CSC

B-66

STATE OF NEW JERSEY

In the Matter of Kimberle Malta-Roman, County of Hudson	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2016-1302	Request for Counsel Fees

ISSUED: DEC 17 2015 (SLK)

Kimberle Malta-Roman, a Human Services Specialist 1 with Hudson County, Department of Family Services, represented by Colin M. Page, Esq., requests counsel fees in accordance with the attached Civil Service Commission (Commission) decision rendered on April 15, 2015.

By way of background, the appointing authority charged the petitioner with conduct unbecoming a public employee and inability to perform duties and she was removed from her position effective June 12, 2013. Specifically, the appointing authority asserted that the petitioner was unable to perform duties after undergoing a fitness-for-duty examination. The petitioner subsequently appealed to the Commission, and the matter was referred for a hearing to the Office of Administrative Law (OAL). Following a hearing, the Administrative Law Judge (ALJ) recommended that the charges against the petitioner be reversed. Upon its review, the Commission adopted the ALJ's initial decision, ordered the petitioner to undergo another fitness-for-duty examination in order to determine if she should be reinstated or removed and awarded back pay[1] and counsel fees in accordance with *N.J.A.C.* 4A:2-2.12.

The parties were unable to reach an agreement regarding the amount of counsel fees due. In support of the petitioner's request, she filed an application for counsel fees and provided a certification of services from Mr. Page dated October 23, 2015, requesting $36,900 for 92.5 hours at a rate of $400 an hour, $21,752.50 for

[1] The petitioner indicates that the parties have reached an agreement on the back pay amount.

79.1 hours of work at a rate of $275 an hour for his associate, Robin Bernstein, Esq., a 35% enhancement of attorney's fees in the amount of $20,528.20, plus $2,073.11 for costs, for a total of $81,253.81. Mr. Page provides an itemized statement for services performed by him from August 9, 2013 to May 18, 2015 and for Ms. Bernstein from August 9, 2013 to October 10, 2013. Mr. Page is a partner in a law firm and he was admitted to the New Jersey Bar in 1999 and Ms. Bernstein is an associate attorney in a law firm and she was admitted to the New Jersey Bar in 2006.

In support of the petitioner's request to receive counsel fees at a rate higher than the fee ranges indicated in *N.J.A.C.* 4A:2-2.12, Mr. Page certifies that he graduated Cum Laude from the Georgetown University Law Center, he concentrated his legal studies on labor and employment law, and he has practiced almost exclusively in this area including working for a well-regarded labor and employment law practice and a Fortune 500 company. Although this case involved an appeal before the Commission, Mr. Page states that all the legal principles at issue were derived from discrimination law and therefore the petitioner needed an attorney who specialized in employment discrimination cases. He asserts that this matter involved complicated factual and legal arguments, including overcoming two reports from the appointing authority's experts which indicated that the petitioner was unable to work. Mr. Page highlights that after the Commission made its decision, the Superior Court granted her summary judgment in her parallel disability discrimination claim. Further, he argues that his hourly rate of $400 is reasonable and that the United States District Court for the District of New Jersey approved his rate of $400 per hour in a recent case. He also provides that Ms. Bernstein's rate is $275 per hour and that both of their rates are consistent with the rates received by similarly experienced labor and employment attorneys in New Jersey. Additionally, Mr. Page contends that, unlike public-sector unions, his firm took this matter on a contingency basis which was a substantial risk. He indicates that if the petitioner had not received a favorable judgment, he would not be entitled to any fee and notes that his agreement indicates that if the Commission awards fees at below-market rates, the petitioner is responsible for paying the difference. Further, noting that New Jersey Courts typically award fee enhancements to attorneys that bring discrimination cases, he requests a 35% enhancement in the amount of $20,528.20.

In response, the appointing authority, represented by Daniel W. Sexton, Esq., contends that the petitioner's request for $79,180.70 is excessive for a two day trial with four witnesses where the single issue was whether the petitioner was fit for duty. The appointing authority notes that the hourly rates requested are in excess of those provided for in *N.J.A.C.* 4A:2-2.12 and that Mr. Page's qualifications are not so unique to warrant a billing above the regulation rate, and even if the Commission deemed it was warranted, the maximum that should be allowed is $250 per hour. The appointing authority also maintains that Ms. Bernstein's work was

