



## STATE OF NEW JERSEY

In the Matters of Christopher Ferro,  
Bergen County Sheriff's Office

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

CSC Docket No. 2022-1819

Back Pay and Counsel Fees

**ISSUED: MAY 23, 2022 (SLK)**

The Bergen County Sheriff's Office (BCSO), represented by Brian M. Hak, Esq., requests that the Civil Service Commission (Commission) determine the back pay and counsel fees entitled to Christopher Ferro in *In the Matter of Christopher Ferro* (CSC, deemed adopted October 27, 2021).

By way of background, on or around November 7, 2018, Ferro, a County Correctional Police Officer, was subjected to a random drug test, which indicated that his THC level was found to be 18.9 ng/ml and the cutoff for THC is 15.0 ng/ml. Although Ferro claimed that he used CBD oil, the State Lab's December 28, 2018 Toxicology Report noted such use "should not be expected to produce a positive result for THC." Ferro was afforded the opportunity to have the second urine test independently, but he did not accept that opportunity. Ferro was initially suspended in January 7, 2019<sup>1</sup>, and subsequently removed, which he appealed to the Commission, which transmitted the matter to the Office of Administrative Law (OAL) as a contested case. At the time of the initial toxicology screening, the State Lab did not have the capability to test for CBD and CBD metabolite, and only after Ferro's appeal was transmitted to the OAL did the State Lab possess such technology. On or about February 17, 2020, the State Lab tested Ferro's urine specimen for CBD and CBD metabolite, and CBD was not detected above the cutoff level of 5.0 ng/ml, which corroborated the initial report that the purported use of CBD "should not be expected

<sup>1</sup> This date is provided by the BCSO.

to produce a positive result for THC.” The Administrative Law Judge (ALJ) found that Ferro did not use CBD. However, the ALJ concluded that the initial test, which rendered THC above the cutoff, and the CBD test, which indicated THC under the cutoff, presented equivocal evidence. Therefore, in the ALJ’s September 15, 2021 initial decision, he recommended that the removal be reversed. At the Commission’s October 27, 2021, meeting, two members voted to uphold the removal and two members voted to adopt the ALJ’s recommended decision. Therefore, pursuant to *N.J.S.A. 52:14B-10(c)*, no decision was rendered by the Commission, and the ALJ’s recommended decision was deemed adopted as the final decision. In this agency’s November 9, 2021 letter, it informed the parties that Ferro’s removal was reversed, and he was entitled to back pay and reasonable counsel fees. Thereafter, Ferro was reinstated on December 1, 2021. Subsequently, the BCSO requested a stay of the back pay and counsel fee award pending its appeal to the Appellate Division, which was denied in the Commission’s January 19, 2021 decision. In response, BCSO filed the subject request as it disputes the amount of back pay and counsel fees that have been claimed by Ferro.

In its request, the BCSO asserts that based on Ferro’s Affidavit of Mitigation, he has made little to no effort to find suitable employment during his separation as his efforts were limited to applying to three sports writing jobs on August 14, 15, and 19, 2021. Additionally, Ferro drove for Uber in 2019 earning \$2,947.31 and earned a total of \$600 as a writer for FantasyPros. Instead, it indicates that Ferro made a conscious decision to be a stay-at-home dad while his wife worked. Therefore, the BCSO argues that Ferro failed to make reasonable efforts to find suitable employment during the separation period. The BCSO also presents that Ferro’s attorney claims to have spent 231.9 hours on this matter for a total amount of \$82,250, which it believes is excessive. Therefore, it requests that this matter be transmitted to the OAL where the matter can be set down for a hearing and fully briefed.

In response, Ferro, represented by David J. Altieri, Esq., asserts that the BCSO has not acted in good faith as it has not tried to resolve this matter in defiance of the Commission and by delaying Ferro’s reinstatement. He presents that the BCSO’s attorney, which did not get involved until eight months after his attorney got involved, has billed 508.3 hours, which is more than double his attorney’s time. Ferro indicates that he has attempted to resolve this matter at different points throughout the litigation, but the BCSO continued to endlessly litigate.

