



STATE OF NEW JERSEY

In the Matter of Vincent Fiscella, Jr.
Township of Belleville, Department of
Public Works

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2019-2748

Court Remand

ISSUED: APRIL 22, 2019 (SLK)

The Appellate Division, Superior Court of New Jersey, reversed and remanded the attached determination of the Civil Service Commission (Commission), *In the Matter of Vincent Fiscella, Township of Belleville, Department of Public Works* (CSC, decided October 19, 2016), which denied the appellant's request for reconsideration and his request for additional counsel fees. Additionally, the Appellate Division affirmed and remanded the attached determination of the Commission, *In the Matter of Vincent Fiscella, Township of Belleville, Department of Public Works* (CSC, decided March 27, 2018), where the Commission determined the hourly rates and the number of hours that were billable for the counsel fee award.

By way of background, Vincent Fiscella, Jr., a former Laborer 1 with Belleville, was removed on charges of insubordination and other sufficient cause. Specifically, Belleville asserted that Fiscella was working in another position at the voting polls while out on sick leave and he failed to attend a scheduled Workers' Compensation appointment. In its final decision, the Commission sustained one of the disciplinary charges but modified the removal to an official written reprimand and awarded back pay and counsel fees in the amount of 50 percent of services. The Commission also denied Fiscella's request for reconsideration regarding the sustained charge. Subsequently, Belleville appealed the Commission's decision to the Superior Court of New Jersey, Appellate Division, complaining that the 50 percent reduction in the counsel fee award was not sufficient due to the "unreasonably high" attorney bills received from Fiscella's attorney. Fiscella also appealed the Commission's determination to the Appellate Division regarding the

penalty and the 50 percent award of counsel fees. At the Commission's request, the Appellate Division ordered that both appeals be remanded to the Commission. On remand, the Commission found that Fiscella was to be awarded counsel fees for his law firm's partner's time at the rate of \$200 and not \$400 per hour as this case lacked the legal complexity and unique legal experience to justify the hourly rate requested. Additionally, it awarded counsel fees for his law firm's associates' time at the rate of \$150 per hour. Moreover, the Commission rejected Belleville's argument that the number of hours that the law firm spent on this matter was unnecessary and duplicated. Accordingly, the Commission awarded Fiscella counsel fees based on all of his attorneys' certified time at the aforementioned rates, which was then reduced by 50 percent.

Thereafter, Fiscella appealed the Commission's decision denying him reconsideration to the Appellate Division. He challenged the finding that he was insubordinate for failing to attend a medical appointment and argued that the amount of the counsel fee award was inadequate. The Appellate Division held that the Commission "did not evaluate Fiscella's conduct in the context of the elements of insubordination." It noted that no superior ordered Fiscella to attend the medical appointment. Therefore, in *In the Matter of Vincent Fiscella, Jr., Township of Belleville, Department of Public Works*, Docket Nos. A-1403-16T2 and A-3953-17T2 (App. Div., March 29, 2019), the Appellate Division reversed the Commission's decision regarding the charges. As none of the disciplinary charges were sustained, the court remanded the matter to the Commission for further consideration of counsel fees. However, the court rejected Belleville's argument that Fiscella's counsel fees were "so unreasonable that a further reduction is warranted."

CONCLUSION

The Civil Service Commission finds that the charges against the appellant were not justified and therefore, reverses that action and upholds the appeal of Vincent Fiscella, Jr. *N.J.S.A.* 11A:2-22 provides that reasonable counsel fees may be awarded to an employee as provided by rule. *N.J.A.C.* 4A:2-2.12(a) indicates 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 in an appeal of major disciplinary action before the Commission. As Fiscella completely prevailed on all matters, the Commission determines that he is entitled to the amount of 100 percent of services rendered. The Appellate Division affirmed the Commission's prior determination that Fiscella is entitled to counsel fees of 362.2 hours billed at an hourly rate of \$200 and 294.05 hours billed at an hourly rate of \$150. Therefore, Fiscella is entitled to \$116,547.50 in counsel

fees. Additionally, Belleville shall reimburse Fiscella \$1,806.90 for his costs as previously determined.¹

ORDER

Therefore, it is order that Belleville pay Vincent Fiscella, Jr. **\$116,547.50** in counsel fees and **\$1,806.90** for costs within 30 days of receipt 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 17th DAY OF APRIL, 2019



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Attachments

c: Vincent Fiscella, Jr.
Brian J. Aloia, Esq.
Mauro Tucci
Jeffrey R. Merlino, Esq.
Debra A. Allen, DAG
Joseph H. Orlando, Appellate Division Clerk
Record Center

¹ The Appellate Division decision does not indicate that either party contested the Commission's prior determination of costs. Further, the decision does not indicate that Belleville paid the costs that the Commission already ordered it to pay.

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-1403-16T2
A-3953-17T2

IN THE MATTER OF VINCENT
FISCELLA, JR., TOWNSHIP OF
BELLEVILLE, DEPARTMENT
OF PUBLIC WORKS.

