



STATE OF NEW JERSEY

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

 In the Matter of Robert Brand, *et al.*,
Juvenile Justice Commission

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 Administrative Appeal

 CSC Docket Nos. 2020-1277, *et al.*

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ISSUED: February 14, 2020 (SLD)

Robert Brand, Mark Macrina and Edward O'Hara, Correctional Police Lieutenants, Juvenile Justice, with the Juvenile Justice Commission (JJC), represented by Kevin D. Jarvis, Esq., request a waiver of repayment of salary overpayments pursuant to *N.J.S.A.* 11A:3-7, which provides that when an employee has erroneously received a salary overpayment, the Civil Service Commission (Commission) may waive repayment based on a review of the case. Since these matters involve the same issue, they have been consolidated herein.

By way of background, in *In the Matter of Investigator, Secured Facilities Title Series and State First Level Law Enforcement Supervisory Titles* (CSC, decided March 10, 2010), the Commission, in relevant part, relaxed the provisions of *N.J.A.C.* 4A:3-4.9(a), to allow for the implementation of an Interest Arbitration Award (Award) between the State and the New Jersey Law Enforcement Supervisors Association (NJLESA), which represents the primary level supervisory law enforcement titles. The December 28, 2009 award modified various terms of the collective negotiations agreement between the State and the NJLESA, including the calculations of salary upon promotion to any sergeant level title represented by the NJLESA. Specifically, the Award stated that an employee who is promoted to any job title represented by NJLESA:

. . . shall receive a salary increase by receiving the amount necessary to place them on the appropriate salary guide . . . on the lowest Step that provides then with an increase in salary from the salary that they were receiving at the time of the promotion. Notwithstanding any

regulation or authority to the contrary, no employee shall receive any salary increase greater than the increase provided for above upon promotion to any job title represented by NJLESA.

Subsequently, Brand, Macrina were promoted, effective February 25, 2012 and O'Hara was promoted, effective February 9, 2013, from the title of Senior Correction Officer Juvenile Justice to Correction Sergeant, Juvenile Justice. However, it appears that, upon promotion, their salaries were calculated pursuant to *N.J.A.C. 4A:3-4.9(a)*, rather than the above-noted Award. Specifically, upon their promotions, the appellants' salaries increased as follows:

NAME	PREVIOUS SALARY	PROMOTIONAL SALARY
Brand	\$74, 939.80 (Step 8, Salary Range L)	\$80,254.10 (Step 6, Salary Range 2)
Macrina	\$74, 939.80 (Step 8, Salary Range L)	\$80,254.10 (Step 6, Salary Range 2)
O'Hara	\$77,667.99 (Step 9, Salary Range L)	\$83,415.82 (Step 7, Salary Range 2)

Subsequently, Macrina and O'Hara were promoted, effective February 20, 2016 and Brand was promoted, effective May 26, 2018, to the title of Correction Lieutenant, Juvenile Justice.¹ While updating the Personnel Management Information System (PMIS) to provide retroactive increases for their salary ranges pursuant to the new contract, it was discovered that the appellants' salaries upon their promotion to Correction Sergeant, Juvenile Justice was incorrectly calculated.

Thereafter, the appointing authority requested a waiver of the salary overpayment on behalf of the appellants. Specifically, the appointing authority maintains that an error occurred in calculating the appellants' salaries upon their promotions in 2012 which is what caused the overpayment. It maintains that Brand and Macrina should have been placed on step 5, salary range 2 (\$77,092.38) and O'Hara should have been placed on step 6, salary range 2 (\$80,254.10), upon their promotion to the title of Correction Sergeant, Juvenile Justice. The appointing authority asserts that although a reconstruction of the appellants' histories has not been undertaken, and without taking into account step increases and contract adjustments, the approximate overpayment amount would be in excess of \$22,069.04 for Brand and Macrina and \$22,132.04 for O'Hara. The appointing authority notes that as the appellants' records have not been corrected, no repayment terms have been set. The appointing authority maintains that due to the substantial nature of the overpayment amount, any repayment of the overpayment will pose an undue hardship on the appellants.

Additionally, the appointing authority asserts that it is preparing to promote the appellants. However, it argues that as a promotion will result in the appellants earning a similar salary for additional responsibilities, it requests a relaxation of

¹ The title was changed to Correctional Police Lieutenant, Juvenile Justice, effective July 7, 2018.

N.J.A.C. 4A:3-4.9 to permit the appellants to receive an additional step increase. The appointing authority maintains that both of its requests are necessary to ensure that the appellants are not harmed by the administrative error.

On appeal, the appellants argue that the circumstances and the amount of the overpayments were such that they could not have known about any errors and the alleged overpayments were the result of an administrative error. Specifically, the appellants argue that there was no way that they could have been aware of the overpayment since it occurred due to the appointing authority's error in calculating their salaries upon their promotion. In this regard, the appellants note that as they were being promoted, they expected an increase in their pay. The appellants also note that upon their promotion, they moved into a different salary range, thereby making it difficult to notice the error. Moreover, the appellants maintain that they relied on the appointing authority and this agency to ensure that their salaries were calculated correctly.

Additionally, the appellants assert that any repayment of the overpayment amount would cause an undue hardship. The appellants maintain that they have not been provided an exact accounting of the overpayment amount, but they estimate that the overpayment amount will "conservatively range between \$20,000 to \$30,000" per appellant. In this regard, the appellant assert that they were each approximately overpaid \$3,000 per year for the last six or seven years, but this amount does not take into consideration any overtime wages paid on the higher salaries; higher withholdings of various taxes; higher pension and health care contributions; and defined contribution plan withholdings and related interest accruals for Macrina and O'Hara. The appellants also assert that the overpayment will also require them to incur substantial costs above the overpayment amounts as they will require the assistance of a tax attorney and/or financial advisor, and would require them to amend their State and federal income tax returns for all years they received an overpayment.

