



STATE OF NEW JERSEY

In the Matter of Immanuel Jones,  
Township of Union, Department of  
Buildings and Grounds

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

CSC Docket No. 2024-2462

Request for Back Pay and  
Counsel Fees

ISSUED: November 27, 2024 (HS)

Immanuel Jones, a Laborer 1 with the Township of Union, Department of Buildings and Grounds, represented by Michael A. Bukosky, Esq., requests back pay and counsel fees in accordance with *In the Matter of Immanuel Jones, Township of Union, Department of Buildings and Grounds* (CSC, decided April 10, 2024).<sup>1</sup>

As background, the appointing authority issued a Final Notice of Disciplinary Action that removed the petitioner, effective October 14, 2022, on charges of conduct unbecoming a public employee; insubordination; and other sufficient cause. Upon his appeal, the matter was transmitted to the Office of Administrative Law for a hearing. Following a hearing before an Administrative Law Judge (ALJ) and the Civil Service Commission’s (Commission) *de novo* review, the Commission modified the removal to a four working day suspension. The Commission ordered that the petitioner be awarded mitigated back pay, benefits, and seniority for the period after the imposition of the four working day suspension through the date of his actual reinstatement and counsel fees in the amount of 75 percent of the services charged. The record reflects that the petitioner was reinstated on April 22, 2024. However, the parties were unable to agree on the amount of back pay or counsel fees due to the petitioner, and the petitioner requested Commission review.

In his request, the petitioner seeks a directive that the appointing authority immediately compute and issue full back pay, benefits, and all other emoluments of

<sup>1</sup> The issue date for the decision is April 11, 2024.

the position. On counsel fees, the petitioner submits his May 29, 2024 list of services and a certification from Bukosky. According to the certification, Bukosky and John J. Collins, Esq., partners with 31 and 21 years of experience respectively, together performed 149.05 hours of work at a rate of \$250.00 per hour for a total of \$37,262.50. Thus, because the Commission only granted 75% of the services charged, the petitioner seeks \$27,946.88 in counsel fees. Additionally, the certification seeks \$911.70 in costs for the filing fee and transcript expenses. Bukosky certifies that there was no formal written retainer agreement in this case and that he “kept contemporaneous records of the time spent on particular tasks . . . and . . . services.” He further certifies that “all . . . time was reasonably expended and necessary in connection with the representation of the [petitioner].”

In response, the appointing authority, represented by Robert J. Merryman, Esq., indicates that the petitioner’s last day on the payroll was in fact November 11, 2022; he was suspended for four working days per the Commission’s prior decision; and he was reinstated on April 22, 2024.<sup>2</sup> His salary was \$33,280.00 in 2022; \$34,120.00 in 2023; and \$35,144.00 in 2024. The petitioner received \$9,620.60 in unemployment benefits for the period of December 11, 2022 through June 10, 2023. However, the appointing authority maintains that the petitioner did not make reasonable efforts to mitigate because he did not seek or apply for any positions similar to the Laborer 1 position he held.<sup>3</sup> Rather, according to the petitioner’s documentation, he applied for the following positions:

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<sup>2</sup> Thus, for purposes of this decision, the back pay period is November 18, 2022, the first date that follows the four working day suspension, through April 21, 2024.

<sup>3</sup> Per the job specification, a Laborer 1 performs varied types of manual and unskilled laboring work and may drive a truck in connection with laboring work on occasion. Appointees will be required to possess a driver’s license valid in New Jersey only if the operation of a vehicle, rather than employee mobility, is necessary to perform essential duties of the position. Appointees may be required to possess a valid Commercial Driver’s License and applicable endorsements for the class and type of vehicle being operated. The responsibility for ensuring that employees possess the required motor vehicle license, commensurate with the class and type of vehicles they operate, rests with the appointing authority.

<u>TIME PERIOD</u>	<u>POSITIONS AND APPLICATION DATES</u>
November 18, 2022 – December 10, 2022	None
December 11, 2022 – June 10, 2023	<ul style="list-style-type: none"> <li>• Truck Driver (December 14, 2022)</li> <li>• Lead Coach-Basketball Camp (February 19, 2023)</li> <li>• Signal Trainee at Newark Airport (March 8, 2023)</li> <li>• Route Driver (March 15, 2023)</li> <li>• Machinery Mover-Rigger (March 18, 2023)</li> <li>• Service Technician, Andersen Windows (March 20, 2023)</li> </ul>
June 11, 2023 – April 21, 2024	<ul style="list-style-type: none"> <li>• Air Traffic Control Specialist (July 10, 2023)</li> <li>• CDL Armed Driver Cash Transport (October 2, 2023)</li> <li>• Paratransit Bus Driver-CDL (October 5, 2023)</li> <li>• Border Patrol Agent (October 18, 2023)</li> <li>• UPS Casual Package Driver (October 18, 2023)</li> <li>• County Correctional Police Officer (March 3, 2024)<sup>4</sup></li> </ul>

