its limited statutory authorization and because

Taimanao failed to follow proper grievance procedures. Appellees' Br. at 9-12 (Nov. 1, 2012). The CSC counters by arguing that it properly exercised its jurisdiction over the Taimanao matter because the matter was reviewable as either a personnel action or as a furlough appeal, because DOE's Personnel Rules and Regulations vest the CSC with jurisdiction, and because the CSC served as the Administrator of the Unified Pay Schedule at the time it reviewed the Taimanao matter. Cross-Appellee's Response Br. at 6-14 (Jan. 2, 2013). The CSC also maintains that it provided DOE with sufficient notice and opportunity to be heard in the Taimanao matter, and that DOE did not otherwise demonstrate that it suffered prejudice as a result of the CSC's actions. *Id.* at 15-17.

[28] GovGuam also asserts that the CSC incorrectly interpreted statutory law to mean that teachers who opted for a twenty-six pay period cycle are employed on a continuous basis, and that this interpretation would imply that DOE is required to unlawfully pay teachers for services not rendered during summer break. Appellees' Br. at 22-36. The CSC contends that teachers who opted for the twenty-six pay period cycle were furloughed when their pay was delayed by one pay period in SY04, and that DOE's suggestion that the CSC's interpretation would require DOE to make unlawful payments is unfounded. Cross-Appellee's Response Br. at 17-21.

[29] Lastly, GovGuam asserts that the CSC was not authorized to hear a class action claim, basing its assertion on a traditional maxim of statutory construction. Appellees' Br. at 36-38. To counter, the CSC argues that it was authorized to hear a class action claim, given that nothing in its enabling legislation precludes class actions and given its implied authority to discharge its functions that are expressly authorized by statute. Cross-Appellee's Response Br. at 21-22.

A. The Character of the Taimanao Matter.

[30] The dispositive issue on appeal is whether the CSC had jurisdiction to entertain the Taimanao matter. In addressing this issue, we must first decipher the character of the Taimanao matter.

1. Whether the Taimanao Matter is a Grievance.

[31] DOE Personnel Rules and Regulations provide this definition of a "grievance" in Rule 909.100:

> A grievance is any question or complaint filed by a permanent employee alleging that there has been a misinterpretation, misapplication or violation of a personnel statute, rule, regulation, or written policy which directly affects the employee in the performance of his official duties; or that he has received prejudicial, unfair, arbitrary, capricious treatment in his working conditions, or work relationships.

DOE R. & Regs. 909.100.

[32] Moreover, DOE's Rules delineate the scope of a "grievance" in Rule 909.200:

> Grievances may include but are not limited to, such matters as employee-supervisor relationships, duty assignments not related to job classification, shift and job locations assignments, *hours worked*, working facilities and conditions, policies for granting leave *and other related matters*.

DOE R. & Regs. 909.200 (emphases added).

[33] Under these Rules and Regulations, the definition of a grievance includes allegations that a personnel statute has been violated, and the scope of a grievance encompasses matters concerning "hours worked" as well as "other related matters." Because the Taimanao matter concerned the hours worked by teachers, it fits within this definition of "grievance" and is not otherwise excluded under DOE Rules and Regulations Rule 909.301.[3] Therefore, the Taimanao matter may be properly characterized as a grievance.

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[3] DOE Rules and Regulations Rule 909.301 provides:

The following are not covered by these grievance procedures:

2. Whether the Taimanao Matter is a Furlough.

[34] DOE Personnel Rules and Regulations define the term "furlough" in Rule 910.13.2:

> A furlough action is the placement of an employee in a temporary non-duty and non-pay status on a continuous basis (for example: 10 consecutive days), or a noncontinuous basis (for example: 4 hours per week). A furlough is not a layoff or reduction in force action.

DOE R. & Regs., App. H, Rule 910.13.2.

[35] Furlough actions should be taken, as a matter of policy, to avoid layoffs and to ensure that DOE meets its educational, health, and safety commitments to the people of Guam. *See* DOE R. & Regs., App. H, Rule 910.13.1; DOE R. & Regs., App. H, Rule 910.13.3 ("Furlough is caused by any one of the following reasons: 1. Lack of work; 2. Shortage of funds; 3. Insufficient personnel operations; 4. Reorganization; 5. Reclassification of an employee's position due to erosion of duties when such action will take effect after a formal announcement of a reduction in force."). Moreover, involuntary furlough actions should only be taken "[w]here budget constraints are crucial." DOE R. & Regs., App. H, Rule 910.13.6.