Concerning his mitigation efforts, Ferro asserts that the BCSO’s position that running a household with two small children after being wrongfully terminated does not constitute a worthy endeavor is a position straight out of the 1950’s. He notes that it was the BCSO’s unlawful termination that put him in this position where he and his wife could not afford childcare for his kids. Ferro presents that his household duties required the time of full-time employment and he drove for Uber and freelance

sports writing in addition. He states that the BCSO has put him in the impossible position of having to be a full-time stay at-home parent and a full-time worker in law enforcement. He notes that it is the BCSO's burden to prove that he did not seek suitable employment and asserts that it is illogical to take the position that childcare is not employment as there are almost 500,000 childcare workers in the United States and 18 percent of parents are stay-at-home parents. Ferro contends that since he has spent his entire career in law enforcement, there was no suitable employment for him other than law enforcement. Further, he emphasizes that reasonable efforts are to be based on the totality of circumstances. Ferro presents *In the Matter of Richard Morales* (CSC, decided September 16, 2020), which indicates that "there is no mandatory obligation that the only acceptable manner that an employee can mitigate an award of back pay is to seek employment from a third party." He argues that his termination in law enforcement for an alleged failed drug test prevented him from obtaining another law enforcement position, which he contrasts to *Morales*, who was a plumber, as there are no advertised employment opportunities in law enforcement for suspended or terminated law enforcement officers. Additionally, he indicates his lack of a college degree or other training or certification impairs his ability to gain employment outside of law enforcement. Ferro also highlights that the pandemic made his ability to find third-party employment nearly impossible. He certifies that his family was unable to afford COBRA, which resulted in thousands of dollars in family medical and dental expenses, many of which went to collections as he could not afford to pay them. Ferro states that while the BCSO has the legal burden in this matter, the real burden fell on the Ferro family despite no wrongdoing on his part.

In reply, the BCSO presents that Ferro was requested, as part of certification of mitigation, to include "the names, addresses and dates of contact and/or application with prospective employers and/or any other pertinent information." However, it indicates that he largely provided information about his expenses and gave little information regarding his mitigation efforts. Regarding counsel fees, Ferro's attorney was to provide an Affidavit of Services that contained the credentials of the attorneys who worked on the case, a listing of costs, if the rate exceeds the ranges outlined in *N.J.A.C. 4A:2-2.12(c)*, which it does in this case, an explanation justifying the rate, and a copy of any fee arrangement between Ferro and his attorney and/or the fee agreement between the union and the law firm representing the membership, but he has failed to do so. It asserts that it must have this information before it can respond to his request for counsel fees.

In further response, Ferro submits a Supplemental Affidavit of Mitigation where he indicates that he was offered seasonal employment by UPS in December 2019, but he declined it because he made more money driving for Uber. He also indicates that he collected unemployment insurance benefits in 2019, in the amount of \$9,048, in 2020 in the amount of \$41,233, and in 2021 in the amount of \$36,325. He presents *O'Lone v. Dep't of Human Servs.*, 357 N.J. Super. 170, 176-177 (App. Div. 2003) where the Appellate Division held that even where an employee did not make

a serious effort to seek employment during the separation from State service, such failure “was not a sufficient basis for the denial of his back pay claim, without any consideration of the availability of such employment.” He notes that he did seek employment and was hired for three positions, despite the reality that he had a full-time job at home. Ferro also presents *Brown v. Cty. Of Passaic*, Docket No. A-1607-12T4 (App. Div. June 6, 2014) where the appellant, a Detective, was forced to retire from the Prosecutor’s Office and she did not seek employment as she was caring for a dying sister and a disabled sister. The Court noted that the appellant was a high school graduate who had no experience beyond law enforcement, who was barred by law from re-employment in law enforcement, and the economy was in severe recession and it did not require the appellant to mitigate in order to receive back pay. Ferro argues that his circumstances are parallel, and he should not have been required to mitigate, even though he did, under his circumstances. Ferro also requests interest under *N.J.A.C. 4A:2-2.11*, as he repeatedly attempted to resolve this matter.

