



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Carolyn McKnight,
City of Newark

CSC Docket No. 2021-686

Court Remand

ISSUED: JANUARY 22, 2021 (SLK)

The Superior Court of New Jersey, Appellate Division remanded *In the Matter of Carolyn McKnight* (CSC, deemed adopted November 15, 2019) to the Civil Service Commission (Commission) to address McKnight’s claims regarding back pay and reinstatement. In reply, the City of Newark (Newark), represented by Cheyne R. Scott, Esq., requests a stay pending its appeal to the Appellate Division.

By way of background, McKnight, a Principal Buyer, appealed her removal effective July 22, 2016 on charges to the Commission. The matter was transmitted to the Office of Administrative Law as a contested case. Administrative Law Judge Kimberly A. Moss (ALJ), who rendered her initial decision on July 1, 2019, recommended modifying the removal to a four-months suspension. Exceptions were filed on behalf of Newark and a reply was filed on behalf of McKnight. At that time, the Commission did not have a quorum. Therefore, in a November 12, 2019 letter, this agency informed the parties that under these circumstances, the ALJ’s recommended decision was deemed adopted as the final decision in this matter per *N.J.S.A. 52:14B-10(c)*, effective November 15, 2019. The letter indicated that McKnight was to be reinstated with back pay, benefits and seniority from the end of her four-month suspension until the date of actual reinstatement. Further, the back pay award was to be reduced and mitigated and McKnight was entitled to reasonable counsel fees. The parties were to make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, this agency indicated under no circumstances should McKnight’s reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

On December 19, 2019, McKnight, represented by Lynsey A. Stehling, Esq., filed a request for enforcement with the Commission. Thereafter, on December 20, 2019, Newark filed an appeal with the Appellate Division which responded on December 24, 2019 indicating that since there were counsel fee issues outstanding, the matter was not final and not appealable until all issues were resolved. On December 26, 2019, this agency advised McKnight that it could not act on her request for enforcement since it did not have a quorum. Thereafter, Newark filed an amended appeal to the Appellate Division and on February 3, 2020, the Appellate Division filed an Order denying Newark's Motion for Leave to File a Motion for Leave to Appeal as Within Time and dismissed the appeal as interlocutory. On September 8, 2020, the counsel fee issue was resolved, and counsel fees were paid to McKnight. In November 2020, Newark served McKnight back pay calculations and McKnight requested clarification on the proposed calculations. Additionally, McKnight made multiple requests to Newark to be reinstated, but she has not been reinstated. On November 25, 2020, McKnight filed a motion with the Appellate Division seeking a temporary remand regarding back pay and reinstatement, which the Commission indicated it did not oppose. On December 7, 2020, Newark filed a response opposing the request. On December 10, 2020, the Appellate Division issued an Order granting a temporary remand to the Commission to address McKnight's claims regarding back pay and reinstatement within 45 days.

In regard to back pay and reinstatement, McKnight presents that Newark never sought a stay of the Commission's final decision and, therefore, she should be immediately reinstated, and her benefits and seniority should be corrected in accordance with the Commission's final decision. McKnight states that under *N.J.A.C. 4A:2-2.10(d)5*, she is not obligated to mitigate her back from November 15, 2019, the effective date of the Commission's decision until her reinstatement. She notes that after November 15, 2019 to the present, she was not eligible for unemployment and did not earn money during this time. McKnight indicates that starting in 2017, due to her age, she received social security benefits. She presents that she received \$11,352 in social security in 2017, \$11,718 in 2018, \$11,988 in 2019, and will receive \$12,180 in 2020 based on her monthly benefit of \$1,015. She states, as indicated under her mitigation form which she provided Newark, she received unemployment from December 17, 2016 through June 18, 2017, and asserts that her approval of benefits during this time indicates that she actively sought work during that time. McKnight indicates that she did not qualify for extended unemployment benefits. She presents the retail positions that she sought on October 8, 2018, October 17, 2018, and on June 3, 2019. McKnight states that she was unsuccessful in gaining employment and she believes that she did not obtain employment due to her age. She asserts that her unemployment has caused her economic hardship and she had to receive a \$60,000 Deferred Compensation Plan payment in 2017 to pay bills during unemployment and she notes that there was a penalty associated with this payment.