[36] In determining whether the Taimanao matter could be deemed a "furlough action," we look to the nature of the Board's action and the circumstances under which this action was taken. As Taimanao highlights in her personnel action appeal to the CSC, there is evidence that DOE

A. Disqualification of an applicant
B. Disqualification of an eligible
C. Examination ratings
D. Removal during original probationary period
E. Appeals from classification determinations
F. Appeals of adverse personnel actions
G. Allegations or complaints of discrimination
H. Appeals of performance evaluations.

DOE R. & Regs. 909.301.

was not suffering from a shortage of funds that would otherwise require DOE to resort to a furlough action, and that, instead, "the department has declared that it has six million dollars in excess funds and is requesting to use those funds for operational expenses." *See* Taimanao RA, tab 20, attach. A at 6 (Mem. P. & A. Supp. Pet. Review, Sept. 19, 2005).

[37] A furlough action taken under these circumstances would indeed be improper. Nevertheless, we find that no furlough action was in fact taken because the Board's action of delaying the start of SY04 does not meet the definition of a furlough as it applies to the unique employment status of Guam's classified teachers.

[38] GovGuam argues that teachers are employed on a "school-year basis" with a minimum of 180 "instructional days" per school year. Appellees' Br. at 22. GovGuam submits that the Board is authorized to establish a school calendar with a minimum of 180 instructional days. *Id.* (citing Pub. L. 13-9; 17 GCA § 3127(f) (2005)); *see also Guam Fed'n of Teachers v. Guam Educ. Policy Bd.*, SP0041-03, Dec. & Order at 11 (Super. Ct. Guam Apr. 16, 2003) (holding Board of Education has exclusive authority to establish the school calendar). According to the record, SY04 teachers worked 180 instructional days and approximately five days of professional training, for a total of 185 duty days. *See* Taimanao RA, tab 38, ex. C4 & C5 (Submission of Docs. Pursuant to J., Sept. 15, 2010). As such, GovGuam argues that there was no furlough in SY04, but instead merely a decision made by the Board to change the start and end dates of the school year, "which the Board of Education was entitled by law to do." Appellees' Br. at 23; *see also* 17 GCA § 6101 (2005).[4]

[4] Title 17 GCA § 6101 provides:

> It shall be the duty of the Board [of Education] to adopt and place into effect for the public schools of Guam standards and standard practices regarding hours of commencement of schools and classes, recesses, lunch periods and hours of discontinuance of classes. Such standards and standard practices shall be adopted in accordance with sound educational practices with due regard

[39] GovGuam also brings our attention to the CSC's declaration that only those teachers who opted for 26 payments per year were furloughed, while those who opted for 21 payments were not. Appellees' Br. at 23 & n.6 (citing Rector RA, tab 3 at 5 (Mem. P. & A. Supp. Pet. Writ Mand. Compel Payment of Wages, Jan. 8, 2007)). By following the CSC's line of logic, GovGuam contends, summer break would be considered an annual furlough for all teachers who choose to receive 21 payments per year and would require DOE to unlawfully pay teachers who have not rendered services during the intermittent summer months. *Id.* at 24. GovGuam illustrates this point as follows:

> The 2002-2003 school year ran from July 30, 2002 through May 30, 2003. Therefore, Ms. Taimanao was employed from July 30, 2002 through May 30, 2003, and received her full annual salary over 26 payments. There were no duty days between May 31, 2003 and August 17, 2003. Ms. Taimanao resumed her next duty day when school began on August 18, 2003. Ms. Taimanao and all other teachers received their first check for SY04 on August 29, 2003, in compliance with all statutes and regulations that govern employees paid on a school-year basis.

Appellees' Br. at 35-36.

[40] As to GovGuam's assertion that the Board controls the school calendar and therefore no furlough occurred, the CSC does not dispute the Board's authority to create and adjust the school calendar, but the CSC avers that neither DOE nor the Board have the discretion to alter a particular salary payment structure that is required by law. Cross-Appellee's Response Br. at 19. The CSC suggests that when the Board chose to delay the start of SY04 by two weeks, those who sacrificed a percentage of pay they earn during the school year and who chose, instead, to

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> for health, growth and general welfare of the pupils. Such standards so adopted shall also cause the standardization of all school policies in such a manner as to be not inconsistent with the Guam Organic Act or with the economic means of parents.