Brand asserts that the overpayment amount represents 29-35% of his annual income and as the sole provider for his family, it would result in a hardship. Macrina asserts that the overpayment amount represents 29-35% of his annual income and would represent a hardship if he was required to repay as he has "significant alimony, child support and pension [loan] repayment" amounts that he is required to make on a monthly basis. O'Hara asserts that the overpayment amount represents 23-29% of his annual income and would represent a hardship if he was required to repay as he was divorced in 2018 and the monthly alimony that he is required to pay was contingent upon his rate of pay at that time. Any repayment of the amount would necessitate the reopening of his divorce to account for the adjusted rate of pay and alimony and his ex-wife may also have to amend her taxes. Additionally, O'Hara asserts that as a result of his divorce, he was forced

to take out a pension loan, with a monthly payment of \$1,800. In support, the appellants submit certifications containing the above information.

The appellants argue that a loss of one-quarter to one-third of their annual income is objectively significant and would undoubtedly cause a hardship due to individual factors for each appellant as noted above. Therefore, they contend that, as they have satisfied all three factors indicated in *N.J.A.C. 4A:3-4.21*, their request for a waiver should be granted.

CONCLUSION

N.J.A.C. 4A:3-4.21 Salary overpayments: State service, provides as follows:

- (a) The [Commission] may waive, in whole or in part, the repayment of an erroneous salary overpayment, or may adjust the repayment schedule based on consideration of the following factors:
 - 1. The circumstances and amount of the overpayment were such that an employee could reasonably have been unaware of the error;
 - 2. The overpayment resulted from a specific administrative error, and was not due to mere delay in processing a change in pay status;
 - 3. The terms of the repayment schedule would result in economic hardship to the employee.

It is well settled that all of the factors outlined in *N.J.A.C. 4A:3-4.21* must be satisfied to successfully obtain a waiver of the repayment obligation. Thus, in *In the Matter of Thomas Micai v. Commissioner of Department of Personnel, State of New Jersey*, Docket No. A-5053-91T5 (App. Div., July 15, 1993), the Superior Court of New Jersey, Appellate Division, affirmed the Commissioner of Personnel's decision to deny a request for waiver of repayment of salary overpayment, finding that, although the appellant had established that the overpayment was the result of an administrative error, he failed to show that enforcement of the repayment would create economic hardship.

The appellants request a waiver of the salary overpayments since they claim that the circumstances and the amount of the overpayments were such that they could not have known about the error. Specifically, they argue that the overpayment occurred because of the appointing authority's error in calculating their salaries upon their promotion. Moreover, they note that they relied on the

appointing authority and this agency to calculate their promotional increases correctly. However, even though the appointing authority has acknowledged that its errors caused this situation, employees cannot benefit from an administrative error. *See e.g., Cipriano v. Department of Civil Service*, 151 N.J. Super. 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 N.J. 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 N.J. Super. 538 (App. Div. 1998) (No vested or other rights are accorded by an administrative error).

Furthermore, even if the appellants have satisfied the first two factors of the governing rule, as noted above, all three factors must be satisfied. Although the appellants claim that the repayments of the amounts would create a hardship, none of the appellants have presented any specific evidence, such as their monthly income and expenses, to substantiate their claims of hardship. Moreover, the actual amounts and repayment terms have not yet been set. Rather, the appellants argue that the overpayment amounts range from 23% to 35% of their annual income, and because of individual circumstances, would cause a hardship. However, the Commission notes that the full overpayment amount is not required to be repaid in a single year. Therefore, with generous repayment terms, the repayment of the overpayment should not cause a significant hardship. For example, if the repayment amount is \$25,000, and the repayment schedule is set over a period of five years, (assuming 26 pay periods per year), the repayment amount would be approximately \$192.31 per pay period. The repayment terms could be extended over a longer period of time, resulting in an even lower per pay period amount.² Further, the appointing authority indicates that the appellants will be promoted which should result in their annual salary remaining similar to what they currently receive. Accordingly, a sufficient basis does not exist to grant a waiver of the repayments at issue pursuant to *N.J.A.C.* 4A:3-4.21.

Finally, the appointing authority's request to relax the provisions of *N.J.A.C.* 4A:3-4.9 to provide the appellants with an additional step increase, upon their current promotion, since without the additional step increase, the appellants will earn a "similar salary for additional responsibilities" cannot be granted. In this regard, as previously noted, employees cannot benefit from an administrative error. *See e.g., Cipriano, supra*. In this regard, the appellants were not entitled to any of the overpayment amount, and thus, should not benefit from receiving it by receiving an extra step upon their promotion. Moreover, it must be noted that similarly situated employees who were promoted from Correctional Police Lieutenant, Juvenile Justice, but whose promotional salary upon appointment to Correction Sergeant, Juvenile Justice was correctly calculated, would be on a lower step than the appellants, creating an inequitable outcome.

² In this regard, the Commission suggests that the appointing authority devise as lenient a repayment schedule as necessary to ensure the least negative impact possible.

ORDER

Therefore, it is ordered that this request for a waiver of the repayments by Robert Brand, Mark Macrina and Edward O'Hara be denied. It is also ordered that the appointing authority's request to relax the provisions of *N.J.A.C. 4A:3-4.9* be denied.

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 12TH DAY OF FEBRUARY, 2020



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