McKnight submits Newark's calculation of her gross pay as \$31,191.82 from August 1, 2016 to December 31, 2016, \$75,409.62 for 2017, \$77, 205.63 for 2018, \$77,429.83 for 2019 and \$61,471.07 from January 1, 2010 to October 16, 2020. Additionally, McKnight indicates that Newark's calculations do not include an annual 14% longevity benefit that she is entitled to as an employee who has completed 30 years of service nor does it include contractual increases received under the collective negotiations agreement for 2015 through 2018.

McKnight argues that Newark should not be allowed to continue to defy the Commission's decision, she should be immediately reinstated, and receive back pay retroactive to November 11, 2016,¹ which is four months after her initial suspension in accordance with the ALJ's recommendation which was adopted by the Commission. She reiterates that her unemployment award demonstrates that she made a good faith effort to obtain employment during the time she received unemployment benefits, and thereafter, she sought employment, but was unable to find work. She presents that she is not required to mitigate during the time after she was to be reinstated. McKnight requests interest on her back pay under *N.J.A.C. 4A:2-2.11(a)*, as she asserts that Newark has unreasonably delayed compliance with the Commission's order by refusing to reinstate her and provide back pay. She highlights that Newark's December 7, 2020 submission to the Appellate Division clearly indicates that it will not return her to employment notwithstanding the Commission's order. Finally, McKnight is requesting counsel fees under *N.J.A.C. 4A:2-1.5(b)* on the basis that Newark has unreasonably refused to comply with the Commission's order.

In response, Newark requests a stay of the matter. It argues that it has a clear likelihood of success on the merits as the ALJ's decision was arbitrary, capricious, and unreasonable. It presents numerous arguments regarding its contentions. Further, Newark argues that there is no prejudice to McKnight if she is not returned to work pending appeal because the back pay will continue to run and, if she is successful on appeal, she will receive back pay and made whole. Additionally, it argues that it is in the public interest that she not be restored to her position and Newark's cross-motion to stay McKnight's reinstatement and back pay should be granted.

In the event that its request for a stay is not granted, Newark argues that McKnight's back pay should be reduced due to her failure to mitigate between her termination on October 3, 2016 and the Commission's decision, effective November 15, 2019. Newark argues that McKnight's only applying for three jobs in a three-year period, two in October 2018 and one in June 2019, does not meet the requirement to make reasonable efforts to find suitable employment. It argues that there was no indication that McKnight reviewed classified advertisements, reviewed online job listings, attended job fairs, visited employment agencies, networked or distributed

¹ As McKnight's suspension was on July 22, 2016, November 21, 2016 would be the end of the four month-suspension.

resumes. Additionally, it asserts that McKnight did not apply for “suitable” employment as required as she was employed by Newark for 44 years, collected an annual salary of \$65,000 at the time of termination, was a Qualified Purchasing Agency, and had significant experience in the field of purchasing and procurement. However, McKnight’s applications were for sales associate and team member positions for minimum wage jobs that were below her experience and salary level in positions that did not have comparable job duties or responsibilities. Newark acknowledges that she mitigated her back pay during the time she received unemployment benefits between December 17, 2016 and June 18, 2017. However, it argues that she should not receive back pay between June 19, 2017 and November 15, 2019, which is the effective date of the Commission’s decision. Newark presents that it submitted updated back pay calculations to McKnight’s counsel. Further, it asserts that under *N.J.A.C. 4A:2-2.10(d)(3)*, it is entitled to reduce her back pay by the amounts that she received for Social Security payment and from her Deferred Compensation Plan.