17 GCA § 6101.

be paid on the 26 pay period cycle so they could draw a regular paycheck every two-week cycle "made that sacrifice for naught." *Id.*[5]

[41] Also, in response to GovGuam's allegation that the CSC's interpretations would lead to absurd or illegal results regarding employment over the summer months, the CSC counters by arguing that a furlough occurs only when a teacher is involuntarily placed in a non-duty and non-pay status on a continuous or non-continuous basis; by choosing to be paid on a 21-pay period schedule, those teachers have voluntarily opted to be paid in that manner. *Id.* at 18. By contrast, the CSC explains, Taimanao did not choose to be placed in non-duty and non-pay status, but rather, "[t]he choice was made for her . . . ." *Id.*

[42] We observe an abundance of factors strongly suggesting that, unlike other GovGuam employees, classified teachers are employed on a school-year basis and not on a continuous basis. Teachers must fulfill at least 180 instructional days each school year and approximately 35 duty hours per week.[6] *See* Guam Pub. L. 13-9 (Apr. 14, 1974). According to GovGuam's unchallenged account, GovGuam teachers also spend numerous hours in excess of their duty hours preparing for classes, grading tests, and completing other job-related assignments, all without additional compensation. *See* Appellees' Br. at 25 ("It could not be clearer, then, that teachers are not paid for working 40 hours per workweek.").

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[5] GovGuam's position is that a teacher's choice to receive 26 payments instead of 21 payments is more of a "convenience" than a "sacrifice." *See* Appellees' Br. at 17 (Jan. 25, 2013).

[6] As GovGuam explains:

> In reality, the typical hours for a teacher are 7:30 a.m. to 2:30 p.m., with the requirement that teachers be at their school site 15 minutes before their first class and 15 minutes after their last class. Teachers take a 30-minute lunch break. Therefore, typically, a teacher's duty hours are seven per day, or 35 per week.

Appellees' Br. at 25.

[43] Various personnel rules governing GovGuam teachers further distinguish them from other GovGuam employees. For example, GovGuam teachers do not have a guarantee of contiguous dates for each school year due to the annually scheduled summer vacation. *See* DOE R. & Regs. 904.705 ("The term 'School Year' means such period as determined by the official school calendar." (dichotomizing summer vacation from school year to determine pro rata basis for compensation)). GovGuam teachers are also deprived of annual leave normally afforded to GovGuam's classified employees. *See* 4 GCA § 4109(a) (2005).

[44] In fact, on the basis of their wording alone, some provisions governing GovGuam teachers further suggest they are employed on a school-year basis. *See, e.g.*, DOE R. & Regs. 904.704 (entitled "Salary Increments For *School-Year Employee* (emphasis added)); DOE R. & Regs. 904.701 ("Whenever a teacher, *who is employed on a school year basis . . . .*" (emphasis added)); 4 GCA § 4109(a) ("Annual leave shall be granted to employees occupying permanent positions, except personnel of the Guam Public School System, the Guam Community College or the University of Guam, *who are employed on a school year basis . . . .*" (emphasis added)).

[45] Though of seemingly great concern to the parties, whether teachers opted to be paid in installments of 21 or 26 payments is a fact irrelevant to the determination that teachers, who are paid on a school-year basis and not on a continuous basis, were not furloughed by the Board's discretionary decision to delay SY04 by roughly two weeks. Even those teachers electing to be compensated over the span of 26 two-week pay periods, meaning they would have expected to receive uninterrupted payment throughout the course of the calendar year, could not have reasonably expected to work during those initial weeks once the Board declared these dates to be outside the confines of the defined SY04 schedule strictures. Phrased differently, while those teachers electing 26 payments may have been placed in a "non-pay" status as a result of the

Board's decision, it cannot be said that the Board "placed" them in a "non-duty" status because they were not on duty until the Board determined when their duties began that year. *See* DOE R. & Regs., App. H, Rule 910.13.2.

[46] Our decision today is akin to the decision made in *Berland v. Employment Security Department*, wherein the Court of Appeals of Washington affirmed denial of unemployment benefits for substitute teachers during holiday periods. 760 P.2d 959, 964 (Wash Ct. App. 1988). Although the *Berland* ruling addressed the rights of substitute teachers under a state statute, and whether the state statute violated equal protection and due process, the court's reasoning is edifying:

> School employees . . . are not entitled to unemployment benefits for those periods when they traditionally do not work. . . . This [c]ourt has suggested that the Legislature's exclusion resulted in part because of an opinion that school employees "know of the seasonal layoff well in advance (and may consider it an employment benefit) and are not faced with the same 'economic crunch' as those who are unpredictably laid off during the year.