The appointing authority argues that the petitioner was unqualified for the Truck Driver position because he was not employed with it in that capacity and does not hold a Commercial Driver’s License (CDL). He was not qualified for the Signal Trainee position because he has not demonstrated that he met the requirements of at least an Associate’s degree, or completion of vocational training, along with a minimum of one year of full-time paid work experience performing semi-skilled duties in the installation, testing, maintenance, servicing, and/or repair of electrical/mechanical equipment or comparable maintenance or construction experience. He was not qualified for the Service Technician position as he has not even alleged that he met the position requirements of “1-2 years of experience installing windows and doors preferred, or equivalent experience in neighboring industry” and having a vehicle that can accommodate transporting window and doors (*i.e.* truck, sprinter van, *etc.*). He was not qualified for the Paratransit Bus Driver-CDL and CDL Armed Driver Cash Transport positions as he does not possess a CDL. Finally, he has not indicated how he was qualified for the Machinery Mover-Rigger,

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<sup>4</sup> The petitioner also applied for a Refinery Operator position on an unknown date.

Lead Coach, Refinery Operator, Air Traffic Control Specialist, County Correctional Police Officer, and Border Patrol Agent positions.

The appointing authority argues that absent from the above list is any of the significant number (at least 28) of comparable and available public works/laborer positions in geographic proximity to the Township of Union that were advertised on-line or on the New Jersey League of Municipalities (League) website during the relevant time. Specifically, the appointing authority reports that the following positions were advertised on the League's website in the December 2022 – December 2023 time period:

- Road Department Laborer – Berkeley Heights Township, Union County. Qualified candidates had to have a Class B CDL (preferred) or a validated permit.
- Laborer – Hightstown Borough, Mercer County. High school diploma required.
- Public Works Laborer – River Vale Township, Bergen County (application deadline April 14, 2023). Successful applicant was required to possess a valid New Jersey driver's license, CDL Class A or Class B preferred. Had to obtain CDL Class B within one year of hire.
- Temporary Seasonal Laborer, Department of Public Works (DPW) – Woodcliff Lake, Bergen County.
- Public Works Laborer (Water/Roads) – Clinton, Hunterdon County. Applicants had to possess a valid driver's license and have a clean driving history (CDL was a plus). Minimum of high school diploma or equivalent required.
- Public Works Fulltime Laborer – Saddle River, Bergen County. Applicant had to possess a valid driver's license in good standing, CDL Class B was desirable.
- Laborer, DPW – Boonton, Morris County. Applicant was required to have a valid New Jersey Driver's License. Applicant was required to possess a valid CDL (minimum class B) with manual transmission endorsement within one year of hire date
- Public Works Laborer – River Vale Township, Bergen County (application deadline September 30, 2023). Had to obtain CDL Class B within one year of hire.
- DPW Laborer, Fulltime – Florham Park, Morris County. New Jersey CDL was a plus, but not required. CDL training was available in-house.
- DPW Laborer – Highlands, Monmouth County. New Jersey Driver's License was required, CDL B was preferred.

- Truck Driver/Laborer, Road Department – Bernardsville, Somerset County. Had to have a CDL or ability to obtain within six months of employment.

The appointing authority reports that the following are other online advertised positions:

<u>POSTING DATE</u>	<u>POSITION</u>	<u>REQUIREMENTS</u>
December 20, 2022	Public Works or Water Department Laborer – East Hanover, Morris County	High school diploma or GED equivalent; valid New Jersey driver's license, CDL license or ability to obtain within six months
January 9, 2023	Hanover Sewerage Authority, Morris County – Wastewater Treatment Plant Laborer/Custodian	High school diploma and valid New Jersey driver's license
January 13, 2023	Public Works or Water Department Laborer – East Hanover, Morris County	High school diploma or GED equivalent; valid New Jersey driver's license, CDL license or ability to obtain within six months.
January 20, 2023	Laborer – Morris Plains, Morris County	Valid New Jersey driver's license
January 25, 2023	Laborer 1 – Scotch Plains, Union County	Valid New Jersey driver's license and CDL
February 14, 2023	Public Works or Water Department Laborer – East Hanover, Morris County	High school diploma or GED equivalent; valid New Jersey driver's license, CDL license or ability to obtain within six months
April 20, 2023	Public Works Laborer – Millburn, Essex County	CDL Class B with air break endorsement
May 8, 2023	Fulltime DPW Laborer – Raritan, Somerset County	CDL preferred
May 19, 2023	Maintenance Worker, Public Works – Livingston, Essex County	High school diploma; must possess CDL or train for and obtain within six months