Regarding McKnight’s claim for interest and counsel fees, it presents that although the Commission’s decision was effective November 15, 2019, Newark did not receive the mitigation forms necessary to calculate back pay until July 1, 2020. Additionally, it indicates that the impact of COVID-19 delayed both McKnight and Newark. It presents that the parties first worked to resolve the counsel fee issue, which was resolved September 8, 2020. Thereafter, Newark filed a Notice of Appeal and McKnight filed a motion for temporary remand which was granted and is currently before the Commission. Thereafter, it argues that the delays in this matter were outside of the control of both parties and Newark should not be punished for these delays.

In reply, McKnight states that although Newark indicates that it provided updated calculations, she indicates that the calculations appear to be the same and do not appear to include collectively negotiated salary increases. She indicates that she is still reviewing the calculations and she reserves her right to assert that there are errors in the calculations. Regarding the time period from June 19, 2017 to November 15, 2019, McKnight states that Newark has not provided specific instances where she failed to apply for jobs that she was qualified to perform, and Newark has the burden to prove that her mitigation efforts were insufficient during this time, which she argues it has failed to do.

CONCLUSION

N.J.A.C. 4A:2-1.2(f) provides, in pertinent part, that following a final administrative decision by the Commission, and upon the filing of an appeal from that decision to the Appellate Division of Superior Court, a party to the appeal may petition the Commission for a stay or other relief pending a decision by the Court in

accordance with the procedures and standards in *N.J.A.C. 4A:2-1.2(c)*. See *N.J. Court Rules 2:9-7*.

Pursuant to *N.J.A.C. 4A:2-1.2(c)*, the standards to be considered regarding a petition for a stay are:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm if the request is not granted;
3. Absence of substantial injury to other parties if the request is granted;
and
4. The public interest.

N.J.A.C. 4A:2-2.10(a) provides where a disciplinary penalty has been reversed, the Commission shall award back pay, 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 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 additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal.

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 set forth in (d)4 below.
4. Where a removal or a suspension for more than 30 working days has been reversed or modified or an indefinite suspension pending the disposition of criminal charges has been reversed, and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts.

i. "Underemployed" shall mean employment during a period of separation from the employee's public employment that does not constitute suitable employment.

ii. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes.

iii. "Suitable employment" or "suitable position" shall mean employment that is comparable to the employee's permanent career service position with respect to job duties, responsibilities, functions, location, and salary.

iv. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter.

v. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment.

5. An employee shall not be required to mitigate back pay for any period between the issue date of a Commission decision reversing or modifying a removal or reversing an indefinite suspension and the date of actual reinstatement. The award of back pay for this time period shall be reduced only by the amount of money that was actually earned during that period, including any unemployment insurance benefits received.

N.J.A.C. 4A:2-2.10(e) provides that unless otherwise ordered, an award of back pay, benefits and seniority shall be calculated from the effective date of the appointing authority's improper action to the date of the employee's actual reinstatement to the payroll.

N.J.A.C. 4A:2-2.10(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:2-1.5(b) provides that back pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. *See N.J.A.C.* 4A:2-2.10. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the Commission or where the Commission finds sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.

In this matter, in its request for a stay, Newark makes various arguments that it has a clear likelihood of success on the merits as the ALJ's decision was arbitrary, capricious, and unreasonable. However, the Appellate Division's remand was not for the Commission to entertain challenges to the underlying decision in this matter. Rather, it was solely remanded to afford the Commission to consider the issues of "back pay and reinstatement." Thus, it summarily dismisses Newark's claims regarding its request to stay the matter based on its merits. Even if could be argued that the Commission must necessarily review the merits to determine whether McKnight should be reinstated pending the filings in the Appellate Division, the Commission finds no substantive reason to stay McKnight's reinstatement given the underlying ALJ's initial decision, and the subsequent adoption of that decision under *N.J.S.A.* 52:14B-10(c).