Id. at 963 (citation omitted).

[47] The *Berland* court emphasized that school vacation is not the type of "aggravated and unpredictable period[] of unemployment" that requires recompense. *Id.* We agree.

[48] We recognize that case law from other jurisdictions may seem to militate against our finding that DOE did not take a furlough action when delaying the start of SY04. For example, in *Rogel v. Taylor School District*, the Court of Appeals of Michigan held that, due to a four-week delay to the start of the school year, affected government teachers were entitled to unemployment compensation benefits, even though they ultimately worked a full school year and received full compensation for their labor. 394 N.W.2d 32, 35 (Mich. Ct. App. 1986). The *Rogel* court explained:

> [W]e are unable to agree with the circuit court that claimants' unemployment benefits would constitute a windfall and unjust enrichment merely because they eventually received their full salaries for the school year when the school year was lengthened. This argument ignores the purpose of the act, *i.e.*, to alleviate the economic burden of unemployment. The fact that a presently unemployed worker may eventually be made whole does little to soften the immediate economic burden caused by a month of unexpected unemployment. Moreover, for any claimants who ordinarily sought other employment during the summer, lengthening the school year deprived them of one month in which to work the next summer. Such claimants would obviously not be enriched, unjustly or otherwise.

Id.

[49] But the *Rogel* case is distinguishable on the grounds that, under Michigan law, the school calendar was a mandatory subject of collective bargaining. *Id.* at 423; *see also id.* at 425 ("The Legislature was apparently less concerned with the possibility of unjust enrichment in such a situation than with the immediate economic burden of unemployed school employees. We see no difference when a school district's unilateral action delays the bargained-for and scheduled beginning of the school year."). By contradistinction, the Board retains exclusive authority to set the school calendar, and no showing has been made here that a collective bargaining agreement grants GFT the authority to establish or otherwise negotiate with the Board over the school calendar.

[50] Accordingly, we find that DOE acted properly within its exclusive discretion when delaying the start of SY04, and we find that no furlough action was taken.

[51] In so finding, we do not mean to imply that the Board enjoys omnipotent authority to postpone the start of the school year indefinitely. Absent exigent circumstances, such as a natural disaster or a real threat of terrorism, the Board is limited to delaying the start of the

school year such that a total of 360 instructional days are scheduled and available for completion over the course of 1095 calendar days.[7]

3. Whether the Taimanao Matter is an Adverse Action.

[52] While the parties were quick to suggest that the Taimanao matter was not an adverse action,[8] we must still address the possibility because, if submitted as an adverse action, the CSC could have properly reviewed the matter. *See* 4 GCA § 4403(b) (2005) ("[The CSC] shall hear appeals from the adverse actions taken to suspend, demote or dismiss an employee from the classified service if such right of appeal to the [CSC] is established in the personnel rules governing the employee . . . ."); *Blas*, 2000 Guam 12 ¶ 17 (holding member of classified service subject to suspension, demotion, or dismissal is entitled to appeal to the CSC under 4 GCA § 4403 (b)).

[53] The Taimanao matter does not qualify as a suspension, demotion, or dismissal. Recently, in *Santos v. Government of Guam*, we clarified that the term "adverse action" implies the taking of some disciplinary measure. 2012 Guam 9 ¶ 10. DOE's delay to SY04 was not taken as a disciplinary measure. Accordingly, the Taimanao matter cannot be characterized as an adverse action.

[7] Because the Board has discretion to set the parameters of the school year, an arbitrary and unreasonable delay could be challenged through writ of mandate on the basis that the Board abused its discretion. School years generally span two calendar years. Therefore, a delay precluding completion of one school year (180 instructional days) over the span two calendar years (730 calendar days) would be unreasonable if not reconciled by the end of the subsequent calendar year. A reasonable calculation provides, then, that the Board's action of delay could amount to a furlough if it prevents teachers from completing two sets of annual instructional days (2 x 180) within the span of three non-leap-year calendar years (3 x 365). Hence the ratio of 360 instructional days per every 1095 calendar days.