similar to a paralegal or secretary and therefore her work should be billed at $100 per hour. Additionally, it argues that the petitioner's attorneys' billings are excessive and duplicitous and that Mr. Page's and Ms. Bernstein's internal conference should not billable. Therefore, it claims that 7.45 hours should be deducted from Mr. Page's time and 12.95 hours should be subtracted from Ms. Bernstein's time. In the alternative, the appointing authority suggests that the Commission only allow for Mr. Page's time for these conferences. It also believes that Mr. Page's and Ms. Bernstein's time for research was excessive and suggests that Mr. Page's research time should be reduced from 17.5 to 8.75 hours and Ms. Bernstein's research time should be reduced from six to three hours. The appointing authority indicates that the December 16, 2013 hearing on Mr. Page's timesheet was actually only a two hour conference and therefore the bill for this appearance should be reduced from four to two hours. It also maintains that their trial preparation was excessive and duplicative and Mr. Page's trial preparation time should be reduced from six hours to three hours and Ms. Bernstein's trial preparation time should be reduced from 41 hours to 10.2 hours since her time is inflated as she was not working on the case at the time of the second day of the trial. Additionally, the appointing authority argues that there is no legal authority or regulation for a fee enhancement in a Civil Service matter. Consequently, the appointing authority maintains that the total amount for counsel fees and costs should be $18,934.11.

In reply, the petitioner states that counsel fee rates have increased and that the appointing authority has not contested or offered any evidence that Mr. Page's rate of $400 per hour and Ms. Bernstein's rate of $275 per hour are not market rates. Additionally, the petitioner contends that the appointing authority has not offered any evidence that her attorneys' time was excessive and she argues that this time was necessary to respond to the appointing authority's strategy to overwhelm her. Specifically, she highlights that her counsel had to prepare for the appointing authority's two expert witnesses and respond to the appointing authority's 29 page post-hearing brief to the ALJ and 50 page exceptions' brief to the Commission. Further, the petitioner presents that it is common practice for a junior attorney to summarize and synthesize case law, documents, prior testimony and prepare detailed examination outlines for senior attorneys to prepare for trial. The petitioner argues that she is entitled to a fee enhancement as this was a discrimination case that her attorneys' firm took on a contingency fee basis and the appointing authority has not provided any legal support exempting Civil Service cases from fee enhancements. Additionally, the petitioner claims that her fee request is not that large and is reasonable compared to other six-figure fee awards for employment law cases with fee enhancements in other cases in New Jersey courts.

In further response, the appointing authority maintains that while the amount of counsel fees that the petitioner requests may be common in Federal or

State Courts, it is extravagant for a Civil Service matter. Also, it states that the petitioner has not provided any evidence that attorney fees have soared over the past 12 years and submits an article that indicates that attorney billing rates have been under pressure since the 2008 recession.

CONCLUSION

N.J.A.C. 4A:2-2.12(c) provides as follows: an associate in a law firm is to be awarded an hourly rate between $100 and $150; a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between $150 and $175; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with practice concentrated in employment or labor law, is to be awarded an hourly rate between $175 and $200. *N.J.A.C.* 4A:2-2.12(e) provides a fee amount may also be determined or the fee ranges in (c) above adjusted based on the circumstances of a particular matter, in which case the following factors shall be considered: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated; the nature and length of the professional relationship with the employee; and the experience, reputation and ability of the attorney performing the services. *N.J.A.C.* 4A:2-2.12(g) provides that reasonable out-of-pocket costs, such as costs associated with expert witnesses, subpoena fees and out-of-state travel, shall be awarded. However, costs associated with normal office overhead shall not be awarded. *N.J.A.C.* 4A:2-2.12(d) provides that, if an attorney has signed a specific fee agreement with the employee or the employee's negotiations representative, the fee ranges set forth above may be adjusted. *N.J.A.C.* 4A:2-2.12(e) provides that the fee amount or fee ranges may be adjusted based on the circumstances of the particular matter, and in consideration of the time and labor required, the customary fee in the locality for similar services, the nature or length of the relationship between the attorney and client and the experience, reputation and ability of the attorney.