July 7, 2023	Part Time Laborer 1 DPW – Ogdensburg, Sussex County	Valid New Jersey driver's license
July 7, 2023	Water Laborer, DPW – West Caldwell	Skills such as prior municipal public works experience and/or equipment operation preferred
August 17, 2023	Night Shift Laborer, Braen Stone – Lafayette, Sussex County	General quarry and maintenance/welding experience a plus
December 30, 2023	DPW Laborer – Wyckoff, Bergen County	CDL Learner's Permit may be considered but must obtain CDL Class B within one year of hire
December 2023	Laborer – Andover, Sussex County	Valid New Jersey driver's license
February 1, 2024	Seasonal Public Works Laborer, DPW – Hanover, Morris County	Valid New Jersey driver's license
February 14, 2024	Laborer Roads/Public Works – Montgomery, Somerset County	Valid New Jersey driver's license; high school diploma

The appointing authority further argues that based on data maintained by the United States Bureau of Labor Statistics for the North Jersey Area showing the mean hourly wage and mean annual salary for Buildings and Grounds Cleaning and Maintenance workers for Local Government as of May 2023, the petitioner could have more than mitigated his lost wages. The appointing authority contends that the petitioner's list of employers does not show diligence to overcome the proofs demonstrating available positions for which the petitioner made no effort to obtain, and thus, back pay should be denied or significantly reduced. It cites *In the Matter of Richard Holland*, Docket No. A-1318-09T2 (App. Div. November 29, 2010), where in rejecting Holland's argument against reducing his back pay award based on his failure to mitigate, the court held that "his generalized testimony expressing his unsuccessful attempts is insufficient and does not show diligence to overcome the established proofs of job availability." In support, the appointing authority submits copies of job postings for the aforementioned public works/laborer positions; a payment record for the pay period ending November 11, 2022; and other documents.

Turning to counsel fees, the appointing authority urges the Commission not to "accept passively the submissions of counsel." *Rendine v. Pantzer*, 141 N.J. 292, 335 (1995). "[N]o compensation is due for nonproductive time." *Id.* A losing party cannot be required to "pay for the learning experience of attorneys for the prevailing party."

See *H.I.P. (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 *N.J. Super.* 144, 160 (Law Div. 1996). The party seeking counsel fees “bears the burden of proving the reasonableness of the fees by a preponderance of the evidence[.]” *Giarusso v. Giarusso*, 455 *N.J. Super.* 42, 50 (App. Div. 2018).

The appointing authority complains that the requested hourly rate of \$250.00 is inflated and requests that the rate for this “straightforward” matter instead be set between \$175.00 and \$200.00 an hour as contemplated by Civil Service regulations.

The appointing authority considers the following entries in the petitioner’s list of services to be erroneous:

<u>DATE</u>	<u>DESCRIPTION</u>	<u>HOURS</u>
May 1, 2023	Review of worker’s compensation retaliation statute; conference call with ALJ concerning petitioner trial	0.3
June 28, 2023	Preparation for conference telephone call with petitioner; conference call with ALJ	3.0
July 24, 2023	Telephone conference with DAG concerning possible settlement	0.9
August 12, 2023	Attendance at hearing	5.0
May 28, 2024	Modification of counsel fees	1.0
		<b>10.2 (subtotal)</b>

Specifically, the appointing authority calls for the deletion of the above entries for the following reasons:

- **May 1, 2023:** The worker’s compensation retaliation statute had no relation to this matter and was never considered by the ALJ. There was no conference call with the ALJ on this date, and the appointing authority has no legal billing for this matter on that date. In May 28, 2024 correspondence, the petitioner indicated that “we are modifying/correcting the entr[y] for . . . May 1, 2023.”
- **June 28, 2023:** There was no conference call with the ALJ on this date. It had been scheduled for 3:30 p.m. and the parties had dialed in. However, at 3:52 p.m., the ALJ’s assistant indicated that the call had to be rescheduled. It was rescheduled to July 6, 2023, for which there are separate billing entries. Moreover, it is patently unreasonable to spend upwards of three hours preparing for a conference call with a client.
- **July 24, 2023:** It is unclear who the “DAG” or what that individual’s relationship is to this case, if any. Moreover, the parties did not have a settlement conference on this date.

- **August 12, 2023:** This was a Saturday, and there was no hearing held this date.
- **May 28, 2024:** This was time spent correcting erroneous entries in the initial list of itemized services, in response to the appointing authority's letter dated May 21, 2024. The time spent correcting legal bills cannot be a part of a request for reasonable counsel fees.