[8] *See, e.g.*, Cross-Appellee's Response Br. at 15 ("Taimanao did not suffer an adverse action.").

4. Whether the Taimanao Matter is a Personnel Action.

[54] The CSC argues that it properly exercised its jurisdiction over the Taimanao matter because Taimanao's appeal was properly reviewable as a personnel action. Cross-Appellee's Response Br. at 6. The CSC states, incorrectly, that 4 GCA § 4403(b) provided for the CSC's ability to review "personnel actions." *See id.* at 6.[9] The CSC further explains that the term "personnel action" is not defined in statute, but that the CSC defined the term when it adopted Resolution No. 2001-003. Cross-Appellee's Response Br. at 6-7.[10]

[55] When the Board changed the school start date, the CSC contends, the Board undertook a personnel action that is subject to the CSC's jurisdiction, rather than a furlough; only after its investigation did the CSC conclude that the Board's action placed Taimanao on a furlough. *Id.* at 7. GovGuam challenges this basis for jurisdictional authority on the grounds that Taimanao worked the same number of school days and received the same compensation in SY04 as the year prior, and therefore, under CSC Resolution No. 2001-03, there was no "substantial change in status quo" amounting to a "personnel action" that would be subject to the CSC's jurisdiction. Appellees' Reply Br. at 8-9 (Jan. 25, 2013).

[56] As discussed, summer vacation is a static element of the status quo of classified teachers. Accordingly, we agree that the Board's choice to delay the start of SY04 was not a personnel action under CSC Resolution No. 2001-03.

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[9] The CSC likely meant to refer to 4 GCA § 4403(d), which provided for CSC to set aside and declare null and void any "personnel action" taken without compliance with personnel laws or rules. 4 GCA § 4403(d).

[10] CSC Resolution No. 2001-003(2)(A) provides the following definition of a "personnel action":

> A personnel action is defined as any action taken by management that ***substantially changes*** the status quo of an employee. Personnel actions are not limited to actions reflected in G.G. #1 Forms.

CSC Resolution No. 2001-003(2)(A) (2004) (emphasis added).

B. Whether the CSC Lacked Jurisdiction Over the Taimanao Matter.

1. Whether the Taimanao Matter Was Properly Reviewable as a Grievance.

[57] Guam adopted the Public Employee-Management Relations Act ("PEMRA"), which prescribes certain procedures for the grievances of public employees. *See generally* 4 GCA § 10101 *et seq.* Specifically, where negotiated collective bargaining agreements brokered between unionized employees and management officials contain procedures for the consideration and final settlement of grievances, such as advisory arbitration, those procedures "shall be the *exclusive procedures* available to public employees in the unit for settlement of individual or group grievances." 4 GCA § 10114(a) (2005) (emphasis added). This facet of PEMRA is reflected in DOE's own Rules and Regulations:

> These procedures are also not applicable when the employee is in a unit covered by an exclusive recognition, as an employee organization, which has negotiated grievance procedures for that unit. When negotiated procedures exist, they shall be the *exclusive procedures* available to employees in the unit for settlement of individual or group grievances.

DOE R. & Regs. 909.302 (emphasis added).

[58] GovGuam avers that a collective bargaining agreement between GFT and the Board dictated that grievances should go to advisory arbitration. Appellees' Reply Br. at 9-10. According to GovGuam, at the time Taimanao presented her matter to the CSC, Local 1581 and the Territorial Board of Education did in fact have such a collective bargaining agreement in place, replete with designated grievance procedures. *See id.*[11]

[11] We note that the agreement in reference was not submitted as evidence to the trial court, let alone filed thereat, but was instead casually appended to GovGuam's Response and Reply brief. Therefore, its contents are not properly before us. On the other hand, GFT has not put forth evidence of an agreement with conflicting terms, such as an agreement indicating that at the time of the Taimanao matter GFT had some say in selecting the start date of the school year. Accordingly, we choose to simply reference GovGuam's arguments without reference to the actual agreement, rather than taking judicial notice or otherwise recognizing the validity of this evidence.

[59] Whether a plaintiff has exhausted the required administrative remedies is a question of law reviewed *de novo*. *Farrell*, 366 F.3d at 1067. In the case of unionized, classified GovGuam teachers, such as Taimanao and Rector, if the collective bargaining agreement dictated the proper channels for addressing their grievances, then any attempt to bypass these procedures served to weaken the CSC's ability to review the matter. Thus, the CSC could not properly review the Taimanao matter, to the extent it was presented on behalf of other unionized employees, until Taimanao first exhausted the administrative remedies available to her and her colleagues, which in this case were left unexpended.

