

fighting to get my job back with the Township, I did not seek other employment during my suspension.” West Orange submits job openings for positions in security, loss prevention and surveillance that would have been suitable employment opportunities that Marsh could have applied for to mitigate the back pay award. Therefore, it argues that Marsh is not entitled to any back pay prior to the Commission’s decision and is only entitled to receive back pay after the Commission’s decision on December 16, 2020 through December 31, 2020. West Orange indicates that Marsh’s weekly salary is \$1,758.10. It asserts that his weekly unemployment benefits received, \$624.00, are to be deducted from his back pay award. Therefore, West Orange argues that Marsh is entitled to \$2,268.20 in back pay.

West Orange also argues that Marsh was not entitled to his “base pay” pursuant to the 180-day provisions in *N.J.S.A. 40A:14-200, et seq.*, as the periods of time for his appeal to the Commission as well as the delay by the OAL in docketing the matter due to staffing issues based on the pandemic should be deducted from calculating the date such base pay should have been started. In this regard, it argues that based on those deductions, the date would be January 26, 2021, and since it reinstated Marsh prior to that date, those pay provisions are inapplicable. As evidence, it presents that Marsh’s appeal was filed 49 days after his initial separation from employment and an e-mails from the OAL Clerk indicating the reason for the delay in the scheduling of the matter.

In response, Marsh, represented by Frank C. Cioffi, Esq., concurs that his six-month suspension ran through September 20, 2020. However, West Orange did not reinstate him until January 1, 2021. He acknowledges that he was not entitled to back pay during the suspension period, and, therefore, he did not have an obligation to mitigate during the suspension period. However, Marsh asserts that he is entitled to his base salary and benefits from September 21, 2020 to January 1, 2021 pursuant to *N.J.S.A. 40A:14-200, et seq.* He contends that the delay in docketing the matter by the OAL should not be used to penalize him. He also indicates that as he was focused on getting his job back and returning to his position with West Orange, he did not obtain employment during his suspension. Marsh presents that he received unemployment benefits beginning in May 2020. Therefore, he states that he is entitled to receive back pay and benefits from September 21, 2020 through December 31, 2020.

Marsh presents that his weekly base salary, as evidenced by his pay stub, is \$1,838.41 based on a 40-hour workweek. Further, he argues that he is entitled to receive 4% longevity pay on top of his base salary. Marsh indicates that his total base salary from September 21, 2020 through December 31, 2020 was \$25,737.74. Additionally, he states that his longevity pay for the 14-week period was \$1,029.51. Marsh indicates that his unemployment benefits during the 14-week period were \$8,736.00. Therefore, he argues that he is entitled to \$18,031.25 in back pay (\$25,737.74 + \$1,029.51 - \$8,736.00), plus full benefits and seniority.

In reply, West Orange indicates that Marsh does not dispute that suitable employment was available to him. Rather, he asserts that he did not obtain employment because he was “focused on getting his job back.” It argues that this is not a defense for his failure to make reasonable efforts to seek employment. West Orange presents revised back pay calculations for the December 16, 2020 through December 31, 2020 period to include the longevity pay. Specifically, it indicates that the gross back pay for that period should be \$2,408.85 (two weeks * (1.04 longevity * \$1,748.00 weekly pay)) – (2 weeks * \$624.00 weekly unemployment benefits).

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 additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal. Further, *N.J.A.C.* 4A:2-2.10(d)4 states:

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 Civil Service 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(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 that if settlement on an amount cannot be reached, either party may request, in writing, Commission review of the outstanding issue. In a Commission review:

- 1. The appointing authority shall submit information on the salary the employee was earning at the time of the adverse action, plus increments and across-the-board adjustments that the employee would have received during the separation period; and
- 2. The employee shall submit an affidavit setting forth all income received during the separation.

