EXECUTIVE SUMMARY
Port Authority of Guam Back Wages Series, Part C
OPA Report No. 22-05, November 2022

This performance audit concludes our three-part audit series of the Port Authority of Guam's (Port) Back Wages of seven reinstated employees. This report presents the results of audit Series, Part C, which focuses on the execution of settlements and legal remedies of the remaining four employees, herein referred to as "Employee X," "Employee N," "Employee Z," and "Employee E."

The Port is highly commended for generally adhering to the administrative and judicial review judgments and orders, and Settlement Agreements in executing the reinstatements of these four employees. The Port paid total legal remedies of $4.5 Million (M) to all seven reinstated employees and $2.9M for the four employees covered in this audit. This comprised of back wages net of mitigation ($1.8M), the Port's share of employees' retirement contributions ($481 Thousand (K)), Medicare tax share ($46K), and attorney fees ($576K). Board Resolution (B.R.) No. 2020-04 (passed in June 2020), disclosed that the Port was able to mitigate $1.5M, although mitigated amounts for two employees totaling $303K could not be validated due to lack of documentation.

However, in our review of the documentation provided and analysis of the processes, we found deficiencies in documentation, deviations from certain provisions of Port Personnel Rules and Regulations (PRR) resulting in potential overpayments or lost savings, lack of or conflicting Notification of Personnel Actions (NPAs), payment of back wages to a retired employee, and other matters of concern. In this audit, questioned costs amounted to $212K with a total financial impact of $503K.

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

In the Port's reinstatement process of the four employees, we found deviations from the Port's PRR. Specifically:

Average Three Prior Years' "Outstanding" Ratings Partly Based on Performance Evaluation Reports Not Approved by any General Manager (GM)

The Port adopted the average rating methodology of the employees' last three years of employment at the Port in 2010, 2011, and 2012. This methodology of calculating back wages was ratified per B.R. No. 2022-01, passed in January 2022. With this methodology, the Port consistently used "5" incremental sub-steps for all four employees, corresponding to an "Outstanding" rating. Comparatively, another autonomous agency considered **"5" as a rare rating, which means that the employee significantly exceeded expectations.**

In our recalculations, we adhered to the Board's ratified average rating methodology. However, our recalculations disclosed that all four employees only obtained averages of a "Satisfactory" rating or "3" sub-steps. This was due to the **lack** of the Employee Performance Evaluation Report (EPER) and Notice of Results of Performance Evaluation Report (NRPER) for all four employees' increments due effective October 2012. These performance evaluation documents need to be prepared and signed by the former GM to signify his approval of the recommended increments. The present Port management consistently justified that employees' increments should not be denied since the former Port GM left the performance evaluation unsigned and did not deny the salary increment in writing. On the contrary, if the former GM intends to approve the employees' eligibilities for increments, he/she should have affixed his/her signature on the performance evaluation documents.

Although, we agree that the reinstated employees are entitled to due process, the Port is also bound to adhere to its own PRR in processing annual increments. Therefore, we recommend that Port management prepare and/or or approve the unapproved performance evaluation documents (EPER and NRPER) effective October 2012 to satisfactorily justify the average three prior years' "Outstanding" rating.

Seven-Year Increments with the Highest Sub-Steps Granted without Performance Evaluation Reports Approved by any GM

The seven-year annual increments of the four employees were not supported with the PRR-required performance evaluation documents such as the EPER and NRPER, which both require approval by the Port GM. The total annual increments granted to each employee from 2012 through 2019 (excluding Port-wide adjustments) ranged from $25K to $40K. Upon reinstatements, one employee's annual salary reached as high as $154K.

In response to audit recommendations per OPA Report No. 21-09, Board Resolution No. 2022-01 ratified Board Policy 2022-01, which established and standardized a salary increment process to include a performance evaluation report to be signed by the incumbent GM, who approves the number of sub-steps in the personnel action forms. Even in the amended Board Policy, annual increments still require that performance evaluations reports be approved by the GM. Therefore, we recommend that performance evaluation documents such as the EPER and the NRPER be prepared and approved to support the GM's authorization and approval of all increments paid.

Potential Overpayment or Savings in Using the "Satisfactory" ("3" sub-steps) Rating as opposed to "Outstanding" Rating ("5" sub-steps)

We acknowledge Port management's efforts to provide the reinstated employees with all the expected benefits "to make the employee whole" as if they were not terminated. However, the employees were only eligible for a "Satisfactory" rating ("3" sub-steps) due to the absence of approved performance evaluation documents, as required per the Port's prevailing PRR at the time of the action. Our recalculated "3" incremental sub-steps as opposed to "5" incremental sub-steps granted by the Port to these employees resulted in potential overpayments totaling $204K, or lost savings to the Port. To reiterate, we recommend that Port management prepare or approve the unapproved performance evaluation documents (EPER and NRPER) effective October 2012 to satisfactorily justify the average three prior years "Outstanding" rating.

