



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Matthew Dsurney

CSC Docket No. 2022-2930

Back Pay and Counsel Fees

ISSUED: May 24, 2023 (EG)

Matthew Dsurney, represented by Frank C. Cioffi, Esq., petitions the Civil Service Commission (Commission) to determine his back pay and counsel fees based on the decision rendered on March 2, 2022, granting him mitigated back pay, benefits, seniority and counsel fees.

As background, Dsurney, a Police Officer with South Orange, was removed effective November 11, 2020, on charges. Dsurney appealed his removal to the Commission and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. Following a hearing and the Commission's *de novo* review, Dsurney's removal was reversed. Further, the Commission ordered that Dsurney be immediately reinstated and awarded mitigated back pay, benefits and seniority from the date of his removal up to his date of reinstatement as well as reasonable counsel fees. The record reflects that the appellant was suspended without pay effective March 11, 2020, and reinstated to the payroll on March 6, 2022. However, the parties have been unable to agree on the amount of back pay due to the petitioner, and the petitioner has requested Commission review.

In the instant matter, the petitioner argues that he is due \$97,445.07 for the period he missed work due to his wrongful termination. He indicates that based on his collective negotiations agreement, his base pay from January 1, 2020, to July 9, 2020, was \$73,785.75. He states that he was suspended without pay for a total of 119 days between March 11, 2020, and July 9, 2020, and lost \$24,047.37 in base wages. On July 9, 2020, his salary increased to \$82,447.86. He lost 184 days of pay equaling \$41,561.92 in wages for that period. Additionally, the petitioner adds that

had he not lost his job he would have earned \$28,287 in 2020 working his second job as a paramedic with Atlantic Health Systems (Atlantic). Further, the petitioner contends that based on his past experience, he expected to earn \$23,883 working outside employment for South Orange. Thus, he claims he lost \$89,492.29 in income in 2020.

The petitioner adds that in 2021 his base salary from January 1, 2021, to July 9, 2021, would have been \$82,447.86. Thus, he claims he lost \$40,884.28 in wages during this period. On July 9, 2021, his salary would have increased to \$91,137. The petitioner states that he lost \$53,433.66 in wages from July 9, 2021, through December 31, 2021. When adding the \$23,883 from working outside employment for South Orange to his lost wages, he argues that he lost \$118,200.94 in 2021. Further, the petitioner asserts that his annual salary from January 1, 2022, to July 9, 2022, would have been \$92,853. He claims that he lost \$16,535.25 in wages up to the date of his reinstatement on March 6, 2022. The appellant adds in \$3,980.50 for his lost income from outside employment and indicates \$20,515.75 lost wages in 2022.

The petitioner asserts that he mitigated his losses by increasing his hours at his second job and with other employment. In 2020, he earned \$71,551.48 in his second job. He claims that he had expected to earn only \$37,716¹ in this position in 2020 had he not been terminated. The petitioner also states that he began working for Trinitas Regional Medical Center (Trinitas) in 2020 and earned \$9,794.46 that year. Thus, he earned \$43,629.94 in mitigation efforts in 2020. In 2021, the petitioner asserts that he enrolled in a nursing school and earned a degree in nursing. He also started working as a nurse with St. Joseph's Hospital and Medical Center (St. Joseph's) and earned \$34,644.82 in 2021. He earned \$57,103.04 with Atlantic but had expected to earn \$37,716 that year as this had been his second job prior to being terminated. The petitioner also earned \$15,308.11 with Trinitas. Therefore, the petitioner asserts that he earned \$69,339.97 in mitigation efforts in 2021. In 2022, the petitioner claims that he earned \$17,794 working for St. Joseph's. This is the only income he provides for this period. Accordingly, the petitioner asserts that he is due \$97,445.07 in back pay for the period that he was out of work.

Th petitioner also claims that for the period of his separation he is entitled to 263 hours of "SCT" time, 525 hours of vacation time, and 113.50 hours of compensatory time. The petitioner further claims that since he was President of PBA Local 12 at the time of his termination, he is owed 180 hours in union leave time.