N.J.S.A. 40A:14-201(2)a states, in pertinent part, that a final determination on a law enforcement officer's suspension and termination shall be rendered within 180 calendar days from the date the officer is suspended without pay. If a final

determination is not rendered within those 180 days, as hereinafter calculated, the officer shall, commencing on the 181st calendar day, begin again to receive the base salary he was being paid at the time of his suspension and shall continue to do so until a final determination on the officer's termination is rendered. Further, *N.J.S.A. 40A:14-201(2)b* states, in pertinent part:

b. The 180 calendar day period shall commence on the date that the officer or firefighter is suspended without pay and shall be calculated as follows:

(1) The calendar days that accrue between the date the officer or firefighter is terminated by his employing agency or department and the date on which the officer or firefighter files his appeal of his termination with the Office of Administrative Law shall not be used in calculating the date upon which the officer or firefighter is entitled, pursuant to subsection a. of this section, to receive his base salary pending a final determination on his appeal;

* * *

(5) If the administrative law judge or Civil Service Commission for good cause postpones or delays a hearing before the 181st calendar day, the calendar days that accrue during that postponement or delay shall not be used in calculating the date upon which that officer or firefighter is entitled, pursuant to subsection a. of this section, to receive his base salary pending a final determination on his appeal.

See also, N.J.A.C. 4A:2-2.13(h).

Further, *N.J.S.A. 40A:14-203(4)c* states, in pertinent part, that if the administrative law judge recommends that the officer be subject to disciplinary action, but to a disciplinary action that is less adverse than termination of the officer's employment, the officer shall be entitled, commencing on the 181st day following his suspension, as provided in *N.J.S.A. 40A:14-201* or on the day set forth in the judge's recommendation, whichever is later, to receive his base salary. *See also, N.J.A.C. 4A:2-2.13(i)3.*

The initial issue in this matter is the applicability of *N.J.S.A. 40A:14-200, et seq.* The Commission finds that its provisions do apply, however, for the following reasons, Marsh is not entitled to any "base salary." At the outset, there is nothing in the applicable statutes that defines "base salary." As such, the Commission interprets that term as used in the pertinent statutes and rules to mean such salary, **without** regard to the back pay provisions set forth in *N.J.A.C. 4A:2-2.10*. In other words, the entitlement to base pay under *N.J.S.A. 40A:14-200, et seq.*, is **not**

conditioned on the mitigation provisions found in *N.J.A.C.* 4A:2-2.10. This interpretation is reasonable as the language of both *N.J.S.A.* 40A:14-200, *et seq.*, and *N.J.A.C.* 4A:2-2.13 do not reference that any award of “base pay” is subject to any provision found in *N.J.A.C.* 4A:2-2.10.¹

There is no dispute that Marsh’s initial separation from employment was March 24, 2020, the conclusion of his six-month suspension was September 20, 2021, and he was reinstated to employment on January 1, 2021. Absent the provisions of *N.J.S.A.* 40A:14-201(2)b(1) and (5), Marsh would have been entitled to receive base pay beginning on September 21, 2020. In this regard, as prescribed for in the statutes and rules, the ALJ should have issued a ruling regarding any entitlement of pay under *N.J.S.A.* 40A:14-200, *et seq.* Such an order was issued by the ALJ on November 2, 2020, concurrent with the date of her initial decision. However, in that order, the ALJ did not indicate a specific date nor that she considered the factors found in *N.J.S.A.* 40A:14-201(2)b in making her determination. The order merely stated that Marsh should begin receiving his base pay “upon expiration of the recommended period of suspension pending issuance of the final decision by the Civil Service Commission.”² As the ALJ apparently did not utilize *N.J.S.A.* 40A:14-201(2)b, or at least reference it, it is now incumbent on the Commission to determine the date Marsh was eligible to receive his base pay under *N.J.S.A.* 40A:14-200, *et seq.*

The Commission finds the date of Marsh’s eligibility for base pay was January 26, 2021. Notwithstanding Marsh’s arguments, the factors found in *N.J.S.A.* 40A:14-201(2)b are applicable and must be applied. In this regard, the record indicates that Marsh’s appeal was filed with the OAL on May 12, 2021, which is 49 days from his initial separation, and is appropriately deducted from the 180-day calculation per *N.J.S.A.* 40A:14-201(2)b. With that deduction, Marsh’s eligibility for base pay would have begun 49 days from September 20, 2020, or November 9, 2020. Further, there

