

Request for Reconsideration

CSC Docket No. 2021-318

DPF-439 * Revised 7/95

received for employment and unemployment benefits during the mitigation period, plus other deductions that are normally withheld. Additionally, Hendrickson's back pay award was to be calculated to include increments and across-the-board adjustments and his current salary was to be adjusted to a rate that includes increments and across-the-board adjustments.

As to benefits, Hendrickson was entitled to all accrued sick time from the date after the suspension up to his reinstatement, since sick leave can accumulate from year to year without limit. Regarding vacation time, upon his reinstatement, Hendrickson was entitled to carry forward his 2017 allotment only since vacation leave not taken in a given year can only be carried over to the following year. Further, Hendrickson was not entitled to "personal" days as administrative leave that is not used during the calendar year is forfeited. Finally, Hendrickson was not entitled to receive a retroactive clothing allowance for the time he was not working for the appointing authority.

In his request for reconsideration, Hendrickson presents that he has been reinstated and received most of the back pay due. However, he claims that there are three issues that remain in dispute. Regarding vacation, Hendrickson argues that the Commission's analysis in its prior decision that indicated that he was only entitled to carry forward his 2017 allotment "misses the point." He presents that he is not asking to carry over any additional time. Instead, he is asking to be allotted vacation time that initially was unjustly taken from him as he was prevented from using this time because he was not working due to his unjust removal. Hendrickson asserts that he must be given the opportunity to use all unused and unallocated vacation time. He argues that he should have been awarded all accrued vacation time from September 4, 2014 until October 15, 2018, minus any time related to his six months suspension, and he should be given one year to use it. Moreover, Hendrickson states that no back vacation days were available to him when he was reinstated on October 15, 2018. Vacation days were allotted to him in September 2020, minus approximately 16 days. He alleges that due to the appointing authority's failure to issue his vacation days when reinstated back in 2018, he could not use his vacation days in a timely manner. Hendrickson claims that he lost approximately 16 vacation days due to no fault of his own as he was not allowed to carry these days over to 2020. These vacation days were first allotted in 2020 due to the appointing authority's delay and he contends that if these days had been available to him when he was reinstated on October 15, 2018, he would have been able to use those days at that time rather than lose them because he was not allowed to carry them over to 2020.

Concerning unemployment compensation benefits that were paid during his six-month suspension, Hendrickson argues that these benefits should not be deducted from his back pay under *N.J.A.C. 4A:2-2.10(d)3*. He presents that he received six months of unemployment benefits while still on suspension. This is time during which he did not receive his back pay award. As a result, he asserts that it cannot be

deducted from his back pay award as he collected it for a period for which he did not collect back pay. Thus, Hendrickson argues that these benefits were not mitigating his back-pay award.

Finally, Hendrickson presents that he applied for night and weekend employment in 2014 before he was terminated. After his removal, he was offered a part-time position which he accepted and continues to perform today. Therefore, Hendrickson argues that this part time work is unrelated to his mitigation for his removal as he applied before his discipline was issued. He asserts that the amount of salary that he earned for this extra work during this period was inappropriately deducted from his back pay award. Moreover, as the part time job earnings were employment after normal work hours, Hendrickson states these earning should not have been deducted.

In response, the appointing authority, represented by Steven M. Gleeson, Deputy Attorney General, argues that Hendrickson's request for reconsideration is untimely as the Commission's decision was issued on February 27, 2020. However, he waited nearly seven months to file reconsideration, which is well after 45 days from receipt of the decision, which is the time that is permitted to file for reconsideration under *N.J.A.C. 4A:2-1.6(a)*.

Additionally, the appointing authority presents that even if Hendrickson's arguments are considered, he has not met the standard for reconsideration. Specifically, he has not presented any new evidence that could not have been presented in advance of the prior decision that would have changed the outcome as he is simply clarifying information that could have been clarified before the prior decision. Further, it argues that the Commission did not make any clear material error.