Concerning counsel fees, Ferro’s attorney has updated his breakdown of services as entries for the Notice of Appeal to the Appellate Division have been dismissed and not billed. Additionally, he presents that his hourly rate that was initially submitted, \$350 per hour, was reasonable for civil legal services in Bergen County. However, Ferro presents that after reviewing *N.J.A.C. 4A:2-2.12(c)*, he would only be due between \$150-\$175 per hour as a Partner in a law firm with nearly 13 years of practice. Additionally, he indicates that if he had not been awarded attorney’s fees, the Police Benevolent Association Legal Protection Plan (LPP) and Ferro would be responsible for the payment. Ferro states that the hourly rate under the LPP is \$130 per hour up to \$26,000 and he is responsible for any fees and costs above that figure, to be billed at the same rate. Therefore, his attorney’s Certification of Services has been updated to reflect that rate. Also, Ferro includes expert fees per the regulation. Ferro’s attorney’s Supplemental Certification of Services indicates that he spent 260.7 hours at a rate of \$130 per hour for a total of \$33,618<sup>2</sup>. He also indicates that the appeal fee was \$20, the expert report was \$1,050 and the expert was \$750 for a total of \$1,820. Therefore, the total request is for \$35,438.

In further reply, the BCSO submits Ferro’s payroll spreadsheet, a health benefit enrollment record for Ferro, Direct Access 8 fact sheet showing in-network and out-of-network benefits, Delta Dental PPO plan summary, and a Summary of Benefits for PBA 134 with RX copays. In response to Ferro’s claim that it acted in bad faith by highlighting that he failed a drug test, the Attorney General Law Enforcement Drug Policy (AG’s Drug Policy) requires that law enforcement officers who test positive for illegal drugs be removed, and it was a tie vote among the Commission members regarding his removal. The BCSO reiterates its position that Ferro should be denied back pay because he failed to mitigate. However, if back pay is awarded, it argues that back pay should only be awarded from February 17, 2020, the date of the second “CBD” test and not from his separation starting January 7,

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<sup>2</sup> 260.7 hours x \$130 per hour equals \$33,891 and not \$33,618.

2019, because prior to February 17, 2020, which is consistent with the ALJ's finding that if the initial testing in November 2018 were the only evidence in the case, that would have been enough to support the BCSO's removal of his position.

The BCSO presents that in *O'Lone, supra*, the Court held that an appointing authority does not have the same heavy burden to prove a failure-to-mitigate defense as it does under the New Jersey Law Against Discrimination (NJLAD). Also, the Court concluded that it was appropriate to apply the "lowered sights" doctrine more expansively in a case such as this than in a case where termination of employment is found to have violated the NJLAD or other law as the appellant's back pay award should be reduced by the amount he "could have earned in such substitute employment." The BCSO submits *In the Matter of William Able, City of Newark*, Docket No. A-5106-18 (App. Div. June 14, 2021) which affirmed the Commission's decision to deny back pay where the Commission found that applying for seven jobs over a three-year period did "not constitute a reasonable effort to secure employment." The Court noted that the employer was not obligated to submit its own documentation regarding the employee's job search to satisfy its burden under *O'Lone* and it properly relied on the appellant's mitigation affidavit to establish the he failed to make a reasonable to mitigate. In this case, the BCSO states that Ferro's Affidavit of Mitigation largely provides his expenses and his decision to be a stay-at-home parent and gives no information regarding mitigation efforts. Contrary to Ferro's assertion, the BCSO does not dispute that homemaking is valuable work; however, as he readily admits in his Affidavit, he made no reasonable efforts to find employment most of the time, including working from home. It highlights that Ferro's sole efforts were working for Uber in 2019, where he earned \$2,947.31, \$600 for FantasyPros, and applying for three jobs in one week in August 2021. Therefore, the BCSO argues that Ferro's mitigation efforts were even less than in *Able, supra*. Moreover, even if Ferro's ability to seek employment was limited because his only experience was in law enforcement and he did not have any other specialized skills, the "lowered sights" doctrine must be applied which requires an employee to accept lower paying work that might be available. Also, Ferro declined an offer from UPS and it argues that the money that he would have earned from that position must be imputed against him. Further, Ferro could have worked for Uber and UPS as Uber does not require a set schedule. It notes that his back pay award also must be reduced by the unemployment benefits that he received. The BCSO states that if back pay is awarded, Ferro should provide his tax returns so it can be determined what income was earned during the separation period. It states that Ferro relies heavily upon *Brown, supra*. However, the BCSO presents that *Brown* is inapposite because it was a NJLAD case and not a disciplinary matter and the reason for the difference in burden of proof is that in a NJLAD case the employer acted wrongly in discriminating against an employee, which is not the same as in a disciplinary case such as this, where it was required to terminate Ferro under the AG's Drug Testing Policy. It also contends that any back pay award must be off-set by the childcare saving that Ferro received by being a stay-at-home father as an award of back pay should not justly