¹ Although, the Commission has significant reservations in this regard. Specifically, if an officer receives such base pay, without at least a deduction for any other monies earned or received during that time, it could be considered an unearned windfall. For example, once such pay is received, would an officer also receiving unemployment benefits be required to discontinue such benefits? Or, pay such benefits back if they are continued to be received? Further, an officer who has obtained another position during the pendency of an appeal and thereafter begins to receive base pay would be able to receive both amounts in full, and thus, at least temporarily receive a greater monetary benefit while awaiting the outcome of the appeal. At the very least, it would appear logical that such base pay should be mitigated by any other monies that are being received/earned by an officer. This would eliminate the potential windfall and also reduce the amount an officer may be required to pay back should the removal ultimately be upheld. The Commission poses these issue/questions solely for academic purposes as it has found that Marsh is not entitled to any base pay under *N.J.S.A.* 40A:14-200, *et seq.*

² Although, this statement could be interpreted to mean that Marsh’s eligibility started on September 21, 2020, which is six months from his initial separation. This interpretation notwithstanding, the ALJ needed to include the factors of *N.J.S.A.* 40A:14-201(2)b in making her determination. Without referencing or utilizing such factors, an incorrect date may be determined. Clearly, as explained in this decision, Marsh’s date of eligibility is significantly later than six months from his separation.

is evidence that the OAL delayed the processing of this matter due to lack of staffing, in part attributable to mandatory furlough days at that time, and other issues caused by the COVID-19 pandemic. In these unique times, all of the State's services have been adversely affected in one way or another by the pandemic. Nevertheless, the pandemic does not permit the Commission to ignore the relevant statutory provisions. Moreover, as statutes are jurisdictional, they cannot be relaxed. Accordingly, the Commission finds that *N.J.S.A.* 40A:14-201(2)b(5) is applicable and should be used to deduct the delay from the 180 day calculation.³ The record demonstrates that the OAL finally docketed Marsh's appeal on July 30, 2020. Subtracting the period from May 13, 2020 to July 30, 2020, would make the date of Marsh's eligibility for base pay under *N.J.S.A.* 40A:14-200, *et seq.*, January 26, 2021. As that date is after his reinstatement on January 1, 2021, he is not entitled to any award under its provisions.

Regarding to Marsh's entitlement to back pay under *N.J.A.C.* 4A:2-2.10, in its December 16, 2020 decision, the Commission modified Marsh's removal to a six-month suspension. The decision indicated that he was entitled to mitigated back pay, seniority and benefits from the conclusion of the six-month suspension until the actual date of reinstatement. The decision ordered that under no circumstances should Marsh's reinstatement be delayed based on any dispute of back pay, which it was not as West Orange promptly reinstated March 16 days after the Commission's decision. The record indicates that Marsh's suspension without pay was effective March 24, 2020. Therefore, his reinstatement after the six-month suspension working day suspension should have been September 21, 2020. Accordingly, under *N.J.A.C.* 4A:2-2.10(e), the back pay award period started on September 21, 2020 and, under *N.J.A.C.* 4A:2-2.10(d)5, the mitigation period ended on December 15, 2020, the day before the Commission issued its decision. However, under *N.J.A.C.* 4A:2-2.10(d)4, if 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.