¹ The petitioner certified that he earned \$18,859.44 from Atlantic in the six months prior to being suspended without pay. The \$37,716 is arrived at by doubling the amount earned in the prior six months to estimate a yearly total.

The petitioner also argues that his attorneys Frank C. Cioffi, Esq., and Anthony J. Iacullo, Esq., are entitled to counsel fees. Cioffi represented the petitioner at OAL. He is indicating a rate of \$150 per hour with a total fee of \$22,162.50. He also adds in \$2,685.45 in costs for transcripts, copying and scanning, filing fees and service fees. A detailed statement of hours billed is provided. Iacullo represented the petitioner at the departmental hearing and indicates a \$150 rate with a total fee of \$15,960 and \$117.75 in costs. A detailed statement of hours billed is provided.

In response, the appointing authority, represented by Arthur R. Thibault, Jr. Esq., initially indicates that the base salary amounts for the time period between 2020 and 2022 presented by the petitioner are correct. It asserts that the petitioner's gross salary loss for 2020 was \$55,970.73. After deductions not made for health insurance, Medicare, and normal withholdings his net compensation loss would have been \$47,371.59. In 2021, the net gross salary loss was \$86,637.70 and the net after deductions was \$75,192.67. For 2022, the net gross salary loss was \$17,022.98 and the net after deductions was \$15,228.63. The appointing authority submits a certification from its chief financial officer as to how it derived the petitioners gross and net salaries. With regard to the petitioner position with Atlantic, which he held as a second job before his termination, the appointing authority asserts that the petitioner earned \$8,459 in 2017, \$11,002.98 in 2018, and \$23,406.87 in 2019. Therefore, he earned an average of \$14,289.94 annually with Atlantic while simultaneously serving as a police officer prior to 2020.

The appointing authority contends that the appellant is not entitled to receive any back pay. It argues that the petitioner is not entitled to back pay from any outside employment with the appointing authority. Such extra duty or side job assignments are not part of a Police Officer's gross salary or compensation that any officer is entitled to under the collective negotiations agreement. Rather, it asserts that it is equivalent to voluntary overtime, which is expressly excluded from back pay awards in *N.J.A.C. 4A:2-2.10(d)1*. Further, it argues if the average salary for Atlantic is utilized and the outside employment was deducted from the appellant's totals, the petitioner would have earned more in mitigation than he was due in back pay. It also contends that even if the petitioner had not fully mitigated, any back pay he might be owed should be reduced because he chose to attend nursing school rather than work to mitigate his losses. Moreover, the appointing authority contends that the petitioner should be denied any claims beyond April 13, 2021, the date his hearing at OAL had been scheduled for. It asserts that mere weeks before the hearing, the petitioner decided to retain new counsel which unreasonably delayed the hearing. It states that pursuant to *N.J.A.C. 4A:2-2.10(d)8*, a back pay award is subject to reduction by any period of unreasonable delay of the appeal proceedings by the employee.

Further, the appointing authority contends that the appellant's counsel fees award should be reduced by 70.3 hours due to the duplication of work caused by his decision to change counsel before the hearing at OAL. These 70.3 hours represent the hours Iacullo billed in preparation for the OAL hearing for which he never appeared, and which had to be duplicated by Cioffi. It also contends that billed costs such as copy costs and FedEx are costs associated with overhead and should be deducted from any counsel fees awarded.

Moreover, the appointing authority argues that leave time benefits requested for by the appellant overstate the amount of leave he should receive and seeks an award for time beyond the Commission's authority. It asserts that pursuant to *N.J.A.C. 4A:2-2.10(d)*, the benefits which may be awarded by the Commission shall include vacation and sick leave. In this regard, it claims that the reason that only these two benefit times are named is because the Commission can only award time governed under the Civil Service Act. Thus, the Commission would have no authority to review the petitioner's claim of "SCT" time, compensatory time, and union leave time. Additionally, *N.J.S.A. 11A:6-3(e)* in conjunction with *N.J.A.C. 4A:6.1.2(g)* stated that vacation leave not used in a calendar year shall be used during the next succeeding year only. Based on the petitioner's contract, he would have received 180 hours of vacation time in 2021 and 216 hours in 2022. Therefore, it contends that the petitioner is only entitled to 396 hours of vacation time.

