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2 FOR PUBLICATION  
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5 **IN THE SUPERIOR COURT**  
6 **OF THE**  
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**  
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10 COMMONWEALTH OF THE  
11 NORTHERN MARIANA ISLANDS  
12 DEPARTMENT OF PUBLIC SAFETY,

13 Petitioner/Plaintiff,

14 v.

15 OFFICE OF THE CIVIL SERVICE  
16 COMMISSION,

17 Defendant,

18 JOSE T. CHONG,

19 Respondent/  
20 Real Party in Interest

CIVIL ACTION NO. 01-521E  
CSC APPEAL NO. 01-006A

**ORDER SETTING ASIDE  
OCTOBER 4, 2001  
CIVIL SERVICE COMMISSION  
DECISION AND ORDER**

21 **I.**

22 **INTRODUCTION**

23 This matter came before the Court at 9:00 a.m. on May 15, 2002 for a hearing on Petitioner's  
24 Motion for Judicial Review. The Department of Public Safety [hereinafter Petitioner or DPS] was  
25 represented by Allan L. Dollison. Jose T. Chong [hereinafter Respondent] was represented by Brien Sers  
26 Nicholas.

27 The Petitioner seeks judicial review of a final decision and order by the Civil Service Commission  
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1 reinstating Respondent to his position in the Department of Public Service, where he will not work with  
2 female employees. For the following reasons, the Civil Service Commission's *Decision and Order* dated  
3 October 4, 2001 will be set aside.

4 **II.**

5 **FACTUAL BACKGROUND**

6 The essential facts in this matter are not in dispute. Respondent worked for DPS as a corrections  
7 officer. On March 19, 2001, the Department of Public Service/Department of Corrections issued a  
8 *Notice of Proposed Adverse Action* seeking to terminate Respondent for sexual harassment. The  
9 employer issued a final decision on April 16, 2001 and terminated Respondent.

10 On May 7, 2001 Respondent timely appealed the employer's decision with the Civil Service  
11 Commission [hereinafter CSC or Commission]. CSC held a hearing for Respondent's appeal on July 9-  
12 11, 2001. On October 4, 2001, CSC issued its *Decision and Order* [hereinafter Order]. The Order  
13 stated that Respondent was to be "reinstated to a position within the Department of Public Safety where  
14 [he] will not be working with female employees." *In the Matter of Chong and Department of Public*  
15 *Safety*, CSC No. 01-006A (CSC Oct. 4, 2001) (Decision and Order at 5). On October 5, 2001, the  
16 Petitioner filed a petition for judicial review.<sup>1</sup>

17 **III.**

18 **DISCUSSION**

19 This case is unique because there is no dispute surrounding the existence of Respondent's sexually  
20 harassing behavior. Rather, it is the effect and consequence of the Order that compels review. Common  
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22 <sup>1</sup> This matter was set for a status conference on March 8, 2002. At that time, this Court ordered additional  
briefing and hearing on three issues:

- 23 1. Whether the Court maintains jurisdiction over this matter when the plaintiff does  
24 not dispute the findings of the Civil Service Commission only the remedy that was  
ordered [sic].  
25 2. Whether a trial Court has the authority to remand an administrative order to  
the governing administrative body for clarification of the ordered remedy.  
26 3. Whether DPS is legally required to create a position that satisfies the Civil Service  
Commission's order to reinstate Chong to a position that will not require him to  
27 work with females.

1 sense leads any reasonable person to one conclusion. However, the Court must analyze why and how this  
2 Court will review the Order and set it aside within the legal framework of the Commonwealth's  
3 Administrative Procedure Act, set forth at 1 CMC §§ 9101-9115 [hereinafter APA]. In this discussion,  
4 the Court will first establish jurisdiction. Then, the Court will discuss its standard of judicial review and why  
5 the Order will be set aside.

6 A. Jurisdiction

7 This Court's jurisdiction to review the agency action arises from Title 1 of the Commonwealth  
8 Code, section 9112. Under section 9112(b) a "person suffering legal wrong because of agency action, or  
9 adversely affected or aggrieved by agency action, is entitled to judicial review . . ." 1 CMC § 9112(b).