Additionally, the appointing authority takes issue with 20 hours' worth of entries dated March 11, 2024 and March 14, 2024 for work on the exceptions to the ALJ's initial decision. The appointing authority calls for the deletion of these entries because the exceptions were wholly unsuccessful as the Commission affirmed the ALJ's decision, on both the charges and the penalty. Therefore, the petitioner is not entitled to the expenditure of legal services in furtherance of claims that were both meritless and unsuccessful.

Further, the appointing authority urges that "a party block bills at his own peril." *United States v. NCH Corp.*, Nos. 98-cv-5268 and 05-cv-881 (D.N.J. September 10, 2010). To that end, it contests several block-billed entries in the petitioner's list of services, the presence of which makes it impossible for it or the Commission to determine how much time was billed to each activity and whether same was reasonable. Calling further into question the authenticity of the block-billed entries is that they are all billed to the whole hour, strongly indicating that counsel either rounded up the actual time spent on the tasks, or, in the alternative, failed to contemporaneously track time, and thereafter estimated how much time was spent. These entries are on various dates from April 5, 2023 to June 21, 2023 and total 44 hours. For example, counsel billed six hours on April 12, 2023 for the following tasks: document review and trial preparation using what was supplied by petitioner; assembly and review of interrogatories and documents for exchange; complete review of Preliminary Notice of Disciplinary Action (PNDA) and timeline and witnesses with petitioner; and extensive recount and questioning of petitioner.

Thus, in all, the appointing authority calls for 74.2 hours of the requested 149.05 to be deleted. Additionally, the appointing authority avers that the parties had agreed to split the cost of the transcripts and that the petitioner still owes it \$895.95 to that end. As such, it maintains that the total award must be offset by that amount. In support, the petitioner submits the certification of Merryman.

It is noted that the petitioner's list of services includes the following entry that was not specifically objected to by the appointing authority:

<u>DATE</u>	<u>DESCRIPTION</u>	<u>HOURS</u>
May 9, 2024	Preparation of affidavit of mitigation	4.75



In reply, the petitioner argues with respect to back pay that there is a presumption that he sufficiently mitigated during the period that he received unemployment benefits. He certifies that he received no other compensation for wages lost during his separation. In addition, he argues that many of the jobs the appointing authority submits as possibilities are either very far away or require or give preference to special qualifications such as a CDL. It is also extremely doubtful, in the petitioner’s view, that another municipality would hire a worker who had just been dismissed from an adjacent municipality, so those job openings should not be considered as reasonable. The petitioner insists that he performed an adequate job search. For example, he certifies that he researched the potential to work at the Fire Department; researched the position of State Trooper; applied for “some solar jobs” as he has experience in “the solar industry;” applied for a courier job; spoke with his sister’s husband, a plumber, and looked on the Internet for jobs in the plumbing industry; spoke to “some people in Town Hall” about their knowledge of other open jobs and looked for jobs in the library; applied to “over half a dozen” construction jobs; and applied for forklift jobs in warehouses. He also certifies that some of the Internet applications he submitted did not result in a receipt, so he does not have documentation that memorializes those applications. He notes that his area of experience with the appointing authority had been in tree cutting as a ground worker.

Additionally, the petitioner certifies that while separated from employment, he was compelled to spend additional funds to maintain his health insurance and incurred some out-of-pocket medical costs.

On counsel fees, the petitioner now indicates that his request is under both *N.J.A.C. 4A:2-1.5* and *N.J.A.C. 4A:2-2.12*. He proffers that discretionary counsel fees at the rate of \$250.00 are in order because the ALJ made the following specific finding that has a dispositive impact upon this matter: “I also conclude that by preparing and signing the PNDA, while [the petitioner] was still out on documented medical leave, Township officials were predisposed to fire him in violation of his due process rights.” In other words, per the petitioner, the appointing authority was motivated, at least in part, by a “predisposition” that was adverse to and directly caused by his request for medical leave due to his work injury, which is protected conduct. Per the petitioner, the ALJ’s finding can only be understood to mean that the actions taken against him were imbued with an intent of “direct discrimination.”