In reply, the petitioner contends that his outside employment for South Orange should not be treated as overtime but rather as a second job. He contends that he did not voluntarily stop these side-jobs but because he was terminated as a police officer he could not continue to perform these jobs. He also argues that his decision to pursue a new career in nursing should not reduce his back pay award. In addition, the petitioner's decision to retain new counsel should not affect his back pay award in any way. Further, the petitioner argues that although the Commission may not have express authority over other leave times, it has in the past awarded personal days. In this regard, the petitioner contends that the Commission should award him his 263 hours of "SCT" time, 396 hours of vacation time, his 180 hours of Union leave time and 113.50 hours of compensatory time which he earned before his termination.

With regard to the counsel fees, the petitioner contends that it should not be reduced by 70.3 hours. He claims there was no relearning of prior work done. Rather, Cioffi spent his time answering interrogatories and document demands that the appointing authority filed during the delay in the proceeding. Finally, the petitioner claims that the counsel fees requested should be revised to reflect an additional 14.4 hours worked on the present petition.

CONCLUSION

Pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Additionally, *N.J.A.C.* 4A:2-2.10(d)1 states that 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 is not working. *N.J.A.C.* 4A:2-2.10(d)3 provides that an 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. Further, *N.J.A.C.* 4A:2-2.10(d)4 states that where a removal or a suspension for more than 30 working days has been reversed or modified 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. "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. 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. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. See *N.J.A.C.* 4A:2-2.10(d)4v. Finally, *N.J.A.C.* 4A:2-2.10(d)7 states that earnings from other employment held at the time of the adverse action shall not be deducted unless the employee increased his or her hours at that employment during the period of separation.

Under the above standard, the Commission finds that the petitioner made reasonable efforts to secure employment. The petitioner provided documentation that he was gainfully employed throughout the period of separation. He increased the hours at his second job and found other employment. Further, the record does not evidence that the petitioner's decision to get a nursing degree negatively impacted his employment status during said period. Moreover, the petitioner's decision to retain new counsel does not reduce his counsel fees in the instant matter. Any delay in the proceedings on the part of the petitioner's attorney or union representative is not a basis to deny back pay, since only delays directly attributable to the petitioner may be considered in denying back pay. See *N.J.A.C.*

4A:2-2.10(d)8. See also *In the Matter of Frank Hoffman v. Hudson County Department of Public Safety*, Docket No. A-4124-96T2 (App. Div. June 22, 1999), *cert denied*, 163 N.J. 80 (2000) and *In the Matter of Joseph Guziewicz* (MSB, decided August 29, 2000).

In reviewing the back pay amounts, the parties agree on the gross salaries that the petitioner would have earned during the period of separation. However, the appointing authority argues that the net salary after deductions have been taken out is the amount that should be used. *N.J.A.C.* 4A:2-2.10(d)2 provides that 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. Thus, the appointing authority, by rule, should reduce the appellant's back pay award consistent with this provision and provide the appellant with a full accounting of its deductions when it makes its payment to the appellant. See *In the Matter of Ronald Dorn* (MSB, decided December 21, 2005). Therefore, the gross salaries are used in the calculation of the back pay and only when such back pay is being distributed to the petitioner should it be reduced by the sums normally withheld. Further, the Commission agrees with the appointing authority's assessment that the \$23,883 in working outside employment for it is not an amount that the petitioner is entitled to. The petitioner's position as a Police Officer did not require him to work outside jobs nor did it guarantee him such jobs. Such jobs are akin to working overtime hours and cannot be considered part of the appellant's lost salary. See *N.J.A.C.* 4A:2-2.10(d)1.

Moreover, in reviewing the amounts earned by the petitioner in his second job at Atlantic, the parties differ on the amount the petitioner would have earned in this position had he not increased his hours due to his termination from his police officer position. The appointing authority asserts that an average of the prior three years should be used. The petitioner contends that doubling what he earned in the prior six months was a better estimation of what he would have earned. The Commission agrees with the petitioner. It is clear that in the years proceeding his termination the amount the appellant earned at Atlantic increased significantly from year to year. Thus, the petitioner's estimation is more likely to be valid. Based on the foregoing and the chart below of the sums owed and earned, the petitioner is owed \$28,597.49 in back pay.