Argued March 6, 2019 – Decided March 29, 2019

Before Judges Nugent and Reisner.

On appeal from the New Jersey Civil Service Commission, Docket Nos. 2016-2674 and 2018-1674.

Victoria A. Lucido and Brian J. Aloia argued the cause for appellant Vincent Fiscella, Jr., in A-1403-16 and respondent Vincent Fiscella, Jr., in A-3953-17 (Aloia Law Firm LLC, attorneys; Brian J. Aloia, of counsel and on the brief; Victoria A. Lucido, on the briefs).

Jeffrey R. Merlino argued the cause for respondent Township of Belleville in A-1403-16 and appellant Township of Bellville in A-3953-17 (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys; Jeffrey R. Merlino, of counsel and on the brief; Nicholas F. Savio, on the briefs).

Debra A. Allen, Deputy Attorney General, argued the cause for respondent Civil Service Commission (Gurbir

S. Grewal, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Debra A. Allen, on the brief).

PER CURIAM

This appeal involves the discipline of petitioner, Vincent Fiscella, Jr., a former laborer in the Township of Belleville Department of Public Works. Respondent, Township of Belleville (the Township), charged Fiscella with two offenses, suspended him without pay, and subsequently terminated his employment. Following a hearing in the Office of Administrative Law (OAL), an Administrative Law Judge (ALJ) found the Township had not proven the two disciplinary charges. The Civil Service Commission (the Commission) upheld the ALJ's decision as to one charge, determined Fiscella had committed the other, but modified the sanction and imposed a formal written reprimand. The Commission denied Fiscella's request for reconsideration but ultimately awarded him fifty percent of his counsel fees for having prevailed on one of the disciplinary charges.

Fiscella appeals the Commission's final administrative action denying reconsideration of its decision to uphold one of the disciplinary charges. He challenges as arbitrary and capricious the Commission's finding that he was insubordinate for failing to attend a medical appointment scheduled by a case

manager for the Township's workers' compensation carrier. He also challenges the fee award as inadequate. The Township appeals the amount of the fee award, arguing it is excessive. For the reasons that follow, we reverse the Commission's decision upholding the disciplinary charge, affirm its award of fees, and remand for consideration of additional counsel fees in light of the dismissal of the second disciplinary charge.

I.

The parties developed at the OAL hearing the following proofs relevant to the disciplinary charges at issue on this appeal. Fiscella injured his mid and low back while lifting a heavy object during the course of his employment on Monday, May 5, 2014. A co-employee drove Fiscella to Clara Maass Hospital Medi-Center where he was evaluated, told not to return to work, and given a follow-up appointment for the following Thursday, May 8. The parties do not dispute the Township's workers' compensation carrier assumed management of Fiscella's medical treatment.

Fiscella returned to the Medi-Center a day early, Wednesday, May 7, due to the intensity of his pain. The doctors kept Fiscella out of work and rescheduled a follow-up appointment for Monday, May 12.

During Fiscella's appointment on May 12, the doctor said he could return to work with restrictions. He could not lift, push, or pull objects weighing more than fifteen pounds. He could not sit, stand or walk more than fifteen minutes at a time. The doctor also prescribed six pills.

Fiscella had concerns about returning to work on restricted duty and about taking the medication. He had been injured in an accident at work the previous year and informed there was no light duty for laborers. He had also undergone gastric bypass surgery. Since his surgery, certain combinations of medication caused him severe stomach distress. He wanted to confer with his own doctor before taking the pills the workers' compensation doctor had prescribed.

To satisfy his concerns, Fiscella made some telephone calls. He spoke with his supervisor at work and explained that he was still in pain and wanted to see his own doctor. He also asked if he had sick time. The supervisor said the Township could accommodate Fiscella's work restrictions, but he also said Fiscella could use his sick time. Fiscella requested sick time for Tuesday, May 13, through Friday, May 16, and the Township approved his request. When Fiscella asked to see his own physician, the supervisor did not indicate there would be anything inappropriate about his doing so.

Fiscella also spoke to a clinic case manager for the workers' compensation carrier. He informed her he had asked his supervisor for sick time for the remainder of the week. He also told her he was treating with his own doctor. She did not say he was not allowed to do so, but did say that if he saw his own doctor the workers' compensation case would be closed. She also told him that if he went through his own doctor, he would have to pay.¹

The next day, Wednesday, May 14, Fiscella saw his personal physician. His doctor said not to take the medication prescribed at the Medi-Center because it would be too strong. The doctor prescribed a lighter dose that would be easier on Fiscella's stomach. He also scheduled Fiscella for Magnetic Resonance Imaging the next day. Fiscella paid for these medical services.