In support, the petitioner submits a revised July 30, 2024 list of services. The revised list deletes the following entries:

<u>DATE</u>	<u>DESCRIPTION</u>	<u>HOURS</u>
July 24, 2023	Telephone conference with DAG concerning possible settlement	0.9
August 12, 2023	Attendance at hearing	5.0
		<b>5.9 (subtotal)</b>

The revised list adds the following entries:

<u>DATE</u>	<u>DESCRIPTION</u>	<u>HOURS</u>
June 5, 2024	Preparation of petition for counsel fees and back pay for petitioner	6.0
June 5, 2024	Preparation of correspondence to petitioner	0.4
June 28, 2024	Receipt and review of order from Civil Service; preparation of correspondence to petitioner	0.5
July 10, 2024	Review of recent decisions concerning back pay mitigation obligations; telephone conference with Township Attorney	1.8
July 10, 2024	Preparation of correspondence to petitioner concerning request for mitigation effort, materials, and documents	0.9
July 10, 2024	Telephone conference with Township Counsel concerning back pay; receipt and review of correspondence and data from Township concerning salary and back pay amounts; review of contract; preparation of correspondence to petitioner concerning possible settlement; preparation of correspondence to Township Attorney	2.1
July 11, 2024	Receipt and review of several correspondences from petitioner; preparation of reply to petitioner and Association concerning back pay	1.0
July 15, 2024	Office conference with petitioner concerning mitigation efforts; review of documents relating to mitigation	4.25
July 16, 2024 <sup>5</sup>	Review of Civil Service regulations and case law; preparation of affidavit of mitigation for petitioner concerning all efforts at mitigation; preparation of correspondence to Civil Service concerning back pay issues	5.9
		<b>22.85 (subtotal)</b>

<sup>5</sup> For the July 15, 2024 and July 16, 2024 entries on the revised list of services, the document indicates the year as 2023. This is presumed to be a typographical error.

Thus, the petitioner now seeks reimbursement for 166 hours and the same \$911.70 in costs.

## CONCLUSION

### Back Pay

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. 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. *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)4, *et seq.*

Initially, the record evidences that the petitioner received unemployment benefits for the December 11, 2022 through June 10, 2023 period. 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 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 . . . [t]he 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 individual 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). For the reasons discussed below, the presumption has been rebutted in this particular case.

Upon review, the Commission finds that the appointing authority has sustained its burden of proof to establish that the petitioner did not make reasonable efforts to find suitable employment for the November 18, 2022 through April 10, 2024 period. In this regard, *N.J.A.C.* 4A:2-2.10(d)4iii states that “[s]uitable 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. The appointing authority has submitted evidence that numerous comparable and available public works/laborer positions were advertised on the League’s website or elsewhere online in the relevant timeframe. The petitioner’s argument that these positions are not reasonable because it is doubtful that another municipality would hire a worker who had just been dismissed from an adjacent municipality is unpersuasive. In *O’Lone v. Dep’t. of Human Servs.*, 357 *N.J. Super.* 170, 184 (App. Div. 2003), the court stated:

We do not believe that the [Commission] may impose an obligation upon a public employee to deceive or mislead a prospective employer as a condition of obtaining back pay without reduction for what the employee could have earned from substitute employment during a period of separation from public service. This does not mean that a separated employee seeking substitute employment should present negative information in a manner designed to discourage an employment offer. *Such an employee has an obligation to seek substitute employment in good faith.* However, in determining whether suitable substitute employment was available to [the employee], the [Commission] should not assume he would have deceived or misled prospective employers (emphasis added).

Moreover, an individual’s own opinion regarding his employability does not relieve him of the duty to seek employment. See *In the Matter of Ibrahim Abdul-Haqq* (MSB, decided June 11, 2008).

Also unavailing is the petitioner’s contention that many of the jobs identified by the appointing authority are very far away. All of the positions were located in New Jersey and mostly in the northern part of the State. Even if the petitioner considers the location of these positions to be less than ideal for him, that is no basis to disregard the positions because “it is appropriate to apply the ‘lowered sights’ doctrine more expansively in a case such as this.” See *O’Lone, supra*, 357 *N.J. Super.* at 182. Further, the petitioner’s argument that many of the identified positions require or give preference to special qualifications such as a CDL is also not

persuasive. In this regard, the Commission notes that an individual is not required to *obtain* employment while attempting to mitigate damages, but merely required to make a good faith effort to *seek* employment. *See In the Matter of Robert Jordan* (MSB, decided June 11, 2008). Thus, even if an advertisement expressed a *preference* for a qualification such as a CDL, the petitioner would not necessarily have been barred from at least *seeking* the position by applying. As for positions *requiring* a particular special qualification at the time of hire, the petitioner has not specified the jobs to which this applies. Nevertheless, it would appear that only four positions, Road Department Laborer with Berkeley Heights; Laborer 1 with Scotch Plains posted January 25, 2023; Public Works Laborer with Millburn posted April 20, 2023; and DPW Laborer with Wyckoff posted December 30, 2023 required the individual to hold a special qualification such as a CDL or CDL Learner's Permit at the time of hire. As such, any contention that the appointing authority's list of identified positions should be disregarded because they required special qualifications at the time of hire is insubstantial.

