



**STATE OF NEW JERSEY**

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

In the Matter of Heath Bernstein,  
Department of Children and Families

Administrative Appeal

CSC Docket No. 2020-18

**ISSUED: NOVEMBER 27, 2020  
(SLD)**

Heath Bernstein, a former Manager 3, Human Services,<sup>1</sup> with the Department of Children and Families, appeals his award under the Management Salary Program.

By way of background, the appellant received a regular appointment to the title of Manager 3, Human Resources, effective December 13, 2012. Thereafter, the appellant was appointed to the Senior Executive Service (SES), effective October 17, 2015. On March 31, 2018, the appellant was returned to his title of Manager 3, Human Resources. In a June 12, 2019 memorandum, the appellant was informed that he was to receive a 5% salary increase of his base salary, pursuant to the Salary Regulation FY 2019 - Management Issued (Management Salary Program), which provides, in pertinent part:

- C. Performance Awards** – Increase to base salary will be effective PP 4/19 (February 2, 2019) for employees covered under this program.

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3. Managerial Performance awards must be supported, if available, by final ePAR ratings on file as of the date of the award or other methods designated by the Civil Service Commission. The

<sup>1</sup> Agency records indicate that the appellant transferred to the Department of Labor and Workforce Development and was appointed to the Senior Executive Service, effective December 9, 2019.

following scale shall apply to calculate the percentage of the increase:

<b>Final 2018 ePAR rating</b>	<b>% Increase</b>
5 (5 level scale) or 3 (3 level scale)	15
4 (5 level scale)	13
3 (3 level scale) or 2 (3 level scale)	11

\* \* \*

6. In the event an employee's January 4, 2018 salary has been decreased due to different or lesser responsibilities, the Appointing Authority can propose remedies to the Civil Service Commission regarding the employee's eligibility to participate in the merit based percentage increase program. These situations will be reviewed and approved on a case by case basis.

On appeal, the appellant argues that the base salary amount that was utilized for him was incorrect. In this regard, the appellant argues that although the Personnel Management Information System (PMIS) listed his "base" salary as \$110,956.98, his entire salary of \$120,168.06 should have been utilized to calculate the amount of his award. The appellant argues that during his tenure with the State, "base" salary has always been defined as "pensionable base" salary, which would exclude overtime, bonuses, clothing allowances, *etc.* He asserts that in *In the Matter of Heath Bernstein* (CSC, decided November 21, 2018), the Civil Service Commission (Commission) found that pursuant to *N.J.A.C. 4A:3-2.9(c)*, the appellant was returned to his highest held class code in his permanent title in the same organizational unit and therefore his salary needed to be reconstructed, as if he had never entered the SES. Moreover, the Commission noted that during this process, any anniversary date increments that he would have received must be applied, as well as any across the board (ATB) increases that were effective during his service in the SES. Consequently, his salary should have been calculated as \$120,168.06, effective March 31, 2018. Finally, the Commission noted that since the appellant's current position was in the "M" ERG, his salary should have been red-circled at \$120,168.06 until such time as salary range M34 increased to include this guaranteed minimum salary. *See N.J.A.C. 4A:3-2.9(c)7iii.* Thus, he argues that based on the foregoing, his entire salary of \$120,168.06 should have been utilized as his "base salary" when his Management Salary Program salary increase was calculated.

With regard to the percentage of his award, the appellant argues that during the 2018 rating cycle, he received a rating of "3-exceptional" dated January 5, 2018 due to the separation of his supervisor and a rating of "2- Successful" as a close out

rating due to the change of his title.<sup>2</sup> Therefore, the appellant argues that he should have been awarded, at a minimum, an 11% award. Specifically, he asserts that although his performance was at least “successful,” if not “exceptional,” the decision to penalize employees who are reassigned due to a change in administration, without a showing of deficient performance, is arbitrary and capricious. The appellant maintains that his salary was already “lessened” to reflect the lesser responsibilities, and by also restricting his performance increase, it penalizes him for someone else’s decision to return him to his permanent title for a non-performance reason.

In response, the appointing authority initially asserts that it defers to this agency regarding the calculation of the appellant’s “base” salary. Additionally, it asserts that its decisions in this matter were not arbitrary and capricious as it merely followed the direction provided by this agency. The appointing authority notes that the appellant was in the SES as the Chief Fiscal Officer. However, upon his return to his permanent title, effective March 31, 2018, his duties were vastly reduced. Therefore, pursuant to provision c(6) of the Management Salary Program, it requested that the appellant’s salary increase be 5%.