Regarding vacation time, the appointing authority states that the law is clear, and an employee cannot carry over more than one year's worth of vacation. It presents that Hendrickson earns 15 vacation days per year. Therefore, he can only carry over 15 vacation days to a subsequent year, effectively capping vacation days to no more than 30 days for any given year. However, Hendrickson has cited no statute, regulation or case law that would allow him to carry over more vacation days than permitted by law. It indicates that he has provided no explanation or evidence to support his claim that he lost 16 vacation days. The appointing authority believes that Hendrickson made this calculation by adding up the number of vacation days he would have received from 2017 through 2020 (57 days) less the approximately 11.5 vacation days used in 2018 and 2019 for a total of approximately 45.5 vacation days that he alleges that he was entitled to upon reinstatement. As the appointing authority permitted him the maximum vacation days that could accrue under law (30 days), he is alleging that he lost approximately 16 days. However, the appointing authority presents that if Hendrickson had never been separated, he could not have accrued more than 30 vacation days in a single year. Therefore, it argues that to

award him more than 30 vacation days in a single year would constitute a windfall for him.

Referring to Hendrickson's argument about his unemployment compensation, it states that *N.J.A.C. 4A:2-2.10(d)3* provides that "the award of back pay shall be reduced by the amount of money that was actually earned during the period of separation...". The appointing authority presents that Hendrickson has not provided any support for his claim that the "period of separation" does not include the period of his suspension. Further, it submits that the Appellate Division, in an unpublished decision, *In the Matter of James Lemieux, Trenton Psychiatric Hospital*, Docket No. A-4189-17T4 (App. Div., November 22, 2019), recently rejected Hendrickson's argument. In this matter, Hendrickson was separated from September 4, 2014 until October 15, 2018, and the Commission appropriately deducted his unemployment earnings from his back pay award. The appointing authority also states that there is insufficient evidence in the record to conclude that all of Hendrickson's unemployment income was earned during the six-month suspension. It presents that Hendrickson's certification only certifies that he "received unemployment compensation...for 2015 in the amount of \$6,020.00" without specifying the dates he received said compensation in 2015.

Finally, the appointing authority presents that Hendrickson admits that he did not hold additional employment prior to his separation. It indicates that *N.J.A.C. 4A:2-2.10(d)7* provides that only earnings from employment held prior to a separation is not to be deducted from a back pay award and applying for a job is not the same as actually holding it. Therefore, since the job did not start until after his separation, all earnings were properly deducted under *N.J.A.C. 4A:2-2.10(d)3*.

In reply to the appointing authority's claim this his appeal is untimely, Hendrickson argues that he is not requesting reconsideration of the Commission's decision that was issued on February 27, 2020. Rather, this request was prompted by a series of emails from the appointing authority in September 2020, which he argues demonstrated that the appointing authority incorrectly interpreted and implemented the Commission's prior decision. Therefore, Hendrickson presents that he is requesting enforcement of the Commission's prior decision and not reconsideration. He states that the appointing authority categorized his September 23, 2020 letter as a request for reconsideration and concluded that it was untimely; however, it does not mention that it filed a response to his response 55 days after he filed his request; which is well after the 10-day time limit for its response.

Hendrickson presents that he is not requesting to carry over any additional vacation time. Instead, he argues that he is asking, for the first time, for vacation time which initially was unjustly stripped for him. Hendrickson states that he was prevented from using this vacation time because he was not permitted to work due to his unjust removal and he will not be made whole unless all vacation days are restored.

Similarly, he argues that unemployment compensation benefits, which were paid during his six-month suspension, should not be deducted from back pay. Hendrickson asserts that the deduction authorized for unemployment benefits is limited to benefits during the period covered by the back-pay period. He states that collecting unemployment benefits when getting back pay does not mitigate his back pay earned so that the six months of benefits cannot be deducted from his back pay. Hendrickson states that the time in question here is when he did not receive back pay. He claims that the appointing authority is trying to double dip as it wants to deduct his unemployment compensation for the periods he was not suspended as well as when he was suspended. Hendrickson notes that *Lemieux, supra*, is an unpublished case and does not have any precedential value. He cites a case that indicates that in deciphering the plain meaning of a statute, courts use the statute's internal structure and conventional meanings of its phrases and words. Courts may use the doctrine of "*expressio unius est exclusio alterius*," which suggests that when items are specifically listed, those excluded were excluded purposefully. Where a list is illustrative, it should ordinarily be preceded by following types of phrases: "such as," "including," "may include," "in any of the following ways," or "including but not limited to."