After the appointment with his doctor on Wednesday, Fiscella drove to the Township Office Manager's office and dropped off a slip from his doctor excusing him from work for the remainder of the week. Fiscella also picked up his authorized leave report from the Township. No one from the Township

¹ Several weeks later, a representative from the workers' compensation carrier confirmed in writing a June 3, 2014 conversation in which Fiscella said he did not wish to seek treatment through workers' compensation. The representative wrote, "Your file will be closed at this time."

suggested to him there was anything improper about taking sick leave for the remainder of the week or seeing his own physician.

Fiscella remained out of work, as authorized, through Friday, May 16. When he returned on Monday, May 19, he was served with a PNDA (the May PNDA). The May PNDA charged Fiscella with, among other things, working while he was out on sick leave. As previously noted, the charges later proved to be unfounded. However, based on those charges, the Township suspended Fiscella without pay effective May 13, 2014 – the first day of his Township-approved sick leave – and informed Fiscella the Township was seeking his removal from office.

Following his suspension, Fiscella did not attend his medical appointment with the workers' compensation doctor later that day, an appointment that had been scheduled on May 12. Nobody asked Fiscella at the OAL hearing why he did not attend the exam.² Fiscella's attorney did ask what Fiscella expected would happen at the appointment. Fiscella "guessed" they would have changed the restrictions because he was feeling better. His attorney then asked if Fiscella

² The ALJ's findings included this: "On May 19, 2014, appellant had a follow-up appointment at 10:00 a.m. at the Workers' Compensation Clinic. Appellant's testimony that he did not go to the appointment after receiving the PNDA because he was upset is believable." Fiscella gave no such testimony.

found work with another employer after being suspended. Fiscella said he did, at the end of June or early July.

On June 3, the workers' compensation carrier closed the workers' compensation file. Two days later, on June 5, the Acting Township Manager – who had made the decision to file the May PNDA – decided to file a second PNDA (the June PNDA). He was unaware on May 19, the date of Fiscella's exam with the workers' compensation doctor, whether Fiscella kept the appointment. It is not entirely clear when he learned Fiscella did not keep it. Nonetheless, he decided to file the June PNDA. He charged Fiscella with insubordination, N.J.A.C. 4A:2-2.3(a)(2), and other sufficient cause, N.J.A.C. 2-2.3(a)(12). The charges specified:

You failed to attend the scheduled Workers' Compensation appointment scheduled on 5/19/14 with Barnabas Health Corp., nor have you scheduled a follow up appointment with regards to your injury of 5/5/14.

As an employee, you have an obligation to play an active role in your recovery and efforts to return to work.

After the close of the evidence at the OAL hearing, the ALJ found the Township had not sustained the charges in either PNDA. The Township filed exceptions. In a January 19, 2016 decision, the Commission adopted the ALJ's

Findings of Fact, upheld the charges in the June PNDA, and modified the disciplinary action to a written reprimand. After recounting the ALJ's findings and the parties' arguments, the Commission stated its decision concerning the charges in both PNDAs. As to the June PNDA charges, the Commission explained:

[E]ven though the ALJ credited the appellant for his explanation that he did not attend his Workers' Compensation appointment since he was upset at receiving a PNDA, that excuse does not negate the fact that he was required to attend the appointment. Accordingly, the Commission finds that the appellant's failure to attend his required Workers' Compensation appointment was improper and upholds the charges of insubordination and other sufficient cause for this offense.

Noting Fiscella was guilty of no other infractions and had no prior disciplinary history, the Commission found that an official written reprimand was the appropriate penalty for Fiscella's failure to attend the medical examination. The Commission also found that because the penalty had been reduced, Fiscella was entitled to "mitigated back pay, benefits and seniority." Last, because Fiscella had prevailed on the most serious charge, "leaving only incidental charges which give rise to a significantly reduced penalty," the Commission awarded Fiscella fifty percent of his counsel fees. The Commission

directed the parties to make a good faith attempt to resolve outstanding issues, including the monetary amount of the counsel fees.

Fiscella wrote to the Commission and requested it reconsider its decision. Fiscella pointed out his non-appearance for the medical appointment was not a violation of any order, statute, rule or Township policy. Fiscella also requested additional counsel fees. In a written decision, the Commission denied Fiscella's request for reconsideration.

The Commission cited a section of the Township's Employee Manual (the Manual), which states, "[a]ll required medical treatment must be performed by a workers' compensation physician appointed by the Township and unauthorized medical treatment may not be covered under the [Workers' Compensation] Act." The Commission added that Fiscella "knew that he was obligated to attend the appointments with the Workers' Compensation Doctor as he in fact scheduled the appointment. Further, there is not any evidence that the appointing authority specifically advised him that it was acceptable for him to skip his appointment if he was seeing his own doctor." Last, the Commission noted the June PNDA was served June 5, 2014, so "even if [Fiscella's] argument is accepted that he was 'in shock' on May 19, 2014 and may have attended the appointment if he had union representation, there has been no evidence presented that he tried to

reschedule his appointment or seek union representation prior to being served the second PNDA."