enrich the employee, which can be at least \$1,100 per month per child, which is \$26,400 per year for two children. Additionally, the appointing authority presents that any back pay award must be reduced by the health insurance contribution he did not make during the separation period, and if it is required to pay for any medical expenses that Ferro incurred during the separation, his back pay award must be reduced by his Chapter 78 health care benefits contribution. Moreover, it argues that Ferro's claim for interest must be denied as it has not unreasonably delayed compliance with the Commission or acted in any way where interest should be awarded. Concerning counsel fees, the appointing authority notes that the hourly rate has been adjusted but it has not been provided a copy of the fee agreement between the union and Ferro's attorney in accordance with *N.J.A.C. 4A:2-2.12(d)* and it reserves further comment until it is in receipt of such information and related information as to the bills for said services.

In further response, Ferro reiterates his position that his case mirrors *Brown, supra*, as there is no comparable available work for a wrongfully terminated Police Officer. He argues that *O'Lone, supra*, supports the awarding of back pay based on the lack of availability of comparable work. Additionally, he presents that not only does *O'Lone* stand for the notion that the employer bears a responsibility in presenting that alternative employment was available, but it recognizes that the availability of employment opportunities is central to the mitigation analysis. He emphasizes that the BCSO has failed to indicate what comparable work that would have been available to him. Ferro argues that the BCSO purposefully misses the point of *Able, supra*, as Able was a custodian, a job that lends itself to a multitude of comparable employment opportunities, while the bulk of Ferro's time was spent running his household and caring for his young children. Therefore, as the BCSO has only cited cases where childcare was not a factor, those cases are distinguishable. He claims that the BCSO's argument that he should have driven for Uber, worked for UPS, and maintained his household and cared for his children demonstrates a complete and utter lack of comprehension of the position that he was put in. Regarding the attorney's fees, he presents that the initial fee reflected a reasonable rate in Bergen County and, upon review of the regulation, the rate was changed to reflect the regulation requirements.

## CONCLUSION

*N.J.A.C. 4A:2-1.1(d)* provides that except where a hearing is required by law, this chapter of *N.J.A.C. 4A:8*, or where the Commission finds that a material and controlling dispute of fact exists that can only be resolved by a hearing, an appeal will be reviewed on a written record.

*N.J.A.C. 4A:2-2.10(a)* provides that where a disciplinary penalty has been reversed, the Commission shall award back pay, benefits, seniority or restitution of a fine. Such items may be awarded when a disciplinary penalty is modified.

*N.J.A.C. 4A:2-2.10(d)* provides that 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.

1. 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 was not working.

2. 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.

3. Where a removal or suspension has been reversed or modified, an indefinite suspension pending the disposition of criminal charges has been reversed, 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, subject to any applicable limitations set forth in (d)4 below.

4. Where a removal or a suspension for more than 30 working days has been reversed or modified or an indefinite suspension pending the disposition of criminal charges has been reversed, 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.

- i. "Underemployed" shall mean employment during a period of separation from the employee's public employment that does not constitute suitable employment.

- ii. "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.

