



STATE OF NEW JERSEY

In the Matter of Lisa Schweizer,
Middle Township School District

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2020-2383

Request for Back Pay

ISSUED: JULY 31, 2020 (SLK)

Lisa Schweizer represented by Louis P. McFadden, Jr., Esq., requests that the Civil Service Commission (Commission) determine the amount of back pay and benefits due based on the decision *In the Matter of Lisa Schweizer* (CSC, decided December 18, 2019). She also requests interest and counsel fees.

By way of background, the appeal of Lisa Schweizer, a Keyboarding Clerk 1 with the Middle Township School District, of her removal, on charges, was before Administrative Law Judge John S. Kennedy (ALJ), who rendered his initial decision on September 23, 2019, recommending the dismissal of the charges and the reversal of the removal. Thereafter, in *Schweizer, supra*, the Civil Service Commission rejected the ALJ's recommendation to dismiss the charges and reverse the removal and instead, upheld the charges and imposed a 20 working day working suspension. Additionally, the Commission ordered that the appellant be granted back pay, benefits and seniority from February 15, 2017 to her reinstatement. Counsel fees were denied pursuant to *N.J.A.C. 4A:2-2.12*.

In her initial request, the appellant stated that the appointing authority took over two months to reinstate her and only did so after she filed a request for enforcement. She indicated that she still has not received her back pay after being wrongfully terminated. Therefore, she requested that the Commission order the appointing authority to submit its back pay calculation. Further, she requested that,

if the parties could not resolve the issue, that the Commission determine the back pay amount.

In its initial response, the appointing authority, represented by Camille L. McKnight, Esq., presented that the appointing authority did provide the appellant its back pay calculation. Thereafter, the appellant provided the appointing authority revised calculations. However, the appointing authority objected to the appellant's inclusion of interest as *N.J.A.C. 4A:2-2.11(a)* provides that the Commission may award interest when an appointing authority has unreasonably delayed compliance with the Commission's order or finds other sufficient cause. However, in this case, the Commission did not provide such an award. Also, the appointing authority disagreed with the appellant's determination that she be placed on Salary Step 2 for the 2017-18 school years as it indicates that secretaries did not move up salary steps in the 2016-17 and 2017-18 school years. Therefore, it stated that the appellant would have been placed on Salary Step 2 at the beginning of the 2018-19 school. It indicated that the parties have agreed that the appellant is currently on Salary Step 3 for the 2019-20 school year. Further, the appointing authority presented that there was a discrepancy between the appellant's gross earnings during her separation. Specifically, the appellant initially indicated that her gross earning during the separation were \$16,603.20, but then indicated in her revised back pay calculation that her gross earnings during the separation were \$16,119.46. Additionally, the appointing authority asserted that the appellant is a 10-month employee and not a 12-month employee. Further, it stated that she is not entitled to have more than one-year of unused vacation time carried over. Therefore, it presented that the appellant is entitled to 57.5 sick days and 20 vacation days as part of her back pay award. Finally, the appointing authority disagreed with the appellant's calculation of the reimbursement for the maintenance of her benefits as the appellant included out-of-pocket expenses and co-pays. Additionally, it indicated that the appellant improperly calculated that she is entitled to the entire amount she paid for health insurance during her separation as she is only entitled to the difference between her contribution with the appointing authority and her contribution during her separation under *N.J.A.C. 4A:2-2.10(d)*.

Thereafter, the appointing authority further responded that the parties had further communications and the appellant clarified that her gross earnings during her separation were \$16,945.57. Additionally, the parties agreed that the appellant was entitled to a gross back pay award in the amount of \$63,928.50, based on \$61,086.54 in salary and \$2,841.86 for vacation days. It indicated that it sent the appellant a settlement agreement, which preserved the appellant's right to appeal her denial of counsel fees as requested. Therefore, as it asserts that this matter has been resolved, it asks that the Commission dismiss this matter.

In reply, the appellant represents that the parties have not reached any agreement as she is not satisfied with certain language in the proposed settlement

agreement concerning her release and waiver of claims and does not include pension language that she indicated was a requirement for a settlement. She acknowledges that the parties have reached an agreement on the amount of back pay.