Fiscella and the Township appealed. The Commission moved before the Appellate Division for a remand to resolve the outstanding issue of Fiscella's attorney's fees. Fiscella had not submitted his attorney's bills to the Commission, so the issue concerning the amount to be awarded to him for attorney's fees remained outstanding. We granted the motion. In a decision issued April 2, 2018, the Commission awarded Fiscella \$58,273.75 in counsel fees and \$1,806.90 for costs. The written decision evidenced the Commission's detailed review of the fee application, including the basis for hourly rates charged and the time spent litigating the matter.

II.

We first address Fiscella's argument challenging those parts of the Commission's decisions denying his request for reconsideration and sustaining the charges set forth in the June PNDA. Our review of the Commission's decision is limited. Karins v. City of Atl. City, 152 N.J. 532, 540 (1998) (citation omitted). A "strong presumption of reasonableness attaches" to the Commission's final administrative decisions. In re Carroll, 339 N.J. Super. 429, 437 (App. Div.), certif. denied, 170 N.J. 85 (2001). That is so because agencies

generally have "expertise and superior knowledge of a particular field." Outland v. Bd. of Trs. of the Teachers' Pension & Annuity Fund, 326 N.J. Super. 395, 400 (App. Div. 1999).

For these reasons, we will "not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Williams, 443 N.J. Super. 532, 541 (App. Div. 2016) (quoting In re Application of Virtua–West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008)). If "our review of the record satisfies us that the agency's finding is clearly mistaken or erroneous, the decision is not entitled to judicial deference and must be set aside." Ibid. (citing L.M. v. State of N.J., Div. of Med. Assistance & Health Servs., 140 N.J. 480, 490 (1995)). We so conclude here.

The June PNDA contained two charges: insubordination and other sufficient cause. Insubordination "is ordinarily defined as a failure to obey a lawful order." Id. at 548 n. 4 (citing Rivell v. Civil Serv. Comm'n., 115 N.J. Super. 64, 71 (App. Div. 1971)); see also Laba v. Newark Bd. of Educ., 23 N.J. 364, 386 (noting "'a willful refusal of submission' to the authority of . . .

superiors" sustained a charge of insubordination) (quoting Harrison v. State Bd. of Educ., 134 N.J.L. 502, 505 (Sup. Ct. 1946)).

Notably, in the case before us, the Commission did not evaluate Fiscella's conduct in the context of the elements of insubordination. Fiscella did not willfully disobey the order of a superior. No superior ordered him to attend the workers' compensation medical appointment. In fact, it is not apparent from the record the Acting Township Manager even knew the appointment was scheduled.

By accommodating Fiscella's request for sick leave after Fiscella requested to see his own doctor, Fiscella's supervisor implicitly approved Fiscella's treatment with his own physician. Moreover, the workers' compensation carrier's representative explicitly confirmed to Fiscella that he could see his own doctor, telling him only that he would have to pay for the treatment and his workers' compensation case would be closed. There is more. When Fiscella reported to work on the day the workers' compensation medical appointment was scheduled to take place, Fiscella was served with the May PNDA, suspended on the spot, and informed through the May PNDA the Township was seeking termination of his employment. Fiscella was ordered to leave work.

In view of the implicit and explicit authorization the Township and workers' compensation representative gave Fiscella to treat with his own doctor, and considering the issue in the context of his precipitous suspension and proposed removal from office, the Township simply did not sustain its burden of proving Fiscella had been insubordinate within the legal meaning of that term. Nor, given the circumstances, did Fiscella's conduct constitute other sufficient cause for his discipline.

In its initial decision, the Commission neither cited any definition of insubordination nor explained the basis for its conclusion that Fiscella was "required to attend the appointment." In its decision denying Fiscella's request for reconsideration, the Commission cited a section of the Township's Employee Manual that stated: "[a]ll required medical treatment must be performed by a workers' compensation physician appointed by the Township and unauthorized medical treatment may not be covered under the Act." That section did not constitute an order by a superior requiring Fiscella to attend a workers' compensation medical appointment. Rather, it explained the consequences of unauthorized medical treatment.

The cited section of the Manual did not preclude an employee from seeking and paying for unauthorized medical treatment, which is precisely what

Fiscella did in this case. He did so with the knowledge and implicit approval of the Township, and with the knowledge of the workers' compensation carrier.

The Commission stated there was no evidence "the appointing authority specifically advised [Fiscella] that it was acceptable for him to skip his appointment if he was seeing his own doctor." That statement does not address the issue of how Fiscella was guilty of willfully disobeying the order of a superior, particularly in view of the apparent authority he was given to treat with his own physician.

Last, the Commission noted "there has been no evidence presented that [Fiscella] tried to reschedule his appointment . . . prior to being served the [June] PNDA." However, in view of the apparent authority extended to Fiscella to treat with his own doctor, he would have had no reason to reschedule the appointment.