	2020	2021	2022	Totals
Police Officer Salary	55,970.73	86,637.70	17,022.98	159,361.40
Atlantic (Net after subtracting \$37,716 from the amount earned)	33,835.48	19,387.04		
Trinitas	9,794.46	15,308.11		
St. Joseph		34,644.82	17,794.00	
Total Mitigation	43,629.94	69,339.97	17,794.00	130,763.91
Total Back Pay Owed				28,597.49

N.J.S.A. 11A:2-22 provides that reasonable counsel fees may be awarded to an employee as provided by rule. *N.J.A.C.* 4A:2-2.12(a) provides that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues in an appeal of major disciplinary action before the Commission. In addition, *N.J.A.C.* 4A:2-2.12(c) provides as follows: an associate in a law firm is to be awarded an hourly rate between \$100 and \$150; a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between \$150 and \$175; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with a practice concentrated in employment or labor law, is to be awarded an hourly rate between \$175 and \$200.

In the instant matter the petitioner is requesting counsel fees of \$24,322.50 in fees for Cioffi with an additional \$2,685.45 in costs for transcripts, copying and scanning, filing fees and service fees. He is also requesting \$15,960 in fees and \$117.75 in costs for Iacullo. Both attorneys bill at \$150 per hour. The appointing authority argues that the counsel fees amount should be reduced by 70.3 hours due to the duplication of work when the petitioner decided to change council before the hearing at OAL. However, other than indicating that Iacullo worked on preparing for the hearing, there has been no substantive proof that the work the two attorneys performed was duplicative. The appointing authority has also argued that the costs being billed are normal overhead costs which should not be reimbursed. The Commission agrees. Costs that represent normal office overhead will not be awarded. See *N.J.A.C.* 4A:2-2.12(g). These costs include photocopying expenses and expenses associated with the transmittal of documents through use of Federal Express or a messenger service. See, e.g., *In the Matter of Monica Malone*, 381 *N.J. Super.* 344 (App. Div. 2005). Therefore, the counsel fees amount equal \$24,322.50 for Cioffi and \$15,960 for Iacullo for a total of \$40,282.50 in counsel fees.

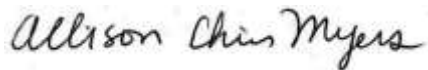
The petitioner also contended that for the period of his separation he is entitled to 263 hours of "SCT" time, 525 hours of vacation time, 180 hours in union leave time, and 113.50 hours of compensatory time. The appointing authority contends that the petitioner is only entitled to 396 hours of vacation. The Commission agrees with the appointing authority. *N.J.S.A. 11A:6-3(e)* and *N.J.A.C. 4A:6.1.2(g)* provide that vacation leave not used in a calendar year shall be used during the next succeeding year only. See, *In the Matter of Donald H. Nelsen, Jr.*, Docket No. A-2878-03T3 (App. Div. February 4, 2005); *In the Matter of John Raube, Senior Correction Officer, Department of Corrections*, Docket No. A-2208-02T1 (App. Div. March 30, 2004); and *In the Matter of Evan Scott* (CSC, decided September 10, 2019). Based on the information in the record, the petitioner would have received 180 hours of vacation time in 2021 and 216 hours in 2022. Thus, he is entitled to only 396 hours of vacation time. With regard to the other time requested, the Commission has no authorization to review benefits provided by the local jurisdiction and not specifically awarded by Title 11A of the New Jersey Statutes. See *In the Matter of James Nance* (MSB, decided October 1, 2003). Accordingly, no further benefit time is awarded to the petitioner.

ORDER

Therefore, it is ordered that the appointing authority pay Matthew Dsurney \$28,597.49 in gross back pay and \$40,282.50 in counsel fees within 30 days of issuance 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 24TH DAY OF MAY, 2023



Allison Chris Myers
Acting 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: Matthew Dsurney
Frank C. Cioffi, Esq.
Arthur R. Thibault, Jr. Esq.
Division of Agency Services
Records Center