



STATE OF NEW JERSEY

In the Matters of F.B., *et al.*,
Township of West Orange

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket Nos. 2022-2407, *et al.*

Administrative Appeals

ISSUED: October 12, 2022 (HS)

The Township of West Orange (Township), represented by Kenneth A. Rosenberg, Esq., requests relief concerning the Civil Service Commission’s (Commission) order in *In the Matters of F.B., et al., Township of West Orange* (CSC, decided March 2, 2022). These matters have been consolidated herein due to common issues presented.

As background, the Township placed F.B., J.D., D.K., J.N., and S.R., Fire Fighters, and S.G. and C.R., Fire Captains, on unpaid leaves of absence, commencing October 23, 2021. In *F.B., supra*, the Commission decided that the employees had actually been subjected to disciplinary action when they were placed on unpaid leave and noted that none of the disciplinary rules in Chapter 2 of Title 4A of the New Jersey Administrative Code were observed. As the employees had been disciplined without any of the requisite procedural safeguards, the Commission instituted a remedy. Specifically, the employees were to receive back pay, benefits, and seniority from October 23, 2021 until whichever of the following occurred first: the employees were reinstated to duty; the employees were properly immediately suspended without pay, *see N.J.A.C. 4A:2-2.5*; or disciplinary action was properly imposed upon issuance of Final Notices of Disciplinary Action (FNDAs). The record reflects that the employees were reinstated to duty on March 25, 2022.

On appeal to the Commission, the Township argues that the back pay award must be subject to a mitigation requirement. In other words, the Township, citing *N.J.A.C. 4A:2-2.10(d)3-4*, maintains that the back pay owed for the relevant

timeframe, if any, should be based on the salary the employees would have earned less any income actually earned and subject to a duty to make reasonable efforts to find suitable employment. The Township thus requests that the Commission require the employees to provide proof of mitigation efforts so that it may establish the appropriate back pay owed, if any.

In response, the employees, represented by Craig S. Gumpel, Esq., counter that in *F.B., supra*, the Commission found that the Township failed to follow Civil Service law, rules, and regulations, which include procedural due process requirements, when it imposed the unpaid leaves. It was this finding, the employees state, that led the Commission to determine that back pay, benefits, and seniority constituted an appropriate remedy. Thus, in the employees' view, a literal interpretation of *N.J.A.C. 4A:2-2.10* is inapplicable to these matters. The employees also point out that the Township consistently took the position, both before they filed their appeals and in their prior submissions to the Commission, that they were not subject to disciplinary action. The employees assert that the Township never provided them notice that during their unpaid leave, they were permitted or required to mitigate by seeking non-Township employment. The employees emphasize that this is not a case where they engaged in misconduct but successfully argued for less severe discipline and were awarded back pay.

In reply, the Township contends that it is clear that the employees were obligated to take steps to mitigate their damages during their separation from employment so as to avoid a windfall as it is not the intention of Civil Service law and rules to provide a profit to public employees when they are reinstated. In addition, the Township insists that Civil Service law and rules do not require appointing authorities to notify employees that they can or should engage in mitigation efforts if they believe they have been wrongly denied their pay. Rather, the Township, citing *N.J.A.C. 4A:2-2.10(d)4*, maintains that the regulations clearly provide that any award of back pay is subject to mitigation and they are devoid of any provisions that place an affirmative obligation on appointing authorities to notify employees of the same. The Township states that the following legal principles are well-settled in New Jersey: the purpose of awarding back pay is to ensure that while the individuals do not profit, they do not suffer any loss in earnings; a party should be neither unjustly deprived of anything nor unjustly enriched in determining back pay awards; individuals should not be given a windfall; and it must always be presumed that the Legislature favored the public interest as against any private one. The Township contends that the former Merit System Board (Board) applied the foregoing principles in *In the Matter of Donald Hicks* (MSB, decided December 20, 2006), where it ordered Hicks, a Police Officer, to repay over \$94,000 in back pay previously awarded because he failed to mitigate his damages by seeking alternate employment as a security officer; Hicks's efforts were minimal; and he should not be rewarded for this action. The Board determined that the purpose of mitigation is to spread the damages as equally as possible between the litigants and that while the appointing authority is

responsible to repay the employee for the lost salary and benefits during the time that he was improperly suspended or terminated, the employee has an obligation to try to lessen the burden on the taxpayer by seeking alternate employment if available. As such, the Township contends, the employees' claims that they did not have notice that they had been suspended is not a defense to their mitigation obligations where they are seeking back pay from a public entity. The Township also highlights that the employees, from the very outset, believed and took the position that they had been improperly disciplined without the appropriate notice and hearing requirements. Thus, the Township argues that it is "particularly ironic" that they are now claiming that they lacked notice and did not know that any back pay award would be subject to mitigation.

In reply, the employees note that in *F.B., supra*, the Commission did not expressly order that they receive "mitigated" back pay and argue that the regulations regarding mitigated back pay address back pay in the context of successful disciplinary appeals. The employees also maintain that the Township's claim that they are required to mitigate their back pay award even without notice by the Township must be rejected. In this regard, the employees assert that the Township admits that it imposed an unpaid leave on them and did not believe that they would be entitled to any back award based on its actions. The employees argue that the Township is unreasonably asking the Commission to ignore the Township's claims to them that they were wrong in believing that their involuntary unpaid leaves were disciplinary in nature. Citing *West New York v. Bock*, 38 *N.J.* 500, 522 (1962), the employees argue that a lack of notice regarding disciplinary charges is fatal to a public employer's ability to pursue those charges. The employees state that their argument concerning the lack of notice is based on the principle of equitable estoppel, which is founded in the fundamental duty of fair dealing imposed by law and designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment.