During oral argument on the appeal, counsel for the Commission cited a document entitled "Township of Belleville Worker Compensation Program." The document, apparently a part of the Employee Handbook, requires employees to notify the workers' compensation "Leave Representative" of any cancellations. The document also states that if an employee fails to make the

required notification, "disciplinary action shall be taken in accordance with the Township Administrative Code and/or Contract Agreements."

It is not apparent from the record that the Township argued to the Commission that Fiscella violated this document's requirement. The Commission did not cite this provision in its decisions. Regardless, when considered in the unusual context of this case — the Township's and workers' compensation carrier's leading Fiscella to believe he could treat with his own doctor — Fiscella's non-compliance was tantamount to neither insubordination nor other sufficient cause for disciplinary action.

For all the foregoing reasons, we conclude the Commission's decision was unsupported by substantial credible evidence in the record and was contrary to the law concerning insubordination. We further conclude, for the reasons we have expressed, the Commission's decision that Fiscella's failure to keep the appointment constituted other sufficient cause for discipline was unsupported by substantial credible evidence in the record.

In his second argument, Fiscella requests counsel fees for one hundred percent of his attorney's services. In view of our decision that none of the disciplinary charges should have been sustained, we remand this matter for further consideration of counsel fees in light of our decision.

III.

The Township challenges the Commission's fee award. The Township argues that Fiscella's counsel's fees were "so unreasonable that a further reduction is warranted." We disagree. The Commission engaged in a thorough analysis of the hourly rates charged in view of counsel's experience and rates authorized by administrative guidelines. The Commission also engaged in a thorough evaluation of the reasonableness of the hours expended, many of which were necessitated by the Township's position in pursuit of what turned out to be unfounded disciplinary charges. We reject the Township's arguments to the contrary. They are without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

IV.

In summary, we conclude the Commission's determination that Fiscella was guilty of insubordination or other sufficient cause for discipline was unsupported by either competent evidence in the record or applicable legal principles. We reject the Township's challenge to the fee award, but remand for further consideration in view of our determination that none of the charges should have been sustained.

Affirmed in part, reversed in part, and remanded for further consideration.

We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office



CLERK OF THE APPELLATE DIVISION



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Vincent Fiscella, Jr.,
Township of Belleville, Department of
Public Works

Court Remand

CSC Docket No. 2018-1674

ISSUED: APRIL 2, 2018 (SLK)

The Superior Court of New Jersey, Appellate Division (Appellate Division), as indicated in the attached orders dated November 30, 2017 and December 29, 2017, has remanded the matters of Vincent Fiscella, Jr.'s (Fiscella) penalty and award of counsel fees from the Township of Belleville (Belleville) to the Civil Service Commission (Commission).

By way of background, Fiscella was removed on charges of insubordination and other sufficient cause. Specifically, Belleville asserted that Fiscella was working in another position at the voting polls while out on sick leave and that he failed to attend a scheduled Workers' Compensation appointment. Fiscella appealed his removal to the Commission, which transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case. In its final decision, the Commission modified the removal to an official written reprimand and awarded back pay and counsel fees in the amount of 50 percent of services. *See In the Matter of Vincent Fiscella, Jr.* (CSC, decided December 16, 2015). Thereafter, Fiscella requested reconsideration seeking additional counsel fees. The Commission denied his request for additional counsel fees as the award was only for fees incurred related to the proceedings at the OAL and the proceedings at the departmental level. *See In the Matter of Vincent Fiscella, Jr.* (CSC, decided October 19, 2016).¹ Subsequently, Belleville appealed the Commission's October 19, 2016 decision to the Appellate Division complaining that the 50 percent reduction in the counsel fee

¹ It is noted that the Commission did not calculate the actual amount of counsel fees due as no information regarding the original amounts requested was provided by Fiscella.

award was not sufficient due to the “unreasonably high” attorney bills received from Fiscella’s attorney. On November 30, 2017, at the Commission’s request, the Appellate Division ordered that Belleville’s appeal be remanded to the Commission. The Appellate Division indicated that it did not retain jurisdiction in Belleville’s matter. Additionally, Fiscella appealed the Commission’s October 19, 2016 determination to the Appellate Division regarding the penalty and the 50 percent award of counsel fees. On December 29, 2017, at the Commission’s request, the Appellate Division ordered that Fiscella’s appeal be remanded to the Commission. The Appellate Division retained jurisdiction over Fiscella’s matter.