Regarding the back pay award, the record indicates that McKnight was suspended on or around July 22, 2016. Further, the ALJ's decision sustained a four-month suspension against McKnight. As such, McKnight's suspension ended on or around November 21, 2016. The record indicates that McKnight initiated a claim for unemployment benefits, and she received benefits from December 17, 2016 through June 18, 2017. Her affidavit of mitigation indicates that she received \$657 per week for unemployment benefits for a total amount of \$17,082. Newark is not contesting that McKnight adequately mitigated her benefits while she collected unemployment. Concerning McKnight's comments about the accuracy of Newark's calculation of her pay during the back pay period and her reserving the right to challenge these calculations, the Commission notes that this matter is on remand from the Appellate Division to calculate her back pay award within 45 days and McKnight has not provided any evidence that the calculations Newark provided are inaccurate, as such, the Commission shall use Newark's calculations to compute the back pay award. Newark indicates that McKnight's pay from August 1, 2016 to December 31, 2016 was \$31,191.82. Further, it indicates that McKnight's pay in 2017 was \$75,409.62.

Therefore, the Commission finds that McKnight's mitigated back pay award from November 22, 2016 until June 18, 2017 was \$20,422.46.²

Concerning Newark's statement that McKnight's back pay award should be further mitigated by her social security payments and her deferred compensation distribution, under *N.J.A.C. 4A:2-2.10(d)5*, back pay is only to be reduced by money earned during the mitigation period, including unemployment benefits received. McKnight's receiving social security benefits and a deferred compensation distribution are neither based on money earned during the mitigation period or unemployment insurance benefits, and these benefits are not to be considered in mitigating the back pay award. Instead, these were benefits that were primarily earned based on her work prior to the mitigation period.

Concerning the period from June 19, 2017 to November 14, 2019, Newark argues that McKnight's mitigation efforts were insufficient. It contends that McKnight provided no evidence that she reviewed classified advertisements, reviewed online job listings, attended job fairs, visited employment agencies, networked or distributed resumes. Additionally, it asserts that McKnight did not apply for "suitable" employment based on her prior employment and many years of experience in the field of purchasing and procurement. McKnight presents that she applied for a retail sales associate position on October 8, 2018, a retail team member position on October 17, 2018, and a sales associate position on June 3, 2019. Although McKnight does not know why she was not hired for any of these positions, she believes that she was not hired due to her age. The Commission notes that Newark presents that there is no indication that McKnight reviewed classified advertisements, reviewed online job listings, attended job fairs, visited employment agencies, networked or distributed resumes. As such, the Commission finds that Newark has met its initial burden of proof that McKnight has not made reasonable efforts to find suitable employment as applying for three retail positions in over two years, regardless as to why she did not get hired for these positions, was an inadequate effort on her part to mitigate her back pay award. Accordingly, the Commission finds that she is not entitled to receive any back pay award during this period. *See In the Matter of Manuel Oliveira* (CSC, decided January 14, 2009), *aff'd In the Matter of Manuel A. Oliveria*, Docket No. A3325-08 (App. Div. September 28, 2010).

Regarding the period from November 15, 2019 until January 20, 2021, the record indicates that McKnight's pay from November 15, 2019 to December 31, 2019

² Pay from August 1, 2016 to December 31, 2016 was \$31,191.82. There were approximately 22 weeks during this time. $\$31,191.82/22 = \$1,417.81$ per week. There were approximately six weeks from November 22, 2016 to December 31, 2016. Therefore, McKnight's pay in 2016 during the back pay award period was \$8,506.86 (6 x \$1,417.81). Weekly pay for 2017 was \$1,450.18 (\$75,409.52/52). There were approximately 20 weeks from January 1, 2017 to June 18, 2017. Pay from January 1, 2017 to June 18, 2017 was \$29,003.62 (\$1,450.18 x 20). Therefore, pay from November 22, 2016 to June 18, 2017 was \$37,504.46 (\$8,500.86 + 29,003.60). Accordingly, mitigated back pay from November 22, 2016 to June 18, 2017 was \$20,422.46 (\$37,504.46 - \$17,082 unemployment insurance received).