As to the rate of counsel fees in this matter, the Commission finds that the petitioner has not provided sufficient information to justify awarding her counsel fees for Mr. Page at the requested hourly rate of $400. It is noted that their retainer agreement indicates that Mr. Page's normal market rate is $350 per hour. Further, although the petitioner argues that this was a complex employment disability discrimination case that needed special expertise, the Commission notes that a two-day hearing does not evidence a particularly complex issue. In this regard, the petitioner was removed for inability to perform duties. The petitioner has not established entitlements to reimbursement at a higher rate as the legal issues were not novel nor were extraordinary time and labor expended in this matter. The underlying disciplinary matter was clearly not novel in any way and was no more complex than any of the thousands of disciplinary appeals involving

removals decided over the years by the Commission. In this regard, an appeal of a removal from employment inherently lacks the legal complexity necessary to justify the hourly rate requested and no unique legal experience. Further, the Commission notes that although there is a fee agreement in place in this matter, that is not sufficient, in and of itself, to award a higher fee than those listed in *N.J.A.C.* 4A:2-2.12. Therefore, based on the information provided that Mr. Page is a partner in a law firm with a practice concentrated in employment or labor law, the petitioner, should be reimbursed for Mr. Page's time at the rate of $200 per hour. *See N.J.A.C.* 4A:2-2.12(c), (d), and (e). However, the Commission disagrees with the appointing authority's assertion that Ms. Bernstein's work was similar to a paralegal or secretary as she was engaged in the practice of law supporting Mr. Page's representation in this matter. Accordingly, the petitioner should be reimbursed for Ms. Bernstein's time, who is an associate in a law firm, at the rate of $150 per hour. *See N.J.A.C.* 4A:2-2.12(c)1. Additionally, although the petitioner's attorneys' firm took this case on a contingency basis, there are no provisions, under Civil Service law and rules, that authorize an enhancement of counsel fees for this basis and the petitioner has not cited any authority that a counsel fee enhancement shall apply to Civil Service administrative proceedings.

In the statement of counsel fees, Mr. Page represents that he spent 92.25 hours in this matter. This includes his "travel to and from and attend hearing" at the OAL on October 10, 2013 in the amount of nine hours and on February 21, 2014 in the amount of 8.5 hours. This also includes his time to "prepare for and attend hearing" at the OAL on December 16, 2013 in the amount of four hours. The appointing authority has represented that the December 16, 2013 entry was for a two hour conference, which has not been disputed. Ms. Bernstein represents that she spent 79.1 hours in this matter. This includes her "travel to and from and attend hearing" at the OAL on October 10, 2013. Additionally Ms. Bernstein's time includes sending faxes on August 26, 2013, September 4, 2013, September 10, 2013 and sending a subpoena, cover letter, and check on September 17, 2013 in the amount of 1.25 hours. The Commission disagrees with the appointing authority's claim that internal conferences between Mr. Page and Ms. Bernstein are not billable as it cites no authority for this representation. Similarly, the appointing authority has not presented any evidence that Mr. Page's and Ms. Bernstein's time researching issues and preparing for trial were excessive or duplicative. However, travel time to and from conferences and hearings is not reimbursable. Therefore, the Commission finds that two hours travel time to and from the separate hearings or conferences at OAL shall be deducted for each separate date of appearance by Mr. Page and Ms. Bernstein. Additionally, 1.25 hours shall be deducted from Ms. Bernstein's time for sending out faxes and mail as this is normal office overhead that is not reimbursable under *N.J.A.C.* 4A:2-2.12(g).

Therefore, counsel fees are awarded as follows:

Mr. Page: 86.25 hours x $200 per hour = $17,250

Ms. Bernstein: 75.85 hours x $150 per hour = $11,377.50

Total: $28,627.50

In addition, the petitioner requests to be reimbursed for $2,073.11 in costs. Such costs are for medical records, a United States Postal Service (USPS) certified mail return receipt, a witness fee, an expert fee, and parking at a hearing. However, as indicated above, the costs that represent normal office overhead will not be awarded. *See N.J.A.C.* 4A:2-2.12(g). These costs include photocopying expenses and expenses associated with the transmittal of documents through use of Federal Express or a messenger service. *See, e.g., In the Matter of Monica Malone,* 381 *N.J. Super.* 344 (App. Div. 2005). Thus, the USPS fee in the amount of $6.11 is not reimbursable. However, the remaining costs are reimbursable as reasonable out-of-pocket costs. Accordingly, the petitioner should be reimbursed $2,067 for medical records, a witness fee, an expert fee and parking.

Therefore, the Commission finds that the petitioner is entitled to reimbursement for $28,627.50 in counsel fees and $2,067 in costs.