Hendrickson states that the regulation for an award of back pay is for a certain period of time that the Commission modifies or reverses a suspension. Thus, the back pay award and the amount of suspension are linked together. He states that the amount of suspension time is directly related to the amount of unemployment insurance benefits that are deducted. Hendrickson argues that the Appellate Division in *Lemieux* incorrectly ruled that all unemployment compensation should be deducted as he asserts that it appears that the Appellate Division did not read the first line of the pertinent regulation. In following the applicable regulations, the salary earned during the period of suspension relates back to the provision in the regulation that references modifying a suspension. When a suspension is modified, unemployment compensation should not be deducted for the length of the suspension. He claims that it is inconsistent to deduct unemployment compensation during a period where no back pay is awarded. Since there is no back pay, he states that he is not required to mitigate during the suspension. Hendrickson states that under the appointing authority's theory, he could owe money to it if he did not have earnings, but collected unemployment compensation while he was suspended. Therefore, he argues that reasoning of the Appellate Division is incorrect.

CONCLUSION

N.J.A.C. 4A:2-1.6(a) provides that within 45 days of receipt of a decision, a party to the appeal may petition the Civil Service Commission for reconsideration.

N.J.A.C. 4A:2-1.6(b) provides that a petition for reconsideration shall be in writing signed by the petitioner or his or her representative and must show the

following: (1) The new evidence or additional information not presented at the original proceeding, which would change the outcome and the reasons that such evidence was not presented at the original proceeding; or (2) That a clear material error has occurred.

N.J.A.C. 4A:2-2.10(d)3 provides, in pertinent part, where a removal or suspension has been reversed or modified 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.

N.J.A.C. 4A:2-2.10(d)7 provides that if an employee also held other employment at the time of the adverse action, the back pay award shall not be reduced by earnings from such other employment. However, if the employee increased his or her work hours at the other employment during the back pay period, the back pay award shall be reduced by the earnings from such additional hours.

N.J.S.A. 11A:6-2g and *N.J.A.C.* 4A:6-1.2(g) provide, in pertinent part, that vacation leave not used in a calendar year because of business necessity shall be used during the next succeeding year only and shall be scheduled to avoid loss of leave.

In this matter, Hendrickson claims that he is not seeking reconsideration of the Commission's prior decision which was issued on February 27, 2020. Instead, he is arguing that his September 23, 2020 request is a request for enforcement as he claims that the appointing authority, in its September 2020 emails, incorrectly interpreted and implemented the Commission's February 26, 2020 decision. However, a review of Hendrickson's request concerning vacation days cites the Commission's decision and argues that its analysis misses the point. Therefore, Hendrickson is arguing that clear material error has occurred by the Commission, which is a request for reconsideration and not enforcement. Similarly, the Commission's prior decision specifically stated, "the Commission finds that the appellant has made sufficient mitigation efforts and his back pay award shall be reduced only by \$33,907.13, which is the total amount that the appellant certifies that he received for **employment** and **unemployment benefits** during the mitigation period, plus other deductions that are normally withheld (emphasis added)." Therefore, Hendrickson is arguing that the Commission, not the appointing authority, erred when it included all employment and unemployment benefits in determining the mitigation amount.

The Commission's prior decision was issued on February 27, 2020. There is no claim that Hendrickson did not receive the prior decision in a timely fashion. Referring to Hendrickson's comments that the appointing authority's response to his request was not timely, there is no statutory or regulatory time to respond to an appeal. Instead, this agency issued an October 28, 2020 letter advising the parties to submit additional information within 20 days of that letter to help the matter move forward. In response, the appointing authority submitted a November 17, 2020

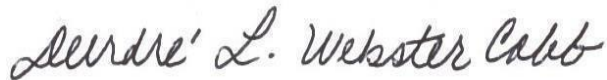
response, which was in keeping with this agency's directions. Further, the timeliness of a response to a request for reconsideration has no impact on whether a request for reconsideration is timely. Therefore, as Hendrickson's September 23, 2020 request was filed well after 45 days of receipt of the decision, his request is untimely under *N.J.A.C.* 4A:2-1.6(a). Additionally, Hendrickson could have made the arguments that he is now making prior to the Commission issuing its February 26, 2020 decision, and therefore, even if his request was timely, it does not meet the standard for reconsideration. Accordingly, the Commission dismisses this matter on the basis that it is untimely.

ORDER

Therefore, it is ordered that the request be dismissed as untimely.

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 16TH DAY OF DECEMBER 2020



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