Marsh presents that he received unemployment benefits during the back pay award period. In this regard, there is a presumption that the receipt of unemployment benefits evidences that an employee sufficiently mitigated during the period of separation, since searching for employment is a condition to receiving such

³ While the statute references such delays "for good cause" by the "administrative law judge" or the Commission, it is reasonable to deem the delay in this matter by the OAL as applicable. In this regard, much of the work performed regarding appeals before the OAL is necessarily performed by staff of the OAL, in support of all of the administrative law judges. As the delay in this matter was mainly attributed to the OAL staff, or lack thereof due to the pandemic, that delay may be deducted. Indeed, if the effects of the pandemic on the OAL, its staff and the administrative law judges are not considered "good cause" for the delay, it would be difficult to fathom what types of delays would constitute "good cause."

benefits. *N.J.S.A.* 43:21-4(c)1 states that “an unemployed individual shall be eligible to receive [unemployment] benefits with respect to any week only if . . . The individual is able to work, and is available for work, and has demonstrated to be actively seeking work.” However, this presumption may be rebutted where the appellant did not make a diligent effort to seek employment. *In the Matter of Donald Hicks*, Docket No. A-3568-03T5 (App. Div. September 6, 2005). See *In the Matter of Alphonso Hunt (MSB, decided September 21, 2005)*; *In the Matter of Philip Martone (MSB, decided February 9, 2005)*.

Marsh certifies “[a]s it was always my intent to return to my position with the Township of West Orange and I was actively fighting to get my job back with the Township, I did not seek other employment during my suspension.” The Commission finds this statement unpersuasive as a justification for not seeking employment during the back pay award period. To interpret it otherwise would render the duty to mitigate under *N.J.A.C.* 4A:2-2.10(d)4 meaningless as it is presumed that any employee who has been removed and subsequently appeals is actively intent on winning the appeal and being reinstated to their position. Further, West Orange submits job openings for jobs in security, loss prevention and surveillance as suitable employment opportunities for a Police Officer, which Marsh has not disputed. Therefore, the Commission finds that West Orange has met its initial burden of proof, and finds that Marsh did not mitigate his back pay award and is not eligible to receive back pay under *N.J.A.C.* 4A:2-2.10(d)4 from September 21, 2020 through December 15, 2020.

Regarding the period starting December 16, 2020, the issue date of the Commission’s decision, through December 31, 2020, the day before his actual reinstatement, Marsh no longer had an obligation to mitigate back pay. Instead, his back pay award shall only be reduced by his unemployment insurance benefits received as he did not actually earn any other money during this period. See *N.J.A.C.* 4A:2-2.10(d)5. That period of time is 12 working days (or 96 work hours). Based on the salary as reported by Marsh⁴, his 40-hour weekly base salary is \$1,838.41, which converts to a \$45.96 hourly rate. Additionally, his longevity pay hourly rate is \$1.83. Accordingly Marsh is entitled to receive back pay in the amount of \$3,090.24 for this period [(\$45.96 * 96 hours) + (\$1.83 * 96 hours) = \$4,587.84; (\$15.60 hourly unemployment benefits rate * 96 hours) = \$1,497.60; (\$4,587.84 - \$1,497.60 = \$3,090.24)].⁵

⁴ This is based on Marsh’s January 15, 2021 pay stub. West Orange submits a slightly different number for Marsh’s base pay; however, it did not provide any documentation to support this different number.

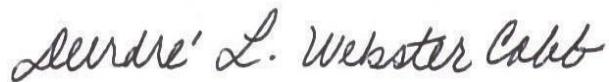
⁵ Marsh is also entitled to seniority from September 21, 2020 to his reinstatement and any concomitant benefits during that period. The fact that his back pay award has been limited does not lessen his entitlement to seniority, for Civil Service purposes, and benefits beginning on September 21, 2020. As the Commission has no jurisdiction over seniority for pension purposes, it makes no finding as to whether the time from September 21, 2020 through December 15, 2020 is creditable for such purposes.

ORDER

Therefore, it is ordered that Ryan Marsh be awarded gross back pay in the amount of \$3,090.24. West Orange shall submit payment, subject to the provisions of *N.J.A.C. 4A:2-2.10(d)2*, to Marsh within 30 days of the receipt 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 17TH DAY OF FEBRUARY, 2021



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 Records Center

That issue is under the jurisdiction of the New Jersey Department of the Treasury, Division of Pensions and Benefits.