

suitable employment. West Orange presents that under *N.J.A.C. 4A:2-2.10(d)3*, when a back pay award has been modified, the award shall be reduced by the amount of money actually earned during the separation, including unemployment benefits received. Further, under *N.J.A.C. 4A:2-2.10(d)4*, when a suspension of more than 30 days has been modified, and the employee is unemployed or underemployed during the separation period, the employee shall not be eligible for back pay for any period during which the employee failed to make reasonable efforts to find suitable employment during the separation period.

West Orange indicates that Carrol certified that he only earned \$840 in income during his suspension, working for one week with a landscaping company. It states that he did not provide any documentation to demonstrate his efforts to find suitable employment during his period of separation. Instead, Carrol certified that he did not maintain employment as he could not commit to long periods of employment due to his inevitable return to his job with West Orange. Additionally, Carrol testified during the hearing that he worked one week in mid-October with a landscaping company. However, his wife and mother “recognized the stress that this was taking on him and advised him that he should take advantage of not working to be at home with the kids because they were virtual schooling during Covid and that we would survive without me working.” Therefore, West Orange argues that Carroll chose not to work. Additionally, it asserts that suitable employment was available for a patrol officer as there was a demand during Covid in the private sector for positions that ranged from \$12 to 18.75 per hour. It submits various security-related on-line job openings to support its claims.¹ Further, West Orange submits email communication to Carroll’s attorney where it indicated that it requested documentation concerning Carroll’s mitigation efforts, including a list of the employers with which he applied/interviewed, job listings he reviewed, and any applications that he sent to employers, but it never received such documentation.

In response, Carroll certifies that he did seek other employment, but could not maintain employment as he could not commit to a long period of employment because of his inevitable return to West Orange. Carroll indicates that he received \$840 gross pay for working one week as a landscaper. He states that he did not receive unemployment benefits during his suspension and received financial assistance from friends and family. Carrol certified that his base pay from August 29, 2020 through September 11, 2020. was \$4,114.02 and over a 15-day period his base pay was approximately \$6,171.03. Therefore, he argues that he should be compensated \$5,331.03 (\$6,171.03 - \$840.00) less appropriate deductions, with the exception of healthcare contributions that he already paid.

¹ It is noted that most of the job openings submitted by West Orange would appear to be on-going full or part-time positions. There was one submission that was for per diem work.

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)3 provides 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 for the in (d)4 below.

N.J.A.C. 4A:2-2.10(d)4 states 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.

Initially, the Commission finds that West Orange has met its burden of proof establishing that Carroll has not made reasonable efforts to find suitable employment during the separation period by submitting on-line job postings in the security industry that were available as well as asking for Carroll to submit evidence of his mitigation efforts, which he failed to do.

In this matter, the record indicates that Carroll was initially suspended for 60 working days, plus an additional 25 days that were held in abeyance from a previous disciplinary action. As such, Carroll was suspended from September 19, 2020 and reinstated on January 23, 2021. Subsequently, on June 30, 2021, the Commission modified the suspension from 60 working days to 45 working days. As such, Carroll was awarded 15 days of back pay, to be reduced and mitigated as set forth in *N.J.A.C. 4A:2-2.10*. As Carroll was suspended for more than 30 days, in order to be eligible for back pay during the separation period, he needed to make reasonable efforts to secure suitable employment. *See N.J.A.C. 4A:2-2.10(d)4*.

The record indicates that in mid-October 2020, he worked for a landscaping company earning \$840. However, other than the one week with the landscaping company, Carroll did not make any mitigation efforts. Instead, when Carroll was asked during the hearing if he gained employment during the separation period, he responded that he worked one week in mid-October for a landscaping company and then “my wife and my mother recognized the stress that this was taking on me and they told me that I should take advantage of not working to be home with the kids because they were virtual schooling during Covid and they would survive without me working.” Also, West Orange asked Carroll to provide a list of the employers with which he applied/interviewed, job listings he reviewed, and any applications that he sent to employers, but none was provided. Therefore, the Commission finds that Carroll’s one week of work during an approximate four-month separation period, combined with him failing to search on-line for employment, failing to contact employers directly, failing to contact temporary employment agencies, and failing to make any other efforts to secure employment was not a reasonable effort to secure employment during the separation period. As such, he is ineligible for back pay. While Carroll, as a Police Officer, was not obligated to work as a landscaper, if he had taken the aforementioned steps to attempt to secure suitable employment during the separation period, even if he was unable to do so due to the temporary nature of his separation, he may have also been eligible for unemployment benefits, which potentially could have helped to mitigate the back pay award. Similarly, the fact that

Carroll failed to apply for unemployment benefits is further evidence that he did not make reasonable efforts to secure suitable employment during the separation period as only individuals that are able to work, are available for work, and have demonstrated that they are actively seeking work are able to receive such benefits.

ORDER

Therefore, the Commission grants West Orange's requests and denies Daniel Carroll's request.

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 27TH DAY OF OCTOBER, 2021



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