ORDER

Therefore, it is ordered that this request be granted in part and that the appointing authority pay Colin M. Page counsel fees at the rate of $200 and hour and Robin Bernstein at the rate of $150 an hour for a total amount of $28,627.50 and costs in the amount of $2,067 within 30 days of the issuance of this decision.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16th DAY OF DECEMBER, 2015

Robert M. Czech
Chairperson
Civil Service Commission

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Attachment

c: Colin M. Page, Esq.
Daniel W. Sexton, Esq.
Kenneth Connolly
Joseph Gambino

A-1e

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Kimberle Malta-Roman, Hudson County Department of Family Services

CSC Docket No. 2013-2883
OAL Docket No. CSV 06087-13

ISSUED: MAY 07 2015 (SLK)

The appeal of Kimberle Malta-Roman, Human Services Specialist 1 (HSS1), Hudson County, Department of Family Services, of her removal effective June 12, 2013, on charges, was heard by Administrative Law Judge Evelyn J. Marose (ALJ), who rendered her initial decision on March 13, 2015. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 15, 2015, adopted the Findings of Fact and the ALJ's recommendation to reverse the removal. However, the Commission ordered that the appellant undergo a psychological fitness-for-duty examination prior to returning to work.

DISCUSSION

The appointing authority removed the appellant on charges of conduct unbecoming a public employee and inability to perform duties. Specifically, the appointing authority asserted that the appellant did not pass a fitness-for-duty examination. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ found that in March 2012, the appellant took a leave of absence and her treating psychiatrist, Lina Shah, M.D., found her fit to return to work in June 2012. However, prior to the appellant returning to work, the

appointing authority required the appellant to undergo a fitness-for-duty examination. Dr. Robert Kanen, a licensed psychologist, evaluated the appellant on behalf of the appointing authority, and in a report issued on June 21, 2012, determined that the appellant was fit to return to work, but also concluded that she needed long-term therapy. Although the appellant was advised that Dr. Kanen found her fit to return to work, she was not told that he had recommended long-term therapy. As part of her recommendation, Dr. Shah requested that the appellant return to work on a part-time basis for the first two weeks, however, the appointing authority denied that request. Therefore, the appellant returned to full time work on June 26, 2012. On her first day back, the appellant had not yet been acclimated to her new medication which resulted in Dr. Shah placing her back on leave until July 16, 2012. Before the appointing authority would permit the appellant to return to work from this second leave, it required her to submit to another fitness-for-duty examination conducted by Dr. Kanen. Unaware that the appellant had not been advised of his recommendation for individual therapy, Dr. Kanen found in this examination that the appellant's failure to enter therapy was indicative of her unwillingness to deal with her problem. Additionally, he stated that the appellant could have difficulty making accurate decisions and perceiving situations at work, had the characteristics of unreliability, impulsiveness, restlessness, and moodiness, described her as untrustworthy and unreliable, and stated that she persistently seeks attention and excitement as she is often engaged in seductive and self-dramatizing behavior. Dr. Kanen acknowledged in his testimony at OAL that he never saw the appellant exhibit any of those characteristics on either day that he evaluated her and said that his predictions were based upon the appellant's diagnoses of major depression, Attention Deficit/Hyperactivity Disorder, and cognitive impairments. Therefore, Dr. Kanen concluded that the appellant was unfit to return to work.

Based on Dr. Kanen's report, the appointing authority charged the appellant with inability to perform duties. Since there was a conflict of medical testimony at the departmental hearing, the appointing authority afforded the appellant the opportunity to undergo another fitness-for-duty evaluation conducted by a different doctor. The appellant was evaluated by psychiatrist, William B. Head, Jr., M.D., who issued reports on April 1, 2013 and May 3, 2013 indicating that the appellant was not fit for duty. However, Dr. Head testified that it was his understanding that the appellant would return for a future evaluation after a few months of psychotherapy. In this regard, Dr. Head stated that it was an oversight on his part that he did not recommend that the appellant receive psychotherapy and then be re-evaluated rather than just stating that appellant was not fit for duty.

Dr. Shah testified that she had been treating the appellant since 2008. In March 2012, she recommended that the appellant stay out of work for approximately one month. Subsequently, she concluded that the appellant could return to work on a part-time basis in June 2012 based on her improvement and

strong desire to work. Dr. Shah testified that she revised her recommendation to have the appellant to return to work in July 2012 so that the appellant could get acclimated to her new medicine. Additionally, Dr. Shah indicated she had reviewed the appellant's job duties and found that there were not any duties that she could not perform as an HSS1. Further Dr. Shah disagreed with Dr. Kanen's conclusion that the appellant possessed certain negative characteristics and had a low level of motivation toward work as she had never observed the appellant as having these negative traits during her treatment and the appellant had expressed a strong desire to her to go back to work.