10 1. The "agency action".

11 Under 1 CMC § 9112(b), agency action is a threshold requirement of conduct by an administrative  
12 entity that must be shown to trigger judicial review. The agency action in this case is CSC's Order of  
13 October 4, 2001. The APA defines "agency," "agency action," "decision," and "order" at 1 CMC §  
14 9101(b), (c), (e), and (h) respectively.

15 "Agency" means each authority of the Commonwealth government, whether or not it is within or  
16 subject to review by another agency." 1 CMC § 9101(b). "Agency action" includes the whole or part  
17 of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 1  
18 CMC § 9101(c). "Decision" means the whole or part of a final disposition of an agency in a hearing on  
19 a proposed regulation." 1 CMC § 9101(e). And "[o]rder" means the whole or part of a final disposition,  
20 whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than  
21 rule-making but including licensing." 1 CMC § 9101(h).

22 The Civil Service Commission is an authority of the Commonwealth government. 1 CMC §§ 8111-  
23 8117. It issued a final Decision and Order on October 4, 2001, which was the final disposition of  
24 Respondent's appeal from adverse action taken by his employer. Thus, the Order of October 4, 2001,  
25 is agency action for purposes of judicial review.

26 2. The "legal wrong" Petitioner suffers.

1 Respondent argues that the Court does not have jurisdiction under section 9112(b) because *he* has  
2 not suffered a legal wrong resulting from the agency action. Respondent asserts that there is “no case or  
3 controversy.” However, Respondent need not be the only one wronged for this Court to review the  
4 agency’s decision. Petitioner can also seek judicial review.

5 Here, the party appealing is DPS. The legal wrong suffered is that DPS would have to  
6 accommodate Respondent to comply with the Order. This adversely affects DPS because it could not  
7 reasonably know how to comply with the Order without clarification of the meaning and effect of the  
8 Order. There may be no position within DPS that can accommodate Respondent, and DPS may have to  
9 create a position. Since DPS would suffer a legal wrong to comply with the Order, this Court has  
10 jurisdiction to consider the DPS’s claims.

11 B. Standard of Review.

12 The standards for judicial review of agency action are set forth in 1 CMC § 9112(f). *Camacho*  
13 *v. Northern Marianas Retirement Fund*, 1 N.M.I. 362, 366 (1990). The Petitioner recites six reasons  
14 why the Court should set aside the Order. These reasons track the standards of review outlined in §  
15 9112(f)(2)(i)-(vi).

16 Petitioner alleges that the Commission’s Order should be set aside because (a) the Commission’s  
17 Order was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law of  
18 the CNMI; (b) that the Commission’s Order was contrary to a constitutional right, power, privilege or  
19 immunity; (c) that the Commission’s Order was in excess of statutory jurisdiction, authority, or limitations,  
20 or short of statutory rights; (d) that the Commission’s Order was without observance of procedure required  
21 by law; (e) that the Commission’s Order was unsupported by substantial evidence in a case subject to 1  
22 CMC § 9108 and § 9109 or otherwise reviewed on the record of an agency hearing provided by statute;  
23 and (f) that the Commission’s Order was unwarranted by the facts to the extent that the facts are subject  
24 to trial de novo by the reviewing court.<sup>2</sup>

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26 <sup>2</sup> In the Petitioner’s additional briefings, it asserts that the Order violates only §§ 9112(f)(2)(i), (ii), (v) and (vi).  
27 *Pet’r Additional Br. in Compliance with Court’s March 7, 2002 Order* (April 19, 2002 at 7). However, the original  
28 petition for judicial review alleges violations of all six. The Court will discuss each.





1 Of the six grounds for setting aside agency action, only two apply in this case. First, this Court can  
2 consider whether the Commission’s decision was contrary to a constitutional right, power, privilege or  
3 immunity, 1 CMC § 9112(f)(2)(ii); and second, whether the Commission’s decision was unsupported by  
4 substantial evidence in a case subject to 1 CMC §9108 and §9109 or otherwise reviewed on the record  
5 of an agency hearing provided by statute, 1 CMC § 9112(f)(2)(v).