In the instant matter, Fiscella, represented by Brian J. Aloia, Esq., requests that he be awarded \$96,682.55 from Belleville, which he states is 50 percent of the attorney’s fees and 100 percent of costs. Fiscella is requesting that the award be based on a partner hourly rate of \$400 for Aloia and an associate rate of \$150 per hour. Fiscella indicates that the amount of time that his attorneys spent in this case was reasonable based on Belleville’s thorough prosecution. Fiscella submits a certification from Aloia, which indicates that he is the sole equity partner for his firm and has been a partner in law firms concentrating on Labor and Employment Law since 1999. Aloia certifies that he spent 363.2 hours on this matter and asserts that his hourly rate of \$400 is a reasonable rate based on fees customarily charged in this area of law. In support of Aloia’s hourly rate, three attorneys from other firms who also practice Labor and Employment Law attest that Aloia’s hourly rate of \$400 is reasonable. Aloia also certifies that his law firm incurred \$2,063 in expenses in this matter. Additionally, Victoria A. Lucido, Esq., an associate with the Aloia Law firm, certifies that she was admitted to practice law in June 2013, served as a law clerk in the Superior Court from August 2013 to August 2014, worked on Labor and Employment Law matters in private practice from August 2014 and became an associate with the Aloia Law Firm in September 2015 where she focuses heavily on Labor and Employment Law. Lucido certifies that she spent 45.4 hours working on this matter. Further, James E. Polles, Esq., a former associate with the Aloia Law Firm, certifies that he was admitted to the practice of law in 2011 and had approximately four years of Labor and Employment Law experience at the time he worked on this matter. Polles certifies that he spent 247.65 hour on this matter.

In response, Belleville, represented by Jeffrey R. Merlino, Esq., asserts that the Aloia Law Firm’s claim that it spent 656.25 hours in this matter is “outrageous” with the majority of the claimed hours to be for “legal research.” It presents that a review of the billing indicates that the Aloia Law Firm spent seven hours or greater on this matter on January 6, 2015 (7 hours), January 7, 2015 (7.5 hours), January 8, 2015 (8 hours), January 9, 2015 (8 hours), July 13, 2015 (9 hours), July 14, 2015 (7 hours), July 15, 2015 (9.5 hours), July 17, 2015 (8 hours), July 20, 2015 (8 hours), July 21, 2015 (8.5 hours), November 13, 2015 (10 hours) and January 26, 2016 (8 hours). Belleville argues that the amount of time that the Aloia Law Firm spent for

two half days of testimony at an administrative law hearing cannot be considered reasonable. It asserts that the issue of termination was relatively straightforward with no novel issues of law being argued. Belleville states that the invoices for routine research are not justified and that many of the purported research was duplicative.

Neither party submitted any arguments regarding the penalty imposed by the Commission in its prior decision nor regarding the award of only 50 percent of counsel fees.

CONCLUSION

N.J.S.A. 11A:2-22 provides that reasonable counsel fees may be awarded to an employee as provided by rule. *N.J.A.C.* 4A:2-2.12(a) indicates 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 in an appeal of major disciplinary action before the Commission. As Fiscella did not completely prevail on all matters, the Commission determined that he was entitled to the amount of 50 percent of services rendered.

N.J.A.C. 4A:2-2.12(c) provides fee ranges for different categories of attorneys, based on the attorney's experience. Specifically, it provides as follows: an associate in a law firm is to be awarded an hourly rate between \$100 and \$150; a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between \$150 and \$175; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with a practice concentrated in employment or labor law, is to be awarded an hourly rate between \$175 and \$200. *N.J.A.C.* 4A:2-2.12(d) states 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) indicates that the recommended fee ranges may be adjusted, based on the circumstances of a particular matter, taking into account the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to performing the legal service properly, the fee customarily charged in the locality for similar legal services, the nature and length of the professional relationship with the employee, and the experience, reputation and ability of the attorney performing the services.

Further, *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. These costs include photocopying expenses and expenses associated with the transmittal of documents through use of Federal Express or a messenger service. *See, e.g., In the Matter of Monica Malone*, 381 N.J. Super. 344 (App. Div. 2005).

Initially, it is noted that although Fiscella's appeal to the Appellate Division involved the penalty and the percentage of the attorney fee's award, neither party has addressed these issues in the current proceeding. Further, as these issues have already been argued and decided in the Commission's prior decisions, the Commission need not address these issues further in this matter.

With respect to Fiscella's 50 percent counsel fee award as ordered in the Commission's prior decisions and costs, Fiscella requests \$94,618.75 in counsel fees and \$2,063.80 for costs. The counsel fee request is based on 293.05 hours at an associate rate of \$150 per hour, which equals \$43,957.50 and 363.2 hours at a partner rate of \$400 per hour, which equals \$145,280. Further, 50 percent of these amounts is \$94,618.75. The request for costs is based on \$39 for parking, \$1,767.90 for transcripts, \$20 for the Civil Service Commission appeals fee, \$16.02 for supplies, \$27.74 for Federal Express Delivery, \$169 for Hand Delivery DC Express, and \$24.14 for postage. In response, Belleville asserts that the Aloia Law Firm's claim that it spent 656.25 hours in this matter is "outrageous." It contends that this matter was relatively straightforward with no novel issues being argued, the billing for routine research was not justified and much of the legal research was duplicative. Belleville highlights days where the Aloia Law Firm billed seven or more hours.

