



STATE OF NEW JERSEY

In the Matters of O.C., *et al.*,
Township of West Orange

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket Nos. 2023-492, *et al.*

Administrative Appeals

ISSUED: February 1, 2023 (HS)

O.C., R.F., G.L., S.M., J.M., D.R., F.R., and G.W., Police Officers; and R.K., Police Lieutenant,¹ all with or formerly with² the Township of West Orange (Township), represented by Jeffrey D. Catrambone, Esq., request relief concerning the Civil Service Commission’s (Commission) order in *In the Matters of O.C., et al., Township of West Orange* (CSC, decided June 15, 2022). These matters have been consolidated herein due to common issues presented.

As background, the Township placed the employees on unpaid leaves of absence, commencing October 23, 2021. In *O.C., 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 through March 24, 2022 as the employees had been reinstated to duty on March 25, 2022.

On appeal to the Commission, the employees state that the Township indicated that it disputed that it owed back pay due to their mitigating damages or failing to engage in good faith efforts to do so. The employees maintain that they are under no

¹ R.K. received a permanent appointment to the title of Police Sergeant, effective October 18, 2019, and a permanent appointment to the title of Police Lieutenant, effective July 19, 2022.

² J.M. resigned in good standing, effective May 11, 2022.

such obligation because the Commission decided the identical issue under the same facts in *In the Matters of F.B., et al., Township of West Orange* (CSC, decided October 12, 2022).

In response, the Township, represented by Kenneth A. Rosenberg, Esq. 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. *F.B., et al., supra*, in the Township's view, was not legally sound and should not be relied upon.³

³ It is noted that the Township filed an emergent motion in the Appellate Division seeking a stay of *F.B.* In denying a stay on November 29, 2022, the court stated that the Township had not demonstrated a reasonable probability of success on the merits and cited *Garden State Equality v. Dow*, 216 *N.J.* 314, 320 (2013), parenthetically noting that an application for a stay requires

The Township also clarifies that although most of the employees were not reinstated to duty until March 25, 2022, three of the employees returned to work earlier than the others because they received the COVID-19 vaccine and used paid time off until they were fully vaccinated and could return to work.

In reply, the employees reiterate their argument that they are identically situated to the Fire Department members involved in *F.B., et al., supra*, and maintain that these matters are not the correct forum to argue the merits of that decision.

In subsequent correspondence, the Township indicated that it paid the employees back pay for the time they were on unpaid leave but that it was not withdrawing its prior submission.

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

consideration of "the soundness of the underlying ruling and the effect of a stay on the parties and the public."

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 the employees were reinstated to duty. 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 had opted to reinstate the employees to duty. 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 *Final Notice of Disciplinary Action*). 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* are 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, under the circumstances, 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 whatever date is applicable to the

specific employee, 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. The Commission notes the Township's indication that it has paid each employee back pay for the relevant timeframe.

ORDER

Therefore, the Commission orders that the employees be awarded back pay as set forth above but notes the Township's indication that it has provided said back pay.

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 1ST DAY OF FEBRUARY, 2023



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