6 First, the Court examines whether this Order should be set aside under the substantial evidence  
7 standard since it is preferred to decide cases on non-constitutional grounds. *Christopher v. Harbury*, \_\_\_  
8 U.S. \_\_\_, 122 S. Ct. 2179, 2188, 153 L. Ed. 2d 413, 425 (2002).

9 a. The 1 CMC § 9112(f)(2)(v) “unsupported by substantial evidence” standard of  
10 judicial review is appropriate.

11 The substantial evidence standard of review is appropriate for this case. This standard only applies  
12 to “a case subject to 1 CMC §§ 9108 and 9109 or otherwise reviewed on the record of an agency hearing  
13 provided by statute.” 1 CMC § 9112(f)(2)(v).

14 Section 9108 of the Commonwealth Code pertains to administrative procedures for adjudications.  
15 Section 9109 of the Commonwealth Code pertains to the administrative procedures for conducting  
16 hearings. These provisions generally provide a mechanism of procedural due process when a “sanction”  
17 may be imposed. Sanction is broadly defined and includes the restrictive and/or compulsory action that  
18 is a consequence of the agency’s order. 1 CMC § 9101(o)(1-7).<sup>4</sup> This is a case subject to sections 9108  
19 and 9109. CSC held a formal hearing where the parties presented evidence and witnesses.

20 i. Court action mandated in context of its standard of judicial review.

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22 <sup>4</sup> Under 1 CMC § 9101(o)(1)-(7) “sanction” includes the whole or part of an agency:  
23 (1) Prohibition, requirement, limitation, or other condition affecting the freedom  
24 of a person;  
25 (2) Withholding of relief where adjudication is required by law;  
26 (3) Imposition of penalty or fine;  
27 (4) Destruction, taking, seizure, or withholding of property;  
28 (5) Assessment of damages, reimbursement, restitution, compensation, costs,  
charges, or fees;  
(6) Requirements, revocation, or suspension of a license; or  
(7) Taking other compulsory or restrictive action.

1 The Commonwealth APA mandates certain action by the court within its standard of review. The  
2 court must determine the meaning and applicability of terms of the agency action and the court must hold  
3 unlawful and set aside agency action which cannot be reconciled within the standard of review. 1 CMC  
4 § 9112(f).

5 1) Mandate to determine the meaning and applicability of terms of an  
6 agency action.

7 Under Section 9112, a court must “determine the meaning or applicability of the terms of an agency  
8 action.” 1 CMC § 9112(f). The Court begins by determining the meaning and applicability of the word  
9 “reinstated.”

10 a) Meaning of the word “reinstated”.

11 The Petitioner argues that the term “reinstated” carries legal significance. This Court agrees. In  
12 its Order, CSC ordered that the Respondent be “reinstated to a position within the Department of Public  
13 Safety where the Employee will not be working with female employees.” The Court finds the meaning of  
14 the word “reinstated,” in the context of the Order, requires the placing of Respondent in the same job  
15 position he occupied before the adverse action was taken against him. *City of Jackson, Miss. v. Martin*,  
16 623 So. 2d 253, 256 (1993), (citing *Ohio ex. rel. Olander v. Ohio Env’tl Prot. Agency*, 543 N.E.2d  
17 1262, 1264 (Ohio 1989); *Gorski v. Dickson City Borough Sch. Dist.*, 113 A.2d 334, 339 (1955);  
18 *Minn. ex. rel. Spurck v. Civil Serv. Bd.*, 32 N.W.2d 583, 588 (1948); *Berg v. Seaman*, 271 N.W. 924,  
19 925 (1937). *But see Dep’t of Transp. v. Pa. Civil Serv. Comm’n*, 290 A.2d 434, 436 (Pa. 1972)  
20 (court created an exception to the rule that reinstatement requires restoring employee to his former job,  
21 where employee clearly lacked the skills and qualifications necessary to perform the job he formerly held  
22 and would face the possibility of termination in the future for inadequately performing the job.).