For the November 18, 2022 through December 10, 2022 period, there are no documented applications for the petitioner. For the December 11, 2022 through June 10, 2023 period, there are documented applications for:

- Truck Driver (December 14, 2022);
- Lead Coach-Basketball Camp (February 19, 2023);
- Signal Trainee at Newark Airport (March 8, 2023);
- Route Driver (March 15, 2023);
- Machinery Mover-Rigger (March 18, 2023); and
- Service Technician, Andersen Windows (March 20, 2023).

For the June 11, 2023 through April 21, 2024 period, there are documented applications for:

- Air Traffic Control Specialist (July 10, 2023);
- CDL Armed Driver Cash Transport (October 2, 2023);
- Paratransit Bus Driver-CDL (October 5, 2023);
- Border Patrol Agent (October 18, 2023);
- UPS Casual Package Driver (October 18, 2023); and
- County Correctional Police Officer (March 3, 2024).

There is no substantive evidence in the record that the above positions were similar to the petitioner's Laborer 1 position with the appointing authority. Further, the appointing authority's citation to the following language in *Holland, supra*, is apt: the petitioner's "generalized testimony expressing his unsuccessful attempts is insufficient and does not show diligence to overcome the established proofs of job availability." Consequently, the appointing authority's presentation establishes that the petitioner did not make reasonable efforts to find suitable employment in the

November 18, 2022 through April 10, 2024 period. Thus, no back pay is owed for that period.

However, the petitioner is entitled to back pay from April 11, 2024, the issue date of the Commission's decision modifying his removal, through April 21, 2024, pursuant to *N.J.A.C. 4A:2-2.10(d)5*. The regulation provides that the employee is not required to mitigate back pay for such period and that the back pay award is to be reduced only by the amount of money that was actually earned during that period, including any unemployment insurance benefits received. The record reflects that the petitioner's receipt of unemployment benefits ended in June 2023, long before the issuance of the Commission's decision, and that he did not receive any other compensation during his separation. Therefore, the calculation of the petitioner's mitigated back pay award is as follows:

<u>DATES</u>	<u>AMOUNT OWED</u>
<b>November 18, 2022 – April 10, 2024</b>	\$0 (no mitigation efforts)
<b>April 11, 2024 – April 21, 2024</b>	\$946.19 ( <i>i.e.</i> , \$135.17 daily rate <sup>6</sup> multiplied by seven working days)
<b><u>Total Gross Back Pay Amount</u></b>	\$946.19
<b><u>Less Mitigation Amounts</u></b>	\$0
<b><u>Total Mitigated Back Pay Award</u></b>	<b><u>\$946.19</u></b>

*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 petitioner's total mitigated back pay award stated above consistent with this provision and provide the petitioner with a full accounting of its deductions when it makes its payment to the petitioner. *See In the Matter of Ronald Dorn* (MSB, decided December 21, 2005).

Additionally, the Commission orders that the appointing authority award the petitioner any benefits (*i.e.*, vacation leave, sick leave, *etc.*) due, if it has not already done so. The record indicates that the petitioner was reinstated on April 22, 2024. The petitioner is not due any vacation leave for 2022 since vacation leave not taken in a given year can only be carried over to the following year. *See N.J.S.A. 11A:6-3(e)* and *N.J.A.C. 4A:6-1.2(g)*. The petitioner is, however, due vacation leave for 2023 and 2024. In this regard, the petitioner would be entitled to have his 2023 vacation leave time credited or carried over and added to his 2024 vacation leave entitlement since he returned to work in April 2024. *See id.* As to the amount of sick leave due, the petitioner should receive any unused sick leave prior to November 18, 2022; sick leave

<sup>6</sup> The petitioner's salary in 2024 was \$35,144.00. Dividing that figure by 26 pay periods results in a biweekly rate of \$1,351.69. Dividing the biweekly rate by 10 results in a daily rate of \$135.17.

for the November 18, 2022 through December 31, 2022 time period; and all of his sick leave for 2023 and 2024, since sick leave can accumulate from year to year without limit. *See N.J.S.A. 11A:6-5 and N.J.A.C. 4A:6-1.3(f).*

However, the Commission declines to order reimbursement for the petitioner's out-of-pocket medical costs. In this regard, *N.J.A.C. 4A:2-2.10(d)* provides for reimbursement of payments made to *maintain health insurance coverage*. As far as Civil Service rules are concerned, the petitioner's entitlement to reimbursement for maintaining health insurance coverage does not apply to any medical expenses incurred. *See, e.g., In the Matter of Shannon Stoneham-Gaetano and Maria Ciufu* (MSB, decided April 24, 2001).