- iii. "Suitable 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.

iv. 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.

v. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment.

5. An employee shall not be required to mitigate back pay for any period between the issue date of a Commission decision reversing or modifying a removal or reversing an indefinite suspension and the date of actual reinstatement. The award of back pay for this time period shall be reduced only by the amount of money that was actually earned during that period, including any unemployment insurance benefits received.

*N.J.A.C. 4A:2-2.10(e)* provides that unless otherwise ordered, an award of back pay, benefits and seniority shall be calculated from the effective date of the appointing authority's improper action to the date of the employee's actual reinstatement to the payroll.

*N.J.A.C. 4A:2-2.10(f)* provides that when the Commission awards back pay and benefits, determination of the actual amounts shall be settled by the parties whenever possible.

*N.J.A.C. 4A:2-2.10(g)* provides that if settlement on an amount cannot be reached, either party may request, in writing, Commission review of the outstanding issue. In a Commission review:

1. The appointing authority shall submit information on the salary the employee was earning at the time of the adverse action, plus increments and across-the-board adjustments that the employee would have received during the separation period; and



2. The employee shall submit an affidavit setting forth all income received during the separation.

*N.J.A.C. 4A:2-2.11(a)* provides that when the Commission makes an award of back pay, it may also award interest in the following situations:

1. When an appointing authority has unreasonably delayed compliance with an order of the Commission or Chairperson, as applicable; or

2. Where the Commission finds sufficient cause based on the particular case.

*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(b)* provides that when the Commission awards counsel fees, the actual amount shall be settled by the parties whenever possible.

*N.J.A.C. 4A:2-2.12(c)* provides that subject to the provisions of (d) and (e) below, the following fee ranges shall apply in determining counsel fees:

1. Associate in a law firm: \$ 100.00 to \$ 150.00 per hour;

2. Partner or equivalent in a law firm with fewer than 15 years of experience in the practice of law: \$ 150.00 to \$ 175.00 per hour; or

3. 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: \$ 175.00 to \$ 200.00 per hour.

*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:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated;
3. The nature and length of the professional relationship with the employee; and
4. The experience, reputation and ability of the attorney performing the services.

*N.J.A.C.* 4A:2-2.12(f) provides that counsel fees incurred in matters at the departmental level that do not reach the Commission on appeal or are incurred in furtherance of appellate court review shall not be awarded by the Commission.

*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.

*N.J.A.C.* 4A:2-2.12(h) provides that the attorney shall submit an affidavit and any other documentation to the appointing authority.

*N.J.A.C.* 4A:2-2.12(i) provides that if settlement on an amount cannot be reached, either party may request, in writing, Commission review.

Initially, it is noted that the BCSO requested that this matter be transmitted to the OAL for a hearing. However, the Commission finds that there is no material and controlling dispute of fact that can only be resolved by a hearing. *See N.J.A.C.* 4A:2-1.1(d). As such, this matter will be decided on the written record.

In this matter, the record indicates that Ferro was separated without pay starting January 7, 2019, until the Commission's October 27, 2021 meeting, when the ALJ's initial decision recommending reversing the removal was deemed adopted since there was a tie vote among the Commission members. Further, the record indicates that Ferro was reinstated on December 1, 2021. As such, the applicable period for back pay that was subject to mitigation was January 7, 2019 until October 26, 2021, while the period from October 27, 2021 until November 30, 2021 was not subject to mitigation. *See N.J.A.C.* 4A:2-2.10(d). Concerning the BCSO's argument that back pay shall start from February 17, 2020, because this is the first time that there was any evidence to potentially support a finding that Ferro did not fail the drug test, the Commission finds this argument unpersuasive as this situation is similar to where

an employee is indefinitely suspended due to pending criminal charges and then the criminal charges are later dismissed. Even though appointing authority may not be at fault for initiating the suspension, the appellant is still potentially entitled to back pay for the entire period that the appellant did not receive pay.