23 In the context of CSC’s Order, the word “reinstated” means that Respondent would be placed  
24 in his former position, as an officer, with the same duties and the same responsibilities and the same  
25 interaction with the same employees prior to any adverse action by the employer.

26 b) Meaning of the words “position not working with  
27



1 females.”

2 The Court finds this phrase ambiguous and unenforceable. The phrase does not identify the female  
3 employees with whom the Respondent may not work. Nor does the phrase identify any scope of work.  
4 On one extreme, this phrase could mean that Respondent is not to have any contact with female employees  
5 such as, for example, administrative assistants within governmental support agencies such as payroll. On  
6 the other hand, it could mean that Respondent is not to have a female officer as his partner.

7 2) Mandate to hold unlawful and set aside agency action within  
8 standard of judicial review.

9 Under the APA, if the court cannot reconcile the agency action within the standard of review, the  
10 court must set aside the agency action. In the context of the substantial evidence review, the court must  
11 “[h]old unlawful and set aside agency action, findings, and conclusions found to be [unsupported by  
12 substantial evidence].” 1 CMC § 9112(f)(2).

13 3. The evidence.

14 Finally, now that the Court has interpreted the meaning of the words of the agency action and  
15 identified the standard of review, the Court turns to the evidence to determine whether there is, indeed,  
16 substantial evidence to support the Order of the Commission. The Court finds that the decision is not  
17 supported by substantial evidence.

18 In fact, there is no evidence to support the Commission’s findings that the Respondent could hold  
19 a position within DPS where he could not work with females. The record is bare of any evidence indicating  
20 that such a position exists. While the Commission made evidentiary findings regarding the scope and  
21 severity of Respondent’s inappropriate work behavior and concluded that he engaged in sexual harassment,  
22 there is no evidence in the record that supports their finding that a position exists within DPS where the  
23 Respondent could work without female employees.

24 At the May 15, 2002, hearing in this Court, the parties identified a position in the armory, where  
25 no female employees are currently employed. However, the Respondent would still have contact with  
26 female officers turning in their weapons. The parties also identified a position in the Criminal Investigation  
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1 Unit where no female employees are currently employed; however, Respondent may still have contact with  
2 female officers dispatched to a crime scene. Regardless of this Court's inquiry into whether a position  
3 existed, or whether DPS was required to create a position for Respondent, further discussion on the issue  
4 is futile. The evidence regarding the existence of a position where the Respondent would not work with  
5 females must support the conclusion of the Commission's Order and not this judicial review.

6 Furthermore, given this Court's interpretation that "reinstated" means that the Respondent would  
7 be restored to his former position, the record supporting the Commission's Order lacked any evidence  
8 supporting the existence, or lack thereof, of female employees within his former position. This leads the  
9 Court to only one conclusion. The Order was not supported by substantial evidence and must be set aside.

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11 4. Contrary to a constitutional right

12 As indicated earlier, the Court can also consider whether the agency action violates a constitutional  
13 right. 1 CMC § 9112(f)(2)(iii). The Court is gravely concerned that the Order violates constitutional rights  
14 respecting equal protection and employment opportunities under Title VII. Even assuming the Respondent  
15 was to be placed in his former position or into a position where he does not work with females, compliance  
16 with the Order would exclude future employment of females who would otherwise be qualified for a  
17 position in the same division of DPS as Respondent. This Court, however, will refrain from deciding these  
18 constitutional issues because this case may be decided on other grounds. *See Harbury*, \_\_\_ U.S. at \_\_\_,  
19 122 S. Ct. at 2188, 153 L. Ed. 2d at 425.

20 **IV.**

21 **CONCLUSION**

22 The October 4, 2001 Civil Service Commission Order is unlawful because it is not supported by  
23 substantial evidence and is hereby set aside.

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26 **SO ORDERED** this 12th day of September 2002.

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/s/ David A. Wiseman  
DAVID A. WISEMAN  
Associate Judge