

B-54



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Shannell Wimbush,  
Department of Human Services

CSC Docket No. 2014-923

Request for Back Pay and Counsel  
Fees

ISSUED: MAY 11 2015 (WR)

Shannell Wimbush, a Senior Maintenance Worker with the Trenton Psychiatric Hospital, Department of Human Services, represented by Rosa Barreca, Esq., requests resolution of a dispute concerning her mitigated back pay and counsel fees.

As background, the petitioner was indefinitely suspended without pay on July 24, 2012 as the result of a criminal complaint brought against her.<sup>1</sup> The charges against the petitioner were administratively dismissed on June 27, 2013. Subsequently, the appellant was reinstated on July 29, 2013. Upon returning to work, the petitioner submitted a notarized Affidavit of Mitigation Back Pay Award (henceforth affidavit) to her appointing authority, in which she indicated she did not seek employment because she "knew she was going back to work."<sup>2</sup> Accordingly, the appointing authority denied her request for back pay. Subsequently, the petitioner submitted additional documents, including a notarized Job Search List stating that she had looked for employment on January 4, 2013; April 17, 2013; May 5, 2013 and May 9, 2013. The appointing authority approved back pay for only those four days. Thereafter, the petitioner requested the Civil Service Commission's (Commission) review. See *N.J.A.C. 4A:2-2.10*.

<sup>1</sup> The petitioner was initially suspended with pay on July 18, 2012.

<sup>2</sup> It is noted that the petitioner received approximately \$4,995 in Temporary Disability Insurance (TDI) from July 19, 2012 through October 31, 2012, and was under the care of a physician and unable to work from October 31, 2012 until December 10, 2012. The petitioner also indicated that she received approximately \$1,160 in welfare benefits from April 2013 through July 2013.

In the instant matter, the petitioner requests an award of back pay. She asserts that she was "actively and regularly" seeking employment from December 2012 until July 2013. She states that after her doctor declared her able to work on December 10, 2012, she regularly searched over 20 internet sites for employment and submitted employment applications to at least nine businesses during this period. The petitioner claims that as an unskilled laborer, she did not keep an accurate record of her job search as many of the jobs she applied for did not require the submission of a resume.

Upon her reinstatement to work, the petitioner contends that she asked the appointing authority for assistance in filling out the affidavit but was "denied any help or explanation of the questions." She therefore states that she initially completed the affidavit incorrectly because she did not understand how to complete it. For example, she states that she believed the questions on the affidavit concerned her present status, not the entire duration of her suspension. Thus, the petitioner explains that she wrote that she had not sought employment because, at the time she filled out the affidavit in July 2013, she was not currently seeking employment as the criminal complaint had been dismissed on July 9, 2013 and she knew she was to be reinstated. Thus, it was reasonable for her to stop searching for employment at that time. After the appointing authority's initial denial, the petitioner states that she realized her mistake and "attempted to clarify the discrepancy" by submitting a list of websites she used to search for employment.

The petitioner further argues that she is entitled to a percentage of back pay for the period she was disabled as she was not required to seek employment during that time. Therefore, she requests the difference between her salary and the amount of TDI she received. Additionally, the petitioner claims that she did not receive TDI from mid-November until December 10, 2012, and requests back pay for this period.

Finally, the petitioner requests counsel fees, as she claims that the appointing authority's denial of her request for back pay left her with no choice but to retain counsel. Therefore, she requests counsel fees in the amount of \$2,360 (\$200 per hour for 9.8 hours) for services rendered from September 20, 2013 to October 3, 2013.

In response, the appointing authority asserts that the petitioner is not entitled to any back pay. Contrary to the petitioner's claims, the appointing authority contends that it did assist the petitioner with her affidavit, stating that it allowed her to submit additional information after she initially submitted the affidavit. In this regard, the appointing authority argues that after its initial denial of the petitioner's request for back pay, the petitioner submitted a supplemental affidavit with an intake form from the Mercer County One Stop Career Center, which included a page entitled Useful Websites. However, the appointing authority

contends that the petitioner never attested as to having visited those websites. Therefore, the appointing authority states that it informed the petitioner that her supplemental information was insufficient to award her any back pay. Thereafter, the appointing authority states that the petitioner submitted a notarized job search which contained four dates on which she sought employment. Therefore, it awarded her mitigated back pay for those four dates. However, the appointing authority argues that the petitioner only attempted to submit additional information when she realized that by doing so she would receive a greater amount of back pay. Therefore, the Commission should only consider her initial submission in which she stated she did not look for work. Finally, the appointing authority opposes awarding the petitioner counsel fees because she was properly suspended and was afforded several opportunities to supplement her affidavit.

### 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. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain health insurance coverage during the period of improper suspension or removal. 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 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. "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)4, et seq.* *N.J.A.C. 4A:2-2.10(d)9* provides that a back pay award is subject to reduction for any period of time during which the employee was disabled from working.

Initially, the Commission observes that the appointing authority has not met its burden of proof that the petitioner did not make reasonable efforts to find suitable employment. The petitioner claims that from December 10, 2012 through July 9, 2013, the date the criminal complaint was dismissed, she actively sought employment and states that her job search included submitting applications to various businesses and searching for jobs over the internet. The appointing authority contends that the petitioner failed to find suitable employment because she indicated in her initial affidavit that she did not seek employment during her suspension. The appointing authority further argues that the petitioner only sought to supplement her affidavit when it became clear to her that doing so would get her a greater back pay award. However, the Commission does not agree with the appointing authority that it is limited to only reviewing the petitioner's initial affidavit. In this regard, it is clear that the appointing authority accepted the petitioner's later submission since it provided her with four days of back pay. Accordingly, a review of the documents submitted by the petitioner indicates that she made reasonable efforts to search for employment. Accordingly, under these circumstances, the Commission finds that the petitioner is entitled to mitigated back pay. However, the record indicates that the petitioner was unable to work from the beginning of her indefinite suspension until December 10, 2012, the date her doctor declared her able to work. Therefore, pursuant to *N.J.A.C. 4A:2-2.10(d)9*, the petitioner is not entitled to any back pay for this period.

Finally, regarding the petitioner's request for counsel fees, *N.J.A.C. 4A:2-1.5(b)* provides, in pertinent part, that counsel fees may be awarded where the appointing authority has unreasonably failed or delayed to carry out an order of the Commission or where the Commission finds sufficient cause based on the particular case. In the instant matter, the appointing authority has not unreasonably delayed implementing a Commission order. The record also fails to indicate that the appointing authority's actions were based on any improper motivation. Thus, the record does not reflect a sufficient basis for an award of counsel fees for time spent on the back pay issue.<sup>3</sup> See *In the Matter of Lawrence Davis* (MSB, decided December 17, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001).

### ORDER

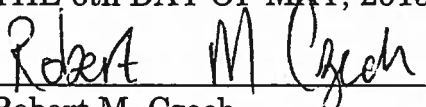
Therefore, it is ordered that this request be granted in part.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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<sup>3</sup> The Commission also notes that counsel fees are not available for representation at the departmental level for appeals of major disciplinary actions that do not involve an appeal of that disciplinary action to the Commission. See *N.J.A.C. 4A:2-2.12(f)*.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 6th DAY OF MAY, 2015

  
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Robert M. Czech

Chairperson

Civil Service Commission

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