



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Wade Rosenberger

CSC Docket No. 2013-2723

Request for Back Pay

ISSUED

MAR 06 2015

(EG)

Wade Rosenberger, a County Correction Officer with Salem County, represented by F. Michael Daily, Jr., Esq., petitions the Civil Service Commission (Commission) for a determination with regard to the back pay awarded in *In the Matter of Wade Rosenberger* (CSC, decided January 9, 2013).

As background, the petitioner appealed his removal effective April 9, 2012¹, on charges, to the Civil Service Commission (Commission). He was charged with incompetency, inefficiency or failure to perform duties and other sufficient cause. Specifically, it was alleged that he left an inmate's cell door open and failed to note or report unusual incidents or imminent behavior of an inmate on suicide watch. An initial decision was rendered by the Administrative Law Judge (ALJ) on October 10, 2012.

The ALJ found that the petitioner acknowledged that he did not close the door to the inmate's cell and that he did not report her actions and as such, he violated the department's rules and policy. Additionally, while the ALJ agreed that the inmate's actions did not portray any behavior on the list of suicide behaviors, her actions were such that they should have been reported or logged. Thus, the ALJ upheld the charge of incompetency, inefficiency or failure to perform duties. In

¹ It is noted that the record indicates that the petitioner was immediately suspended without pay effective February 28, 2012.

determining the proper penalty, the ALJ concluded that the petitioner's actions were not sufficiently egregious to justify a removal. The ALJ therefore recommended a 30 working day suspension. Upon its *de novo* review of the record, the Commission accepted and adopted the Findings of Fact as contained in the ALJ's initial decision, but did not adopt the recommendation to modify the removal to a 30 working day suspension. Rather, the Commission modified the removal to a 90 working day suspension. The Commission found that the petitioner's inaction in not closing the cell door and not reporting the inmate's behavior was clearly inappropriate as the nature of such actions clearly warranted being reported. Further, the Commission found that while observing and conversing with the inmate for an extensive period of time while she engaged in sexually provocative behavior, the petitioner was neglecting his other duties and such actions could have compromised the security of the facility. Accordingly, the Commission determined that a 90 working day suspension was the appropriate penalty. The Commission also ordered that the petitioner be reinstated and granted back pay, benefits and seniority for the period following his 90 calendar day suspension through the date of his actual reinstatement.

Official personnel records reveal that the petitioner returned to work on November 15, 2012. As submitted by the appointing authority and not disputed by the petitioner, his yearly salary for 2012 would have been \$51,629.76. It is also undisputed that the petitioner earned \$661 with Apex Security Group and \$2,030 with Carmen J. LaRosa in 2012. However, the parties were unable to agree on the amount of back pay due and the petitioner requested Commission review pursuant to *N.J.A.C. 4A:2-2.10*.

The petitioner argues that he is entitled to back pay and asserts that he filled out an Affidavit of Mitigation as required. In the Affidavit of Mitigation, the petitioner states that the monies earned with Apex Security Group were for providing security at Philadelphia Eagles games. He asserts that he has been working in this position since 2007. Additionally, the petitioner explains that his position with Carmen J. LaRosa was as a part-time truck driver during the period of his suspension. Further, the petitioner states that he attempted to obtain more lucrative employment by posting his resume on two online websites and regularly checking the sites. In support of this contention, he submits a copy of his registration with one of those sites. Moreover, the petitioner contends that he is entitled to overtime pay as it was part of his regular schedule to work one 12-hour shift every other Sunday for which he was paid time and one-half. Therefore, he claims that he would be entitled to salary of \$16,176.60, plus \$1,134.72 for the Sunday overtime minus the \$661 and \$2,030 he earned from other employment for a total of \$14,620.32.

In reply, the appointing authority, represented by Andrea E. Wyatt, Esq., argues that the petitioner's mitigation efforts were insufficient. In this regard, it

provides a listing of several employment opportunities located near Salem County and advertised in the local newspaper between March 2012 and July 2012. This listing indicates 13 positions including one for Security Guard, two for Special Class II Police Officer and other non-related positions such as Laborer and Custodian.

CONCLUSION

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. Additionally, *N.J.A.C. 4A:2-2.10(d)1* states that 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 is not working. *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)4v*. Finally, *N.J.A.C. 4A:2-2.10(d)7* states that earnings from other employment held at the time of the adverse action shall not be deducted unless the employee increased his or her hours at that employment during the period of separation.

Under the above standard, the Commission finds that the petitioner made a reasonable effort to secure employment. The petitioner indicated in his Affidavit of Mitigation that he actually obtained a part-time job as a truck driver and that he signed up with online job search companies and utilized the services of an

employment agency. In the instant matter, the appointing authority has not persuasively challenged the sufficiency of the petitioner's mitigation efforts, and it has not submitted sufficient information to satisfy its burden of showing that there were jobs available for which the petitioner did not apply. In this regard, the listing of 13 possible positions provided by the appointing authority is inadequate to demonstrate that positions were available that the petitioner could have obtained, especially in light of the fact that he did secure a position. The Commission notes that pursuant to *N.J.A.C. 4A:2-2.10(d)4v*, the burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. The appointing authority has not met its burden in this matter.

With regard to the back pay amount, the petitioner argues that he is entitled to overtime pay as it was part of his regular schedule. The Commission does not agree. *N.J.A.C. 4A:2-2.10(d)1* clearly indicates that back pay shall not include overtime pay. Therefore, regardless of the petitioner's argument that the every other Sunday assignment was part of his regular schedule, he is not entitled to overtime pay as part of any back pay award. Further, while the petitioner subtracts the \$661 he earned with Apex Security Group from his requested back pay award, the Commission finds that pursuant to *N.J.A.C. 4A:2-2.10(d)7*, these monies do not need to be deducted as this position was held at the time of the adverse action and there is no indication that the petitioner increased his hours with Apex during the period of separation.

It is undisputed that the petitioner's compensation for all of 2012 would have been \$51,629.76. There were 261 work days in 2012. Therefore, the petitioner's daily pay equaled \$197.82 ($\$51,629.76 / 261 = \197.82). Official records indicate that the appellant was immediately suspended effective February 28, 2012, and returned to work on November 15, 2012. Thus, the Commission finds that the petitioner's 90 working day suspension should be recorded from February 28, 2012 through July 3, 2012. Accordingly, the petitioner is entitled to back pay from July 4, 2012 through November 14, 2012, which equals 95 work days. The daily rate of \$197.82 times 95 days equals \$18,792.90. The mitigated amount of \$2,030, which the petitioner earned from other employment is then subtracted pursuant to *N.J.A.C. 4A:2-2.10(d)3* for a total of \$16,960.72 ($\$18,792.90 - \$2,030 = \$16,762.90$). Based on the foregoing, the Commission finds that the petitioner is entitled to an award of back pay of \$16,762.90.

ORDER

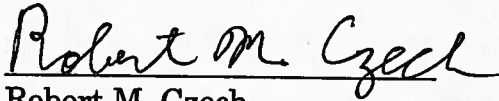
Therefore, it is ordered that the appointing authority pay Wade Rosenberger \$16,762.90 in gross back pay within 30 days of issuance of this decision.

In the event that the appointing authority has not made a good faith effort to

comply with this decision within 30 days of issuance of this decision, the Commission orders that a fine be assessed against the appointing authority in the amount of \$100 per day, beginning on the 31st day from the issuance of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

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 4TH DAY OF MARCH, 2015



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