Additionally, the appellant reiterates her claim for interest and counsel fees.¹ The appellant emphasizes that it had been difficult to reach an agreement on the back pay because the appointing authority initially maintained that the appellant was a 10-month employee before conceding that all records confirmed that she was a 12-month employee. Further, she asserts that the appointing authority continues to ignore the pension plan benefit issue which must be addressed in any settlement agreement. She states that the Commission's order provided for back pay minus mitigation, and all benefits. However, she indicates that the appointing authority has refused to commit to the provision of pension credit, which includes deductions for contribution from her back pay and the pension contribution that the appointing authority is responsible for. Additionally, the appellant presents that the Division of Pension and Benefits (Pension and Benefits) requires that the appointing authority take certain steps to ensure that pension credit is received. Therefore, the appellant requests that the Commission enter an order compelling the appointing authority to deduct pension contributions from her back pay, make the employer contributions to Pension and Benefits, and otherwise comply with its obligations under the Pensions and Benefits "Fact Sheet." Moreover, she contends that the appointing authority's proposed settlement agreement is unacceptable because it requires her to waive many types of claims whereas the award of back pay and benefits does not require her to waive any right.

Additionally, the appellant argues that the appointing authority was unjustified in its delays in implementing the Commission's December 18, 2019 order. She presents that she forwarded all of her financial information regarding mitigation during her separation to the appointing by January 23, 2020, and then the figure changed as she was still working for her prior employer until February 3, 2020. Thereafter, in March, her prior employer paid out personal time and presented another pay stub. She states that there were never any discrepancies in her separation pay and only updates. However, she complains that it took two months for the appointing authority to reinstate her and that it was only done so after she requested that the Commission's order be enforced. Thereafter, the appointing authority delayed settlement by frivolously arguing that she was a 10-month employee. She presents various delays throughout the process which she contends have cost unnecessary counsel fees. Therefore, the appellant believes that she should

¹ In a June 10, 2020 submission, the appellant requested counsel fees. Further, in a June 12, 2020 submission, the appellant requested leave to file a submission asking for the Commission to reconsider the denial of counsel fees. The appellant's counsel indicated that he would like to submit a five-page brief for reconsideration before the Commission relinquishes jurisdiction. This agency responded that the appellant may submit the brief, but the Commission may not consider it. However, this agency has no record that the appellant's attorney ever submitted this brief.

be awarded interest on the back pay award beginning February 1, 2020² , and awarded reasonable counsel fees for her repeated efforts to secure her rightful pay and benefits.

In further response, the appointing authority asserts that on January 22, 2020, the appellant forwarded a premature request for enforcement. Further, this agency's subsequent letter to the parties acknowledging the appellant's request for enforcement did not allow the parties to respond to the other party's submissions. Instead, all the parties were instructed to submit arguments by June 4, 2020, and it did not receive the appellant's latest submission until June 10, 2020. Further, it argues that *N.J.A.C.* 4A:2-2.10(d) provides that benefits include vacation and sick leave credits and additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal. However, the pension issue is separate and apart from the issues before the Commission. Regardless, the appointing authority did agree to provide Pensions and Benefits information and Pensions and Benefits did accept her into the pension system again. It emphasizes that *N.J.A.C.* 4A:2-2.10(g) allows the parties to request intervention from the Commission when the "settlement amount" cannot be reached. However, in this matter, the parties did reach a settlement on the back pay amount. Further, the appointing authority did provide her with minimal changes to the settlement agreement based on her counsel's request, but her counsel chose not to respond until after the appointing authority's board meeting. Therefore, her request for interest is inappropriate and the current request is the only thing holding up the appointing authority from issuing a check and resolving this matter. Finally, the appointing argues that her request for counsel fees is untimely.

In an additional reply, the appellant submits a document regarding longevity pay for employees hired on or before July 1, 2016.

In a further response, the appointing authority advises that longevity pay was not applicable with respect to the years covered for the award of back pay.

CONCLUSION

N.J.A.C. 4A:2-2.10(a) provides that where a disciplinary penalty has been reversed, the Commission shall award back pay, benefits, seniority or restitution of a fine. Such items may be awarded when a disciplinary penalty is modified.

N.J.A.C. 4A:2-2.10(d) provides, in pertinent part, that back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Benefits shall include vacation and sick leave credits and

² Although, it would not be logical to request interest from February 1, 2020 forward since the appellant was reinstated on that date. Accordingly, the Commission assumes that the request is for interest back to the date of the inception of her back pay award.

additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal. It further indicates:

1. Back pay shall not include items such as overtime pay, holiday premium pay and retroactive clothing, uniform or equipment allowances for periods in which the employee was not working.
2. The award of back pay shall be reduced by the amount of taxes, social security payments, dues, pension payments, and any other sums normally withheld.
3. Where a removal or suspension has been reversed or modified, an indefinite suspension pending the disposition of criminal charges has been reversed, the award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations.