Based on the foregoing, the ALJ determined that Dr. Shah, the appellant's treating physician, credibly testified that the appellant was fit to return to work on July 16, 2012. The ALJ noted that Dr. Shah's conclusions were based on her review of the appellant's job duties, her opinion that that she could handle the stress of work once acclimated to her new medicine, that the appellant was highly motivated to return to work, and the appellant's satisfactory work history. Conversely, the ALJ found Dr. Kanen's and Dr. Head's concerns and testimony about the possibility that the appellant could have further depressive episodes because she had past episodes was not enough to support a determination that she was unfit for duty. Further, the appellant was not made aware of their recommendation that she enter therapy and there was no evidence that psychotherapy should have been mandatory before she could return to work. Therefore, the ALJ concluded that the appointing authority failed to meet its burden of proof that the appellant was unable to perform her job duties and recommended reversing the removal.

In its exceptions to the ALJ's decision, the appointing authority argues that the ALJ applied the wrong interpretive framework to the expert testimony. Specifically, the appointing authority argues that since expert testimony was provided, the credibility of the expert witnesses was not the issue. Rather, it contends that the issue is which expert is more persuasive regarding the facts in this matter. The appointing authority maintains that Dr. Kanen's opinion is persuasive as he is an expert in occupational testing and his conclusions were based on well accepted scientifically based occupational psychology in the context of fitness for duty examinations. Further, it asserts that Dr. Head's expert opinion should also be given greater weight as he had a full understanding of the appellant's background and determined that she should not be put in a situation where she would most likely malfunction again. In contrast, it argues that Dr. Shah's opinion should not be considered because it is biased as she is the appellant's treating physician. Additionally, the appointing authority emphasizes that Dr. Shah only met with the appellant for 15 minute increments, and as such, knew very little of her background. The appointing authority also highlights that Dr. Shah does not have a background in occupational psychology and testing and that she had never performed a fitness for duty examination. Moreover, the appointing authority argues that the appellant's testimony supports the conclusion that she is

unfit. It also contends that the reinstatement of the appellant is harmful to the appointing authority's work force, undermines its management responsibility and will have an adverse effect on the particularly vulnerable population served by an HSS1.

In response, the appellant argues that the ALJ correctly stated the legal standard. Therefore, the appellant maintains that the Commission should defer to the ALJ's finding that her treating psychiatrist was more credible than the appointing authority's witnesses.

Upon on its *de novo* review of the record, the Commission agrees with the ALJ's Findings of Fact and assessment of the charges and affirms the ALJ's decision to dismiss the charges and to reverse the removal. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004).

In this matter, there are conflicting medical opinions. The appellant presents testimony from her treating physician, Dr. Shah, that she was cleared to return to work in June and July 2012. Dr. Shah's opinion was based on her on-going treatment of the appellant since 2008. Dr. Shah observed that the appellant had improved since taking her medical leave in March 2012 and that she had a strong desire to return to work. Although Dr. Shah initially found the appellant fit to return to work in early June 2012, an incident at work demonstrated that she needed additional time off in order to acclimate herself to her new medicine. Additionally, Dr. Shah reviewed the appellant's job duties and concluded she was fit for duty in July 2012. Conversely, Dr. Kanen's second evaluation of the appellant did not account for the appellant's need to adjust to her new medicine and he acknowledged that he never saw the appellant exhibit any negative personality traits. Further, Dr. Kanen also strongly relied upon the fact that the appellant had not entered into long-term therapy as a basis for his conclusion that she did not want to deal with her problems. However, the appellant was never apprised of the fact that Dr. Kanen recommended that she receive long-term psychotherapy. Dr. Head acknowledged that the appellant was normal, bright, articulate, capable,

eager to return to work, and confident in her ability to perform her job duties. However, Dr. Head also inferred that the appellant lacked a desire to resolve her issues as she did not enter into long-term psychotherapy, but was still of the opinion that she was only temporarily disabled. Significantly, Dr. Head testified that it was an oversight on his part that he did not recommend in his report that the appellant receive psychotherapy and then be re-evaluated rather than just find that she was unfit for her job.