Regarding Ferro's back pay in 2019, it is clear that Ferro attempted to mitigate his back pay for some portion of that year, as the record shows he did secure employment. However, he provided no evidence of those efforts prior to his employment. As such, he is only entitled to back pay for whatever periods in 2019 that he actually was employed.<sup>3</sup> The BCSO provides that his pay for the applicable period is \$120,158.61, which Ferro has not objected to. The record further indicates that Ferro earned \$2,947.31 from Uber in 2019. Additionally, he earned \$600 from FantasyPros during the separation period, although the record is unclear, how much, if any, was earned in 2019. Ferro also received \$9,048 in unemployment benefits in 2019. The record is unclear if Ferro worked for Uber for all or part of 2019 during his separation period. Therefore, the Commission finds that Ferro is entitled to gross back pay for whatever portion of the \$120,158.61 that was earned during the time he started working for Uber in 2019 until the time he stopped working for Uber in 2019 less the \$2,947.31 he earned from Uber, less whatever portion of the \$600 he earned from FantasyPros and the \$9,048 in unemployment benefits that was received during this time. The Commission denies the BCSO's request to impute income that Ferro could have earned from UPS in 2019 because if he was working Uber during this time, there was no obligation for him to work two jobs, and if he was not working for Uber during this time, he is not entitled to back pay during such time. The Commission also denies the BCSO's request to require Ferro to submit his 2019 tax return as Ferro has already certified to his employment in 2019.

Concerning Ferro's request for back pay in 2020 and 2021, Ferro explains that he made almost no efforts to find employment because childcare was too expensive.<sup>4</sup> He argues that under *Brown, supra*, he had no obligation to seek employment. However, *Brown* is not pertinent as that matter involves a NJLAD case and not a Civil Service disciplinary matter, where there is no evidence that the BCSO separated him for an illegal or invidious reason. To the contrary, the BCSO removed Ferro because he failed a drug test and was required to do so under the AG's Drug Test Policy. Additionally, Ferro presents *Morales, supra*, which indicated that there is no mandatory obligation that the only acceptable mitigation was third party employment. However, *Morales* does not support Ferro because in that case, the

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<sup>3</sup> The Commission notes that receipt of unemployment benefits is a rebuttable presumption that an individual has engaged in a job search. However, here, Ferro provides no evidence of job searches in 2019. Thus, the Commission finds the presumption is rebutted.

<sup>4</sup> Ferro also indicates that he received unemployment benefits in 2020 and 2021; however, per the prior footnote, the presumption that he engaged in a sufficient job search during this time is rebutted. Further, the fact that Ferro was employed for at least part of 2019, contradicts his argument that he could not work at all in 2020 and 2021.

Commission found that Morales sufficiently mitigated his back pay by being self-employed as a plumber under the circumstance. However, there is nothing in that case that stands for the proposition that one has no duty to seek employment to mitigate one's back pay. While the Commission need not decide what a "reasonable effort" to find suitable employment need be under the circumstances in this matter, clearly Ferro's effort, which was limited to applying for three sports writer jobs in one week in August 2021, was not a "reasonable effort." *See Able, supra*. While Ferro argues that due to his childcare responsibilities, his only experience being in law enforcement, his lack of a college degree or other training or certifications, and a lack of opportunities due to the pandemic justified his decision not to search for employment, the Commission, while it appreciates his childcare responsibilities, finds this argument unpersuasive as Ferro could have searched for employment and he could have sought work from employers that were hiring during the pandemic like Amazon, supermarkets, restaurants offering take-out and delivery, work at-home jobs, physical labor<sup>5</sup> and/or other employment. It is noted that there is no rule or other authority that authorizes one to stay at home to care for children during the mitigation period because one feels that it is more cost effective.<sup>6</sup> Further, under *O'Lone* and *Able, supra*, it was not mandatory that the BCSO provide other suitable employment opportunities for Ferro during the period in question as Ferro's Affidavit of Mitigation alone can be used by the BCSO to meet its burden. Therefore, the Commission finds that Ferro failed to make reasonable efforts to mitigate his back pay award in 2020 and between January 1, 2021, through October 26, 2021, and he is not entitled to back pay during this time. *See In the Matter of Ryan Marsh* (CSC, decided February 17, 2021). However, under *N.J.A.C. 4A:2-2.10(d)5*, Ferro had no duty to mitigate once the ALJ's recommendation to reverse the removal was deemed adopted. Therefore, the Commission finds that Ferro is entitled to back pay for whatever portion of his \$126,977.68<sup>7</sup> salary was earned from October 27, 2021, to November 30, 2021, less whatever portion of the \$600 he earned from FantasyPros and the \$36,325 in unemployment benefits that was received during this time. It is unclear if Ferro is asking for reimbursement for family medical expenses that were incurred because he no longer had his employer provided health insurance; however, to the extent that he is, that request is denied. *See In the Matter of Shannon Stoneham-Gaetano and Maria Ciuffo* (MSB, decided April 24, 2001). The BCSO's request to off-set the back pay award by Ferro's saving money on childcare or expenses is denied.