In reference to Aloia's time, a review of his certification indicates that he is partner in law firm with 15 or more years in experience with a practice concentrated in Labor and Employment Law. However, the Commission finds that Fiscella has provided insufficient information to justify awarding him counsel fees for Aloia's time at the requested hourly rate of \$400. While Fiscella attempts to justify the requested rate by providing certifications from other attorneys who practice Labor and Employment Law, he provides no details regarding the subject matter of the cases for which these attorneys were reimbursed at the requested rate. Moreover, this type of appeal inherently lacks the legal complexity necessary to justify the hourly rate requested. In addition, unique legal experience was not required by counsel in order to establish that most of the charges against Fiscella were not warranted. *Compare, Malone, supra.* (Attorney who had a Master's degree and Ph.D. degree in Clinical Psychology and experience in psychology made him uniquely qualified to address psychological diagnostic issues that were raised during the hearing). Therefore, based on the information provided by Aloia regarding his experience in Labor and Employment Law and years of experience in the practice of law, and consistent with numerous similar awards by the

Commission, he should be reimbursed at the rate of \$200 per hour. See *N.J.A.C. 4A:2-2.12(c)* and (e). With regard to the associates' hourly rate, a review of Polles' certification indicates that he was admitted to practice law in December 2011 and had approximately four years of Labor and Employment Law experience while working on this matter. A review of Lucido's certification indicates that she was admitted to practice law in June 2013, served as a law clerk in the Superior Court from August 2013 to August 2014 and worked on Labor and Employment Law matters in private practice since August 2014. The Commission notes that Belleville has not submitted any argument contending that their time should be billed at a lower rate. Therefore, based on the information provided by Polles and Lucido regarding their experience in Labor and Employment Law and years of experience in the practice of law, they should be reimbursed at the rate of \$150 per hour.

In reference to the itemized listing of services, Belleville contends that the number of hours that the Aloia Law Firm spent on this case was unreasonable and the number of hours that it spent performing legal research was unnecessary and many times duplicated. However, the fact that more than one attorney spent time performing legal research on or around the same date or the fact that the firm spent seven hours or more in a day on this matter by one or more attorney is not evidence that such research was unnecessary or duplicated. Further, the Aloia Law Firm also includes sufficient amount of detail in its invoice. In that regard, the invoice reflects the date that services were rendered, a description of such services, hours worked, and the lawyer who worked on the entry. Moreover, Fiscella's attorneys each certified that they did in fact perform the services as itemized. Accordingly, Fiscella is entitled to counsel fees of 362.2 hours billed at an hourly rate of \$200 and 294.05 hours billed at an hourly rate of \$150. Further, this amount shall be reduced by 50 percent as ordered in the Commission's prior decisions. Therefore, Fiscella is entitled to \$58,273.75 in counsel fees.

As to the costs, the expenses of \$1,767.90 for transcripts and \$39 for parking are reimbursable pursuant to *N.J.A.C. 4A:2-2.12(g)*. See *In the Matter of Tracey Andino* (MSB, decided August 21, 2003); *In the Matter of Gail Murray* (MSB, decided June 25, 2003). However, the costs for supplies, postage, and expedited delivery are not reimbursable as these expenses are considered regular overhead under *N.J.A.C. 4A:2-2.12(g)*. Finally, the appeal fee is not reimbursable as per *N.J.A.C. 4A:2-1.8(a)*, this is a processing fee. Therefore, Belleville shall reimburse Fiscella \$1,806.90 for his costs.

ORDER

Therefore, it is ordered that this request be granted in part and Belleville pay Vincent Fiscella, Jr. \$58,273.75 in counsel fees and \$1,806.90 for costs within 30 days of receipt 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 27th DAY OF MARCH, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals
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Trenton, New Jersey 08625-0312

Attachments

c: Vincent Fiscella, Jr.
Brian J. Aloia, Esq.
Mauro Tucci
Jeffrey R. Merlino, Esq.
Debra A. Allen, DAG
Joseph H. Orlando, Appellate Division Clerk



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

In the Matter of Vincent Fiscella, Jr., Township of Belleville, Department of Public Works

CSC Docket No. 2016-2674

Request for Reconsideration Request for Back Pay

ISSUED: OCT 21 2016 (SLK)

Vincent Fiscella, Jr., Laborer 1, Township of Belleville, Department of Public Works, represented by Brian J. Aloia, Esq., requests reconsideration of the decision rendered on December 16, 2015 that modified his removal to an official reprimand. The appellant also requests enforcement of his back pay award and counsel fees.

By way of background, the appellant was removed on charges of insubordination and other sufficient cause. Specifically, the appointing authority asserted that the appellant was working in another position at the voting polls while out on sick leave and that he failed to attend a scheduled Workers' Compensation appointment. The appellant appealed his removal to the Civil Service Commission (Commission) which transferred the matter to the Office of Administrative Law (OAL) for a hearing as a contested case. In its decision, the Commission modified the removal to an official written reprimand and awarded counsel fees in the amount of 50 percent of services and back pay. See In the Matter of Vincent Fiscella, Jr. (CSC, decided December 16, 2015).