Therefore, the Commission agrees with the ALJ's credibility determination and also finds that Dr. Shah's testimony is more persuasive than the appointing authority's experts as her opinion is based on her on-going, long-standing relationship with the appellant, her actual observations of the appellant's characteristics and desire to return to work, the appellant's history successfully performing her job duties, and specific factors in this matter such as the appellant's need to adjust to her new medicine. On the contrary, Dr. Kanen and Dr. Head incorrectly assumed that the appellant did not desire to resolve her problems since she did not enter into long-term psychotherapy when the appellant was never made aware of this recommendation. Additionally, they did not account for the appellant's need to adjust to her new medicine, did not consider the appellant's successful work history, discounted the actual positive personality traits that they both directly observed from her, and instead speculated that the appellant would not be able to successfully perform her job duties based on inferences from psychological testing. Based substantially on the above factors, the Commission cannot find the ALJ's credibility determinations regarding the expert witnesses to be arbitrary, capricious or unreasonable. Moreover, the Commission has no issues with the standard used by the ALJ in making those findings. *See e.g., In the Matter of Mariano Del Valle, Township of Lakewood,* Docket No. A-3934-0575 (App. Div. February 8, 2007) (Removal of a Police Officer who suffered from panic attacks, depression, anxiety, alcohol dependence, and delusional thinking, including the ALJ's credibility determinations regarding the divergent findings of the parties' expert psychologists, upheld) and *In the Matter of David Figueroa* Docket No. A-3718-04T1 (App. Div. February 8, 2006) (Removal of a Police Officer on charges related to his psychological unfitness for duty upheld even though the parties presented conflicting expert testimony related to the appellant's psychological fitness for duty). *See also, In the Matter of Peter Kristensen* (MSB, decided June 25, 2003) (Removal of a Police Officer reversed where the appellant's psychologist's report was entitled to greater weight, since appointing authority's psychologist was speculative in nature).

However, the Commission notes that it is neither bound by nor adopts the standard found in the appellant's Collective Bargaining Agreement defining fitness for duty as an employee who is potentially dangerous to themselves or others. The basis for conducting a fitness-for-duty evaluation is to determine if an employee if physically or mentally able to perform his or her job duties. Should an appointing

authority believe an employee unfit, and an employee is properly evaluated as either medically or psychologically unfit to perform the essential functions of a position, it is of no consequence to the Commission as to whether they are found to also be a danger to themselves or others, aside from such a finding being part of the basis for the unfitness.

While the Commission has reversed the removal, it notes that the appellant did have issues after a one day return to work on June 26, 2012, which required the appellant to ask for an additional three week leave of absence. Accordingly, the Commission has trepidation ordering the appellant's reinstatement without some assurance that she is fully capable of performing the duties of her position. Thus, the appellant should be scheduled for an evaluation with an independent qualified psychiatrist or psychologist. The selection of the psychiatrist or psychologist shall be by agreement of both parties within 30 days of the date of this decision. The appointing authority shall pay for the cost of this evaluation. If the psychiatrist or psychologist determines that the appellant is fit for duty, without qualification, the appellant is to be immediately reinstated to her position. If the psychologist or psychiatrist determines that the appellant is unfit for duty, then the appointing authority should initiate a new charge for the appellant's removal due to her inability to perform duties based on her current unfitness, with a current date of removal. Upon receipt of a Final Notice of Disciplinary Action on that charge, the appellant may appeal that matter to the Commission in accordance with *N.J.A.C.* 4A:2-2.8. Upon timely submission of any such appeal, the appellant would be entitled to a hearing regarding the current finding of unfitness only. In either case, she would be entitled to mitigated back pay, benefits, and seniority from July 21, 2012[1] until the time she is either reinstated or removed.

With respect to counsel fees, *N.J.A.C.* 4A:2-2.12 provides for the award of full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues before the Commission. In this case, the Commission reversed the appellant's removal based on her alleged unfitness for duty. Therefore, she is entitled to reasonable counsel fees. Additionally, in light of the Appellate Division's decision in *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. However, under no circumstances should her reinstatement be delayed pending resolution of any back pay or counsel fee dispute.

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[1] That is the date she was found fit for duty by Dr. Shah.

ORDER

The Civil Service Commission finds that the removal of the appellant was not justified and therefore, reverses that action. The Commission also orders, prior to reinstatement, the appellant undergo a psychological fitness-for-duty examination. The outcome of that examination shall determine whether the appellant is entitled to be reinstated or removed, as outlined previously. In either case, the appellant is entitled to back pay, benefits and seniority for the period from July 21, 2012, until she is either reinstated or removed. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10.

It is further ordered that counsel fees should be awarded to the appellant as the prevailing party pursuant to *N.J.A.C.* 4A:2-2.12. The appellant shall provide proof of income earned and an affidavit or services to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of the appellant's reinstatement or removal. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF APRIL, 2015

Robert M. Czech
Chairperson
Civil Service Commission

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and
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Attachment