[60] As for non-unionized GovGuam teachers in the classified service, DOE's Rules and Regulations also outline a strict and carefully-drawn multi-step grievance procedure. Step 1 mandates use of an informal procedure at the outset. *See* DOE R. & Regs. 909.505(E). Only after taking Step 1 and meeting with an unsatisfactory resolution, or no resolution within ten days of the informal presentation of the grievance, may a disgruntled employee proceed to Step 2 and file a formal grievance. DOE R. & Regs. 909.601. In turn, Step 2 must be similarly exhausted before an employee is entitled to take Step 3. DOE R. and Regs. 909.701. Only after Step 3 does Step 4 avail itself to the grieving employee and equip the CSC with appellate jurisdiction:

[61] An employee is entitled to present a grievance under Step 4, if:

1. he has completed step 3 of these procedures;
2. the grievance is not satisfactorily resolved at the Step 3 level; or
3. the Director of Education/Superintendent failed to render a decision within 25 calendar days of the submission of the grievance, in writing, at the Step 3 level;
4. there has been a violation of the Government Code or Personnel Rules and Regulations;
5. the procedural rights of the employee filing the complaint as outlined have been disregarded;

6. the decision of the supervisor, appointing authority and the Agency Committee, or the Grievance Review Board has been unjust, inequitable or not in accord with the facts; and
7. the appointing authority fails to act on the Grievance Review Board's decision.

DOE R. & Regs. 909.801.

[62] As GovGuam argued, Taimanao attempted to "avail herself of grievance procedures without going through the steps required for grievance procedures." *See* Appellees' Br. at 15. None of the aforedescribed procedures governing unionized and non-unionized GovGuam teachers alike contemplate providing the CSC with the right to review grievances before the matters are exhausted at the administrative level—vis-à-vis the appropriate channels—and we similarly do not find that the CSC had that right in this case. Accordingly, we hold the CSC lacked jurisdiction to hear the Taimanao matter as a grievance.

2. Whether the Taimanao Matter Was Properly Reviewable as a Personnel Action.

[63] As discussed, we find that the Board's choice to delay the start of SY04 should not be characterized as a "personnel action" as the term is defined by the CSC. *See* CSC Resolution #2001-003(2)(A). Assuming *arguendo* that the term "personnel action" dressed in its statutory form in 4 GCA § 4403(d) encompassed a broader swath of actions than those limited by CSC Resolution No. 2001-003, we must address whether the CSC properly exercised jurisdiction over the Taimanao matter under its original jurisdictional authority. *See* 4 GCA § 4403(d).

[64] We have previously held that, as a creature of the legislature, the CSC is limited to implementing its charter as it was constructed. *See Wade v. Taitano*, 2002 Guam 16 ¶ 7 ("[A]n agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature[.]" (citation omitted)); *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 9 (holding administrative agencies must buttress the exercise of authority with statutory

support and their powers are limited to those which "have been conferred upon them by law expressly or by implication." (citation omitted)). Though we should lend great weight to the CSC's own interpretation of the scope of its enabling statute, ultimately the courts have the "final responsibility" to interpret the law and determine whether a challenged administrative action was unauthorized and therefore void. *See US Ecology, Inc. v. State of California*, 111 Cal. Rptr. 2d 689, 704 (Ct. App. 2001).

[65] We have also previously recognized that 4 GCA § 4403 is the CSC's enabling statute. *Att'y Gen. of Guam v. Perez*, 2008 Guam 16 ¶ 30. Consequently, we must turn to the statute's language to clarify and qualify the latitude and longitude of the CSC's authority thereunder:

> (d) it may set aside and declare null and void any personnel action taken by any entity of the government *under its jurisdiction* when it has found that such action was taken without compliance with personnel laws or rules; provided, however, that this Section shall not be deemed to permit appeals by employees from adverse actions not covered by Subsection (b), above, which employee was not hired into the classified service of the government of Guam through competitive hiring as set forth in the personnel rules of the government of Guam, as those personnel rules existed at the time of the hiring of the employee by the government, except that the Commission may declare null and void the hiring of any unclassified employee done improperly, or reduce the compensation of any unclassified employee improperly compensated;