### **Counsel Fees**

*N.J.S.A. 11A:2-22* provides that the Commission may award reasonable counsel fees 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 before the Commission. *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 or equivalent 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 or equivalent in a law firm with 15 or more years of experience in the practice of 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. *N.J.A.C. 4A:2-2.12(d)* provides that if an attorney has signed a specific fee agreement with the employee or employee's negotiations representative, the attorney shall disclose the agreement to the appointing authority. The fee ranges set forth in (c) above may be adjusted if the attorney has signed such an agreement, provided that the attorney shall not be entitled to a greater rate than that set forth in the agreement. *N.J.A.C. 4A:2-2.12(e)* provides that a fee amount may also be determined or the fee ranges in (c) above adjusted based on the circumstances of a particular matter, in which case the following factors (see the Rules of Professional Conduct of the New Jersey Court Rules, at RPC 1.5(a)) shall be considered: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated; the nature and length of the professional relationship with the employee; and the experience, reputation and ability of the attorney performing the services.

The Commission finds that the petitioner has not justified counsel fees at the requested hourly rate of \$250.00. Extraordinary time and labor were not expended in the underlying disciplinary matter. The matter was not novel in any way and was

no more complex than any of the thousands of disciplinary appeals involving major disciplinary action decided over the years by the Commission. In this regard, an appeal of a removal from employment inherently lacks the legal complexity necessary to justify the hourly rate requested and no unique legal experience is needed. Therefore, based on the attorneys' respective positions in their law firms, qualifications, and years of experience in the practice of law, a reasonable hourly rate is \$200.00. *See N.J.A.C. 4A:2-2.12(c) and (e)*. The Commission rejects the petitioner's request to award a discretionary \$250.00 hourly rate using *N.J.A.C. 4A:2-1.5*. *See In the Matter of Salik Wilcher and Billy Grimsley* (CSC, decided June 15, 2022) (remedies under *N.J.A.C. 4A:2-1.5* do not apply to disciplinary appeals as disciplinary appeals have specific rules).

Turning to specific billing entries, the Commission will not disturb the three hours billed on June 28, 2023. The appointing authority has provided evidence that the conference call with the ALJ did not occur. However, the record reflects that it was scheduled for 3:30 p.m. on that date, and the parties had dialed in. It was not until approximately 20 minutes later that the ALJ's assistant advised the parties that the call would have to be rescheduled. And while the appointing authority may be dissatisfied with the amount of time required to prepare for the call, this is not in itself a sufficient basis to delete the entry.

The Commission will not disturb the 20 hours billed in relation to the exceptions to the ALJ's initial decision. The petitioner was within his rights to file exceptions. *See N.J.A.C. 1:1-18.4*. The Commission is satisfied that this work was performed in good faith and was necessary for the attorneys to provide their client with an adequate legal defense. Moreover, the Commission's decision to only award partial counsel fees recognizes that the penalty was modified, not reversed altogether.

The Commission will not disturb the 44 hours' worth of entries identified as block-billed. In *NCH, supra*, the court stated:

Block billing is a timekeeping method by which each lawyer and legal assistant enters the total time daily spent working on a case, rather than itemizing the time expended on specific tasks. In [the Third] Circuit, block billing is a common practice which itself saves time in that the attorney summarizes activities rather than detailing every task and such billing will be upheld as reasonable if the listed activities reasonably correspond to the number of hours billed. While a substantial number of vague entries may be a reason to exclude hours, it is not a reason to exclude the entire entry. This Court believes the more appropriate approach would be to look at the entire block, comparing the listed activities and the time spent, and determining whether the hours reasonably correlate to all of the activities performed (internal quotation marks and citations omitted).



The appointing authority's dissatisfaction with the petitioner's choice of timekeeping method is not a reason to delete entries. Moreover, with respect to any of the block-billed entries, the Commission does not find the hours billed to be unreasonable in relationship to the listed activities, which were necessary for the attorneys to provide their client with an adequate legal defense. While the appointing authority believes these entries are in doubt because they are billed to the whole hour, there are many entries in the list of services that are *not* to the whole hour. As such, the mere fact that these entries are to the whole hour is not in itself a sufficient reason to impose the harsh penalty of deleting altogether entries related to 44 hours' worth of work. Further, the appointing authority's suggestion that counsel rounded up the actual time spent on the tasks or failed to contemporaneously track time and thereafter estimated how much time was spent is speculative. Bukosky has certified that he "kept contemporaneous records of the time spent on particular tasks . . . and . . . services."