In reply, the appellant maintains that although he does not dispute the reduction in his responsibilities, as a result of the reduction in duties, his salary was already reduced. However, reducing his performance increase, unrelated to any performance concerns was punitive, arbitrary and capricious and serves no legitimate governmental purpose other than to disadvantage him for a discretionary decision outside of his control. Moreover, the appellant argues that provision c(6) of the Management Salary Program undermines the stated purpose of the regulation as it is untethered to any legitimate governmental purpose, targets those employees who were displaced with a change of administration, does nothing to further the Civil Service system, and therefore, is invalid.

## CONCLUSION

Initially, with regard to the appellant’s argument that his award was improperly calculated using his “base” salary of \$110,956.98, rather than is “pensionable base” salary of \$120,168.06, the Commission notes that *N.J.A.C. 4A:1-1.3* defines “base salary” as an employee’s rate of pay exclusive of any additional payments or allowances. Accordingly, the use of an employee’s listed “base salary” in the Personnel Management Information System (PMIS) in calculating the amount of the award is normally appropriate.

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<sup>2</sup> Although the appellant raises concerns with the appropriateness of the “2” rating, those arguments will not be addressed in this matter as the Commission’s review of complaints concerning ratings and the PAR itself are limited. See *N.J.A.C. 4A:6-5.3*. Moreover, any claim regarding his rating would also be considered untimely.

However, in the instant matter, the appellant's entire salary should have been utilized as his "base salary". In this regard, in *In the Matter of Heath Bernstein, supra.*, the Commission found that pursuant to *N.J.A.C. 4A:3-2.9*, the appellant's guaranteed minimum salary upon his return from the SES title to his permanent title was appropriately \$120,168.06. However, since he had been returned to the Manager 3, Human Resources with an M34 salary range rather than his previously held title of Manager 3, Human Resources with an M34 salary range, PMIS required that that M34 salary of \$110,956.98 be entered as the base with the \$9,211.08 listed as "extra" to bring his salary to the minimum guaranteed salary that he was entitled to pursuant to *N.J.A.C. 4A:3-2.9*. Therefore, as it was simply a function of the PMIS system that required his salary to be split into "base" and "extra," his entire salary should have been utilized.

With regard to the percentage utilized for his award, the Commission does not agree that an award of 5% was arbitrary or capricious. In this regard, provision c(6) of the Management Salary Program provides that:

In the event, an employee's January 4, 2018 salary has been decreased due to different or lesser responsibilities, the Appointing Authority can propose remedies to the Civil Service Commission regarding the employee's eligibility to participate in the merit based percentage increase program. These situations will be reviewed and approved on a case by case basis.

In the instant matter, there is no dispute that the appellant's responsibilities were lessened upon his return to his permanent title of Manager 3, Human Resources. The Commission does not agree with the appellant that the fact his duties were lessened should not be considered as his return to his permanent title was a "discretionary" decision "due to a change in the administration." The appellant correctly notes that the decision to return him to his permanent title was "discretionary" and although he maintains that it was rooted in the change in administration, even if true, that does not invalidate the fact that his responsibilities were lessened. Thus, a plain reading of this provision allows an appointing authority to propose remedies to this agency regarding an employee's eligibility to participate in the program. Furthermore, the appellant has failed to establish that the appointing authority abused this discretion.<sup>3</sup>

Therefore, based on the foregoing, the appellant is entitled to a differential award utilizing his entire salary of \$120,168.06 from the effective date of the award,

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<sup>3</sup> Moreover, the Commission wholly rejects the appellant's argument that c(6) is invalid. In this regard, the purpose of the regulation was to allow employees in the appellant's situation to be **eligible** to participate in the Management Salary Program at the appointing authority's discretion. In this regard, appointing authorities were permitted to suggest any supportable remedy for such employees. The Commission notes that such remedies could include not providing any award or to provide an increase beginning as low as 1% and increasing upward depending upon the circumstances and the employee's duties and responsibilities.

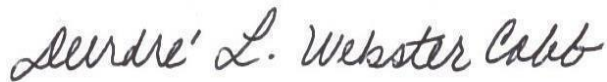
to his appointment to the Senior Executive Service, effective December 9, 2019. This remedy is limited to the particular facts of this matter.

# ORDER

Therefore, it is ordered that this appeal be granted in part.

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 24<sup>TH</sup> DAY OF NOVEMBER 2020




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