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<sup>5</sup> Ferro's "Affidavit of Mitigation" indicates that his household duties included landscaping and working with others to remove an old deck and replace it with a new one and to remedy sewage back up in his basement.

<sup>6</sup> Moreover, the Commission does not require an appellant to secure employment to establish mitigation, but only to **seek** employment. Clearly, Ferro did not satisfy that criteria during 2020 and 2021.

<sup>7</sup> The BCSO indicated that Ferro's salary from the beginning of 2021 until his reinstatement was \$126,977.68. Ferro has not objected to this.

Concerning counsel fees, Ferro presents a letter from the PBA's LPP Administrator which indicates that the fee in this matter is \$130 per hour, which is the applicable rate under *N.J.A.C. 4A:2-2.12(d)*. Further, Ferro's attorney submits a Supplemental Certification of Services indicating that he spent 260.7 hours in this matter. The BCSO has not objected to any specific time that was billed and a review indicates this is applicable time. Therefore, the Commission awards Ferro \$33,891 for attorney's fees (\$130 x 260.7). Additionally, under *N.J.A.C. 4A:2-2.12(g)*, the Commission awards Ferro \$1,800 (\$1,050 for the expert report and \$750 for the expert) in expenses. Ferro's request for the \$20 appeal fee is denied as the appeal fee, per *N.J.A.C. 4A:2-1.8(a)*, is a processing fee. See *In the Matter of Vincent Fiscella, Jr.* (CSC, decided March 27, 2018).

Referencing Ferro's request for interest under *N.J.A.C. 4A:2-2.11(a)*, that request is denied as there is no evidence in the record that BCSO has unreasonably delayed compliance with a Commission order. This agency informed the parties on November 9, 2021, that Ferro's removal was reversed, and he was reinstated by December 1, 2021. Further, there is nothing in the record that suggests that the BCSO did not have a good faith disagreement with Ferro on the back pay and counsel fees awarded. Moreover, as the record indicates that there was a tie among the Commission members, there is nothing in the record to suggest that any of the BCSO's actions in this matter were illegal, done with invidious motivation, or otherwise not performed in good faith.

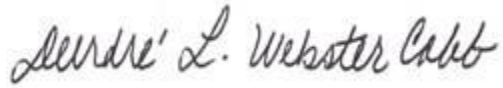
### ORDER

Therefore, it is ordered that Christopher Ferro be awarded back pay as provided for in this decision. Ferro shall provide documentation indicating when he started and stopped working for Uber in 2019 and the income earned and/or unemployment benefits received during the above times, within 30 days of receipt of this decision. Upon receipt, the BCSO shall submit payment, subject to the provisions of *N.J.A.C. 4A:2-2.10(d)2*, to Ferro within 30 days of the receipt of this documentation. Ferro's request for back pay for 2020 and from January 1, 2021, to October 26, 2021, and other additional reimbursements is denied.

Additionally, it is ordered that the Bergen County's Sheriff's Office shall pay counsel fees in the amount of \$33,891 and expenses of \$1,800 within 30 days of the 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 18<sup>TH</sup> DAY OF MAY, 2022



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Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

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