However, the Commission agrees with the appointing authority that the May 1, 2023 entry for 0.3 hour should be deleted. In the May 28, 2024 correspondence, the petitioner had indicated that "we are modifying/correcting the entr[y] for . . . May 1, 2023." Merryman's certification indicates that there was no conference call with the ALJ on this date, and the petitioner has produced no evidence in rebuttal here to show that there *was* a conference on that date. While the Commission does not find it unreasonable that the petitioner would have reviewed the worker's compensation retaliation statute given the facts of the case, the whole entry must be deleted since the amount of time spent solely on such review is not broken out.

The Commission agrees with the appointing authority that the May 28, 2024 entry for one hour should be deleted. It is unreasonable to have the appointing authority reimburse the petitioner for time spent correcting errors in the list of services that were identified by the appointing authority.

Since the parties effectively agree that the July 24, 2023 and August 12, 2023 entries totaling 5.9 hours should be deleted, they will be deleted.

Proceeding to entries that are dated after the April 11, 2024 issuance of the Commission's prior decision, generally, a petitioner is entitled to counsel fees regarding his enforcement request *for his counsel fee award* since New Jersey courts have recognized that attorneys should be reimbursed for the work performed in support of any fee application. *See H.I.P., supra*, 291 *N.J. Super.* 144 at 163 [quoting *Robb v. Ridgewood Board of Education*, 269 *N.J. Super.* 394, 411 (Ch. Div. 1993)]. However, the petitioner is not entitled to an award of counsel fees for time spent on reinstatement or back pay issues where the appointing authority did not unreasonably delay carrying out the Commission's order and did not act with an improper motivation. In the instant matter, the record does not evidence that the appointing authority unreasonably delayed implementing the Commission's order or

that the appointing authority's actions were based on any improper motivation. Thus, the record does not reflect a sufficient basis for an award of counsel fees for time spent on reinstatement or back pay issues. See *N.J.A.C. 4A:2-1.5(b)*; *In the Matter of Lawrence Davis* (MSB, decided December 17, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001). The petitioner's May 29, 2024 list of services included a May 9, 2024 entry for 4.75 hours spent on preparation of the affidavit of mitigation. Since this pertained to back pay, the time is not reimbursable and must be deleted. As for the 22.85 hours tacked on in the revised list of services dated July 30, 2024, the only entry that clearly mentions counsel fees is the June 5, 2024 entry for six hours spent on preparation of the petition for counsel fees and back pay for petitioner. However, the number of those hours spent solely on the counsel fees issue is not broken out. As such, none of the 22.85 added hours are reimbursable.

In summary, the May 29, 2024 list of services sought reimbursement for 149.05 hours. The Commission deducts from that figure 0.3 hour for the May 1, 2023 entry; 0.9 hour for the July 24, 2023 entry; five hours for the August 12, 2023 entry; 4.75 hours for the May 9, 2024 entry; and one hour for the May 28, 2024 entry. The 22.85 hours added on the July 30, 2024 revised list of services are not reimbursable. As the Commission awarded 75% counsel fees, the counsel fees award is as follows:

$$137.1 \text{ hours} \times (.75 \times \$200.00) = \$20,565.00$$

### Costs

*N.J.A.C. 4A:2-2.12(g)* provides that reasonable out-of-pocket costs shall be awarded, including, but not limited to, costs associated with expert and subpoena fees and out-of-State travel expenses. Costs associated with normal office overhead shall not be awarded. These costs include photocopying expenses. See, e.g., *In the Matter of Monica Malone*, 381 *N.J. Super.* 344 (App. Div. 2005). The appeal fee is not a reimbursable cost as per *N.J.A.C. 4A:2-1.8(a)*, this is a processing fee. Thus, only transcript expenses would fall within the scope of *N.J.A.C. 4A:2-2.12(g)*. However, Merryman's certification reflects that the parties had agreed to split the transcript expense, and, at this juncture, the appointing authority has already borne that expense in full, including the petitioner's half. The petitioner has produced no evidence in rebuttal here to show otherwise. He has also not produced any evidence that the transcript expenses for which he seeks reimbursement are unrelated to the aforementioned agreement between the parties. As the petitioner was the substantially prevailing party, he is entitled to full costs. Nevertheless, because the Commission presumes that the appointing authority has already borne the petitioner's half of the transcript expense, the Commission will neither award costs to the petitioner nor order the petitioner to reimburse the appointing authority.


**ORDER**

Therefore, it is ordered that the appointing authority pay Immanuel Jones the gross amount of **\$946.19** for back pay within 30 days of receipt of this decision.

It is further ordered that the appointing authority pay Jones counsel fees in the amount of **\$20,565.00** within 30 days of 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 27<sup>TH</sup> DAY OF NOVEMBER, 2024



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Chairperson  
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