In reply, the Township reiterates that the mitigation provisions of *N.J.A.C.* 4A:2-2.10(d) must be applied. The Township also contends that the principle of equitable estoppel is inapplicable because it never took any actions to dissuade the employees from mitigating their loss of pay during their absences.¹

¹ The Township further requests that the Commission proceed under the prior docket numbers and return its appeal processing fees because the issues that it raises here "flow directly out of" the previously assigned docket numbers. The Commission declines this request. While the instant appeals may arguably "flow directly out of" the prior matters, the issues in each set of matters are separate. Further, there is no basis to refund the appeal processing fees under the governing regulations. See *N.J.A.C.* 4A:2-1.8(a) and *N.J.A.C.* 4A:2-1.8(f).

CONCLUSION

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 forth in [*N.J.A.C.* 4A:2-2.10(d)4].

N.J.A.C. 4A:2-2.10(d)4 provides, in part:

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.

The Commission does not agree with the Township's contention as to the applicability of the above-noted provisions to the back pay awarded in the prior decision. The provisions refer to "removal," "suspension," and "suspension for more than 30 working days." These are all *specific penalties* that an appointing authority may mete out based on specific disciplinary charges arising from specific incidents of which the employee is on notice. However, the Township never issued any such specific charges and penalties. Rather, in the prior decision, while the Township continued to assert that the employees had not been disciplined at all and had only been placed on unpaid leave as a reasonable accommodation, the Commission determined that the employees were subjected to discipline without any of the requisite disciplinary rules being observed. The Commission did not address the merits of the discipline and essentially found that the employees were never removed or suspended *pursuant to* Chapter 2 of Title 4A of the New Jersey Administrative Code and that their leaves were improper. Further, because the employees had been involuntarily separated from employment without pay and without the benefit of any of the requisite disciplinary procedures, the Commission's remedy afforded the employees, in relevant part, back pay from October 23, 2021 *until* whichever of the following occurred first: the employees were reinstated to duty; the employees were *properly immediately suspended* without pay; or *disciplinary action was properly imposed upon issuance of FNDAs*. As such, crucially, there were *no* specific disciplinary charges or penalties at issue because of the failure to observe the disciplinary rules. To date, in fact, there are no such charges or penalties at issue

because the Township opted to reinstate the employees to duty after the Commission's decision. Assuming that the Township had instead opted to impose discipline according to the required procedures, the Township would *then*, as part of the disciplinary process, have been required to apprise the employees of the specific disciplinary charges and penalties leveled. *See N.J.A.C. 4A:2-2.6(d)* (appointing authority required to make decision on *charges* and furnish employee with *FNDA*). Thus, the Township's reliance on the provisions of *N.J.A.C. 4A:2-2.10(d)3* and *N.J.A.C. 4A:2-2.10(d)4* is misplaced as it is not appropriate to apply them to the particular circumstances presented in the prior matters and that the Commission was asked to redress. In that regard, the Commission was redressing the failure to provide any disciplinary process at the departmental level. *See N.J.A.C. 4A:2-2.5(e)* (appeals concerning violations of the right to departmental disciplinary hearing before appointing authority may be presented through a petition for interim relief). It was not a situation where the Commission reduced a penalty *after* the employees had received their due disciplinary process. For that reason, it would also be inequitable to impose a mitigation requirement on the back pay award.

The Township also contends that *Hicks, supra*, is applicable. Again, the Commission disagrees. The Administrative Law Judge, whose initial decision the Board adopted, clearly stated that the case “[arose] out of a *disciplinary hearing*” (emphasis added). As noted above and in the prior decision, there were *no* disciplinary hearings here, thus distinguishing *Hicks*. Rather, a more apt comparison would be to a situation where an employee is laid off without having received the required 45 days' notice. *See N.J.A.C. 4A:8-1.6(a)*. To remedy such a situation, the Commission generally awards pay without any mitigation requirement. *See, e.g., In the Matter of Daniel Vnencak* (CSC, decided August 19, 2020) (Commission ordered appointing authority to pay Vnencak 45 days' *pay* because Vnencak did not receive personal notice of his layoff).

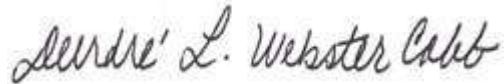
In light of the above discussion, the Commission finds that the employees are entitled to back pay from October 23, 2021 through March 24, 2022, not subject to the mitigation provisions of *N.J.A.C. 4A:2-2.10*. Nevertheless, if the Township is compelled by other law, such as the law governing unemployment compensation, to deduct amounts from the back pay award, it may do so.

ORDER

Therefore, it is ordered that the employees be awarded back pay, as set forth above, within 30 days of the issuance of this decision. In the event that the Township fails to make a good faith effort to comply with this order within the prescribed timeframe, it is ordered that a fine be assessed against the Township in the amount of \$100 per day, beginning on the 31st day from the issuance of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF OCTOBER, 2022



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: John Gross
Kenneth A. Rosenberg, Esq.
F.B. (2022-2407)
J.D. (2022-2408)
S.G. (2022-2411)
D.K. (2022-2412)
J.N. (2022-2413)
C.R. (2022-2414)
S.R. (2022-2415)
Craig S. Gumpel, Esq.
Division of Agency Services
Records Center