4 GCA § 4403(d) (emphasis added).

[66] GovGuam argues that section 4403 did not permit appeals by employees from adverse actions "not covered by Subsection (b)" due to the express caveat located in subsection (d). *See* Appellees' Br. at 11-12. As GovGuam points out, subsection (b) only specifies "adverse actions taken to suspend, demote or dismiss" a classified employee, and therefore an appeal of an action amounting to a furlough would not be covered. *Id.* at 12. By contrast, the CSC maintains that the limitation on adverse actions not covered by section 4403(b) places a limitation on employees who are not in the classified service, but it does not limit the CSC's ability to review

a "personnel action" resulting in the furlough of a classified employee. Cross-Appellee's Response Br. at 10.

[67] We do not construe the caveat in the manner proposed by either party.[12] A strict construction of the statute indicates that, by the presence of a comma following the word "above" in the caveat contained in 4 GCA § 4403(d), as opposed to a period, more than one requirement must be met to trigger the caveat in the first place.[13] That is, the only reviews beyond the CSC's jurisdictional authority under subsection (d) are those of adverse actions not covered in subsection (b) that are appealed by unclassified employees who were not improperly

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[12] See 2A Sutherland Statutory Construction § 47:8, Provisos – Strict Construction:

> As the result of improper drafting, the "provided, however," clause has been frequently used to introduce new and unrelated material, and thus courts have held on some occasions that the words will be treated merely as introductory of new material.

2A Sutherland Statutory Construction § 47:8 (7th ed. 2007) (footnotes omitted). Note, however, that at section 47:9, Sutherland provides:

> Although the form and the location of the proviso may be some indication of the legislative intent, form alone will not control. No presumption concerning the scope of its application arises from the location of the proviso.

Id. § 47:9.

[13] See 2A Sutherland Statutory Construction § 47:33, Referential and Qualifying Words:

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. Thus a proviso usually is construed to apply to the provision or clause immediately preceding it. The rule is another aid to discovery of intent or meaning and is not inflexible and uniformly binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent.
>
> Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.

See 2A Sutherland Statutory Construction § 47:33 (footnotes and internal quotation marks omitted). *See also* section 47:15, Punctuation:

> The better rule is that punctuation is a part of the act and that it may be considered in the interpretation of the act but not to create doubt or to distort or defeat the intention of the legislature. When the intent is uncertain, punctuation may be looked to as an aid if it affords some indication of the true intention.

Id. § 47:15 (footnotes omitted). *But see id.* ("A misplaced comma cannot be used to distort the meaning of the statute.").

hired or compensated. Otherwise, so long as the action is a "personnel action" brought by a classified employee, it is irrelevant that the type of adverse action is not covered under subsection (b).[14]

[68] However the caveat is construed, our focus is instead on the phrase "under its jurisdiction." *See* 4 GCA § 4403(d). We interpret the statute, taken as a whole, to mean that the CSC has both limited original jurisdiction and appellate jurisdiction, depending on the action presented for review. The CSC's original jurisdiction only extends to its authority to declare null and void the improper hiring of unclassified employees and to reduce the compensation of unclassified employees. *Id.* We have also already established that the CSC has appellate jurisdiction over adverse actions. *See* 4 GCA § 4403(b). But the CSC's ability to hear and declare null and void personnel actions under subsection (d) is limited to those actions taken "under its jurisdiction," meaning this jurisdiction must be independently conferred upon the CSC

[14] It seems that this is the very argument the CSC tried to make. What makes it different, however, is the construction of the statutory provision as a whole. Because 4 GCA § 4403(b) already excludes certain employees, it would have been superfluous for the legislature to provide the same exclusions in 4 GCA § 4403(d) unless it wanted to clarify the limited situations where unclassified employee appeals are still entitled to the CSC's review, or, as suggested here, to qualify the caveat with additional triggering requirements. See 2A Sutherland Statutory Construction § 47:37, Words Disregarded or Eliminated:

> Words may be eliminated only when such action is consistent with the legislative intent or meaning. However, it must be certain that the legislature could not possibly have intended the words to be in the statute, and that the rejection of them serves merely as a correction of careless language and actually gives the true intention of the legislature. The cardinal rule of statutory construction is that the court should ascertain from the entire statute the intention to be accomplished by the enactment. When that intention is clear it should be carried out even though it may be necessary to strike out or insert certain words. The existence of surplus words should never be presumed. Courts permit the elimination of words for one or more of the following reasons: where the word is found in the statute due to the inadvertence of the legislature, where it is necessary to give the act meaning, effect, or intelligibility, where apparent from the context of the act that the word is surplusage, where the use of the word would lead to an absurdity or irrationality, where the inclusion of the word was a mere inaccuracy, or clearly apparent mishap, or it was obviously erroneously inserted, where the use of the word is the result of a typographical or clerical error, where it is necessary to avoid inconsistencies and to make the provisions of the act harmonize, where the words of the statute do not have any useful purpose or are entirely foreign to the subject matter of the enactment, or where it is apparent from the caption of the act or body of the bill that the word is surplusage.
>
> 2A Sutherland Statutory Construction § 47:37 (footnotes omitted).

by means of another statutory provision or by agency regulations. *See* 4 GCA § 4403(d). Therefore, the CSC can properly review the Taimanao matter as a personnel action only if the CSC has appellate jurisdiction over that personnel action.

[69] CSC argues that two provisions, 4 GCA §§ 4403(d) and 6302(a), "operated together to confer jurisdiction on [the CSC] over Taimanao's claim." Cross-Appellee's Response Br. at 13. When the CSC reviewed the Taimanao matter in 2004, the language of 4 GCA § 6302(a) provided as follows:

> (a) The Commission shall adopt and apply the unified pay schedule and the Hay methodology of positions classifications and salary administration *to the extent and manner it deems appropriate.* The Hay methodology and unified pay schedule shall be administered by the Judicial Council for the Judicial Branch with assistance from the Personnel Office of the Superior Court of Guam.

4 GCA § 6302(a) (1995) (emphasis added).

[70] In support of its position, the CSC cites to the trial court's decision and order in the TAIMANAO/REVIEW case, where the court noted that "this is exactly the type of issue that should be reviewed by the CSC: a classified employee's compensation negatively affected by action of an agency." Cross-Appellee's Response Br. at 13-14 (citing Taimanao RA, tab 30 at 4 (Dec., Apr. 26, 2006)). The CSC argues that, since it had the authority to adopt and apply the unified pay schedule "to the extent and manner it deemed appropriate," it properly reviewed Taimanao's claim after deeming it appropriate to do so. *Id.* at 13.[15]

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[15] The CSC also suggests that the trial court agreed with its decision on the same basis:

> If [the CSC] preliminarily finds that its vested authority to administer the unified pay schedule and salary administration for Government of Guam employees is being circumvented by actions of another instrumentality of the government, the [sic] it is incumbent upon [the CSC] to hear the issues and make a final determination if such is actually the case.

Cross-Appellee's Response Br. at 13 (citing *Dep't of Educ. v. Civil Serv. Comm'n*, SP0077-04, Dec. & Order at 7).

[71] We disagree with the CSC's position and find that 4 GCA § 6302(a) does not act in concert with 4 GCA § 4403(d) to provide the CSC with jurisdiction. No change in the level classification or salary of an employee was implicated by the Taimanao matter. Accordingly, 4 GCA § 6302(a) is inapposite here.

[72] Finally, as we have already discussed, the CSC does have appellate jurisdiction over grievances under DOE's Rules and Regulations, but only once a grievant reaches Step 4 in a multi-step administrative process. Therefore, we hold that, absent the exhaustion of administrative remedies, the CSC had no appellate jurisdiction over the Taimanao matter, and it was therefore error on the part of the CSC to hear this matter prematurely.

C. Other Matters Mooted.

[73] Because we hold that the CSC lacked jurisdiction to entertain the Taimanao matter, we will not address the remaining issues presented on appeal for our review.

V. CONCLUSION

[74] The CSC lacked jurisdiction to hear the Taimanao matter as an appeal because GFT did not first exhaust its administrative remedies, and the CSC was not otherwise authorized to adjudicate the matter in the first instance under its limited original jurisdictional authority. Accordingly, the CSC erred in entertaining the Taimanao matter, however characterized.

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[75] For the foregoing reasons, we **REVERSE** the amended judgment rendered below and **VACATE** the CSC's decision and judgment in SP0184-04 for want of jurisdiction, and we **AFFIRM** dismissal of SP0009-07 on the grounds set forth in SP0184-04.

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Alexandro C. Castro
ALEXANDRO C. CASTRO
Justice *Pro Tempore*

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Presiding Justice