was \$10,383.31³, was \$77,725.44 in 2020⁴, and \$4,433.01 from January 1, 2021 to January 20, 2021⁵. Therefore, the Commission finds that McKnight's forward pay award from November 15, 2019 to January 20, 2021 is \$92,541.76 (\$10,383.31 + \$77,725.44 + \$4,433.01). It is noted that McKnight had no obligation to mitigate her forward pay award under *N.J.A.C. 4A:2-2.10(d)*⁵. Further, McKnight shall continue to receive a forward pay award from January 21, 2021 until she is reinstated based on the current pay and longevity pay for that time until reinstatement.⁶

Concerning McKnight's request for interest on the back pay award and counsel fees for this matter, the Commission finds that due to the circumstances as described above, Newark has not been in non-compliance regarding calculating the back pay award justifying such awards. Therefore, the Commission shall not add interest to the back pay award. However, the Commission warns Newark that its failure to pay the back pay award in a timely fashion could lead to an award of interest on the back pay. Similarly, the Commission shall not award counsel fees for McKnight's request in this matter as there is no evidence to support that Newark has undergone this process in bad faith or with invidious motivation. However, it warns Newark that a failure to comply with this decision may also lead to a counsel fee award and fines dues to its non-compliance.

ORDER

Therefore, it is ordered that Carolyn McKnight's request for back pay and reinstatement are granted in part, and Newark shall immediately reinstate her. Newark's request for a stay of McKnight's reinstatement and back pay pending its appeal to the Appellate Division is denied.

³ McKnight's salary in 2019 was \$77,429.83 in 2019. There were approximately seven weeks from November 15, 2019 to December 31, 2019. Further, the record indicates that her bi-weekly pay during this period was \$2,966.66 (\$2,602.33 bi-weekly pay + \$364.33 longevity pay). Therefore, McKnight's weekly pay during this time period was \$1,483.33. The record also indicates that McKnight's pay from November 15, 2019 to December 31, 2019 was \$10,383.31 (\$1,483.33 x 7).

⁴ Her pay was \$61,471.07 from January 1, 2020 to October 16, 2020, and her bi-weekly pay rate at that time was \$2,955.34 (\$2,592.40 salary + \$362.94 longevity pay). Therefore, her weekly pay rate was \$1,477.67. There were approximately 11 weeks from October 17, 2020 through December 31, 2020. Therefore, her pay from October 17, 2020 to December 31, 2020 was \$16,254.37 (\$1,477.67 x 11).

⁵ Calculated by using \$1,477.67 weekly pay x approximately 3 weeks = \$4,433.01 for pay from January 1, 2021 to January 20, 2021.

⁶ McKnight asserts that Newark's calculation for her pay did not include a 14% longevity benefit and contractual increases. However, the spreadsheet that supported Newark's calculation of her salary did include increases and a longevity benefit. There is no evidence in the record that these increases were not the correct or complete amounts.

Accordingly, the Commission grants McKnight gross back pay in the amount of \$20,422.46. The County shall submit payment, subject to the provisions of *N.J.A.C. 4A:2-2.10(d)2*, to McKnight within 30 days of the receipt of this decision.

Further, the Commission awards gross forward pay in the amount of \$92,541.76 for the period of November 15, 2019 through January 20, 2021. Additionally, the Commission awards gross forward pay based on the current pay and longevity pay for that time from January 21, 2021 until reinstatement. Newark shall submit payment, subject to the provisions of *N.J.A.C. 4A:2-2.10(d)2*⁷, to McKnight within 30 days of the receipt of this decision.

McKnight's request for interest on her back pay award and counsel fees are denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.⁸

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20^H DAY OF JANUARY 2021

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
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⁷ The Commission notes that this regulation refers to back pay. However, the same reductions are equally applicable to an award of front pay.

⁸ The Commission notes that this matter is on temporary remand from the Appellate Division. As such, the Commission does not retain jurisdiction in this matter. Any further requests in this matter for reconsideration, enforcement or other requests shall be made directly to the Appellate Division.

c: Carolyn McKnight
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