N.J.A.C. 4A:2-2.10(f) provides that when the Commission awards back pay and benefits, determination of the actual amounts shall be settled by the parties whenever possible. *N.J.A.C. 4A:2-2.10(g)* provides, in pertinent part, that if settlement on an amount cannot be reached, either party may request, in writing, Commission review of the outstanding issue.

N.J.A.C. 4A:2-2.11(a) provides that when the Commission makes an award of back pay, it may also award interest in the following situations:

1. When an appointing authority has unreasonably delayed compliance with an order of the Commission or Chairperson, as applicable; or
2. Where the Commission finds sufficient cause based on the particular case.

N.J.A.C. 4A:2-2.12(a) provides that the Commission shall award partial or 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.

N.J.A.C. 4A:2-1.6(a) provides that within 45 days of receipt of a decision, a party to the appeal may petition the Civil Service Commission for reconsideration. *N.J.A.C. 4A:2-1.6(b)* provides that a petition for reconsideration shall be in writing signed by the petitioner or his or her representative and must show the following:

1. The new evidence or additional information not presented at the original proceeding, which would change the outcome and the reasons that such evidence was not presented at the original proceeding; or
2. That a clear material error has occurred.

In this matter, the Commission finds that the appellant is entitled to a gross back pay award in the amount of \$63,928.50 as both parties have indicated that they have agreed to this amount. The appellant also submitted a document suggesting that she was entitled to “longevity pay.” The appointing authority responded that “longevity pay” was not applicable with respect to the years covered for the award of back pay. The appellant did not respond to the appointing authority’s assertion. Therefore, the Commission finds no reason to modify the back pay award with additional amounts for “longevity pay.”

Regarding the appellant’s request for interest, the request is denied. The Commission notes that, although the parties’ efforts to settle this matter have been contentious, there is nothing in the record evidencing that the appointing authority unreasonably delayed the payment of back pay in this case. Moreover, while the appellant argues that her two-month delay in reinstatement warrants an award of interest, the Commission disagrees. In this regard, there is nothing in the record showing that the appointing authority was motivated by bad faith or had a nefarious reason for its delaying in reinstating the appellant or in its not granting the appellant back pay. Without evidence of bad faith, the Commission cannot justify an award of interest based on the facts of the instant matter. *See, e.g., In the Matter of Frank DeBartola* (MSB, decided September 8, 2004).

Concerning the appellant’s request for counsel fees, the Commission denies the request. It is noted that there is nothing in the record that indicates that the appellant has submitted a request for reconsideration of the Commission’s denial of counsel fees that complies with *N.J.A.C. 4A:2-1.6(b)*. Moreover, even if she had, as the appellant’s request for reconsideration of the denial of counsel fees was first submitted on June 10, 2020, which is well after 45 days from the Commission’s December 18, 2020 decision, this request is untimely under *N.J.A.C. 4A:2-1.6(a)*. Regardless, as the Commission noted in its prior decision, pursuant to *N.J.A.C. 4A:2-2.12*, an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the original matter, the Commission sustained the charges and only modified the penalty. Thus, the appellant did not prevail of all or

substantially all of the primary issues of the appeal, and counsel fees were appropriately denied.

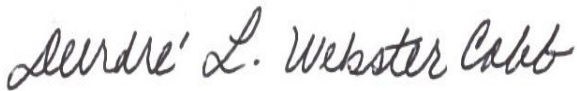
Finally, regarding the pension contribution issue, the record indicates that the appellant's initial request for enrollment in the Public Employees Retirement System (PERS) was initially denied on February 12, 2020. Thereafter, a subsequent determination was made and the appellant's application for enrollment was accepted by Pensions and Benefits and she was enrolled into PERS, effective February 1, 2020. *N.J.A.C. 4A:2-2.10(d)2* provides that a back pay award shall be reduced by "the amount of taxes, social security payments, dues, pension payments, and any other sums normally withheld." Accordingly, the appointing authority should withhold all required deductions from the gross back pay amount. However, the mechanism for how pension contributions are paid to Pensions and Benefits is not within the Commission's authority as, generally, issues related to pensions are outside of its jurisdiction. Therefore, the Commission denies her request related to pensions and those issues should be addressed in the appropriate forum.

ORDER

Therefore, the Commission grants the appellant gross back pay in the amount of \$63,928.50. The appointing authority shall submit payment, subject to the provisions of *N.J.A.C. 4A:2-2.10(d)2*, to the appellant within 30 days of the receipt of this decision. The remainder of the appellant's other requests are denied.

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 29TH DAY OF JULY, 2020



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