Annual Increments Paid without Notifications of Personnel Actions (NPAs)

Employee E's annual increments for seven years totaling $40K, were granted without the required NPAs to be signed by the incumbent GM. According to Port, no NPAs were provided to Employee

E as both parties agreed to it, although this condition was not specified in the Settlement Agreement (SA). The SA simply stated that the "Employee shall be reinstated to [his/her] position at the pay range level to which the Employee would be entitled at the time of reinstatement had the adverse action not been taken against the employee." The agreement further stipulated that Employee E's base pay range level as of July 1, 2020 would be no less than Pay Range PP-11C (hourly rate of $74.19). We recommend that Port management prepare the required NPAs to document the GM's authorization and approval of the annual increments paid, if the employee is considered never retired.

Back Wages Earned during the Retirement Period Paid to a Retired Employee

According to the Port GM, Employee E retired from the Port effective January 2, 2013, as a consequence of wrongful termination. The employee received a retirement annuity effective such date until it was suspended on July 1, 2020, when the employee was reinstated to his/her previous position with the Port. From **January 2, 2013, to June 30, 2020,** the employee received retirement annuities totaling $674.8K and annual Cost of Living Allowance (COLA) payments totaling $13.8K for a collective amount of $688.6K.

The Port-calculated employee back wages from October 13, 2012, through June 30, 2020, for a total of $980K and was reduced (mitigated) by the total retirement annuity of $684K, leaving a balance of $296K. The balance was fully paid to the employee in March 2021. Based on the Government of Guam Retirement Fund's (GGRF) confirmation, the mitigated amount was not reimbursed by the Port to GGRF. Therefore, the retirement from January 2013 to June 2020, was fully effected. The 5% or "5" sub-steps annual increments were factored in the Port's calculation of back wages even though the employee retired from the Port and was receiving his/her monthly annuity.

In September 2021, OPA requested the Guam Office of the Attorney General's (OAG) opinion relative to the proper calculation of back wages for a terminated employee who retired from government service during the termination period, and was later reinstated pursuant to a court order and settlement agreement. In the Chief Deputy AG's response, it was stated that***, "No authority is provided that allows an employee to collect both a retirement annuity and employment compensation for the same period."*** *It further stated that,* ***"The Port's calculation of back wages may not include wages covering the period of time between the retirement and reinstatement for which [he/she] received an annuity."***

We presented an analysis of the effect of the Port's actions depending on how Port management will treat such retirement. If the employee is treated as ***retired,*** then he/she would only be entitled to salaries earned from October 13, 2012, through December 31, 2012, or a total of $5,515 thus an overpayment of $290.6K. However, if the employee is treated as ***not retired,*** he/she will be entitled to all the benefits of a terminated employee, and will only have a net overpayment of $5K. However, the Port will need to reimburse GGRF for a total of $689K. According to the GGRF Director, the Port may not reimburse the amount, however, there would be an effect or a loss of approximately $25K annually, if the employee continues to receive his/her retirement annuities under the Defined Benefit Plan.

We refer the matter for Port management's review and decision. The OPA is not in the position to suggest how Port management decides on the issue. We merely recommend for an appropriate decision/action based on Port management's treatment of employee's retirement, to determine his/her entitlement.

Other Matters

Other matters we noted, which affected the reinstated employees, were related to potential violations of retroactive pay raises and the pay raise freeze mandate based on an OAG opinion issued in November 2021.

Conclusion and Recommendations

We acknowledge and commend the Port's general adherence to the court orders and judgments and Settlement Agreements in its reinstatement processes of the seven wrongfully terminated employees. Their commendable decisions and actions were intended to make the employee "whole" and granted them salaries and benefits as if there were no work interruptions.

We also compliment the Port management and the Port Board of Directors for B.R. 2022-01 in regards to the settlements in line with OPA recommendations per OPA Report No. 21-03 and No. 21- 09, ratifying the legal remedies of the seven employees. We further commend them for ratifying Board Policy No. 2022-01, which incorporated the salary increment process for reinstated employees. The amended policy still retained the existing requirement of performance evaluation reports duly-approved by the GM and all annual increments must be supported with the NPAs. Since the incumbent Port GM approved the employees' NPAs to authorize the payments of annual increments due prior to and during the termination periods, the Port management needs to comply with the documentary requirements specified in its PRR in the processing of these increments.

This audit report emphasized that, in the implementation processes and execution of legal remedies for reinstated employees, the Port also needs to comply with its own policies and procedures embodied in its PRR, specifically on performance-based annual increments for all employees. Port management needs to institute proper implementation of its policies and control procedures for good governance. The Port management generally disagreed with our findings and six recommendations, and has not provided a formal management response as of the report release date.

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