In his request for reconsideration, the appellant states that the appointing authority failed to introduce any evidence that he violated any order, statute, rule, and/or policy when he did not attend his workers' compensation doctor's appointment (appointment) on May 19, 2014 or that he was not allowed to use his own doctor for treatment. Further, he asserts that he was not ordered to attend the appointment and argues that the Commission's findings that he was required to attend the appointment and imposing an official written reprimand are a clear material error. Moreover, the appellant contends that he was wrongfully suspended without pay and without any union representation on the morning of the

appointment and therefore he was upset and understandably did not attend the appointment. Additionally, the appellant maintains that he prevailed on the primary issue in this case and he should be awarded full counsel fees. Further, even if he had some obligation to attend the appointment, he believes that if there is to be any reduction in counsel fees, it should be a *de minimis* amount.

In a supplemental submission, the appellant explains that the appointing authority did not instruct him that his attendance at the appointment was mandatory. In fact, there is no evidence in the record that the appointing authority even knew about his appointment. He emphasizes the active role that he played in his recovery by outlining all of the doctor and hospital appointments he did attend. The appellant indicates that he reported to work on May 19, 2014 and expected the appointing authority to make an accommodation for him to go to and from his appointment. Instead, he states that he was advised to leave the work place. The appellate suggests that if he had union representation, he may have been advised to attend his appointment. The appellant presents that the appointing authority asserts for the first time, in its exceptions, that his treatment was governed by the State Workers' Compensation Act (Act), but does not cite any page in the employee manual that would indicate that he was mandated to seek treatment from the Workers' Compensation Doctor. Further, the appellant contends that he prevailed on the primary issue in this case involving the appointing authority's attempt to remove him for his allegedly working in another position at the voting polls while out on sick leave and that the majority of the time spent in this matter by both the appointing authority and him were spent on this issue.

In his request for enforcement, the appellant states that he is in agreement with the appointing authority's calculation that his mitigated back pay is \$27,380.37 except that it did not include his health care expenses of \$420.56 for an MRI and \$319.48 for health coverage that he paid directly to the appointing authority. Therefore, he is requesting that the appointing authority immediately pay back pay in the amount of \$28,120.41. He is also requesting attorney's fees for this submission to receive his back pay payment as he maintains that the appointing authority has not made a good faith effort to resolve his back pay and has failed to communicate any objections regarding his back pay.

In response, the appointing authority, represented by Jeffrey R. Merlino, Esq., presents that it did introduce into evidence its employee manual which notes that employees who suffer workplace injuries are governed by the Act and, under the Act, employers may compel employees to attend medical appointments, and if the employee refuses, the Workers' Compensation Bureau may modify an employee award. It maintains that if the appellant had not resigned, it would have filed a petition with the Workers' Compensation Bureau to force him to attend any future appointments. Consequently, the appointing authority argues that his counsel fees should be reduced because he did not uphold his obligation to attend the medical

appointment. It also provides that the Commission has wide discretion regarding the award of counsel fees and its award should not be disturbed. It is noted that, although given the opportunity, the appointing authority has not responded to the appellant's submission regarding his back pay.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

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:2-2.10(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 health insurance coverage during the period of improper suspension or removal.

In this matter, the appellant has not met the standard for reconsideration. The employee manual, which was admitted into evidence (R-2), states, in pertinent part:

All required medical treatment must be performed by a workers' compensation physician appointed by the Township and unauthorized medical treatment may not be covered under the Act.

On appeal, the appellant argues that he was "in shock" on May 19, 2014 when he received the first PNDA that sought his removal and therefore it was not unreasonable that he did not attend his appointment that day. The appellant also argues that his appointment was not mandatory since he was seeking treatment with his private doctor and that he might have attended the appointment as scheduled if he was afforded union representation when he was issued the first PNDA. However, the appellant knew that he was obligated to attend the appointments with the Workers' Compensation Doctor as he in fact scheduled the appointment. Further, there is not any evidence that the appointing authority specifically advised him that it was acceptable for him to skip his appointment if he was seeing his own doctor. Moreover, the second PNDA, which charged the appellant for failing to attend the appointment, was not served until June 5, 2014.

Therefore, even if the appellant's argument is accepted that he was "in shock" on May 19, 2014 and may have attended the appointment if he had union representation, there has been no evidence presented that he tried to reschedule his appointment or seek union representation prior to being served the second PNDA. Therefore, under these circumstances, the appellant has not presented any evidence that the Commission made a clear material error in finding that he did not attend the required appointment.

Additionally, the matter of his attendance at his appointment was a primary issue in this case. Further, even if the appellant's argument is accepted that he prevailed on the primary issue, under *N.J.A.C. 4A:2-2.12*, it is within the Commission's discretion to award partial reasonable attorney's fees where an employee has prevailed on all or substantially all of the primary issues before it. See *In the Matter of Nighat Hussain* (CSC, decided September 15, 2010) (Commission modified removal to an official written reprimand and awarded counsel fees in the amount of 50% of services).

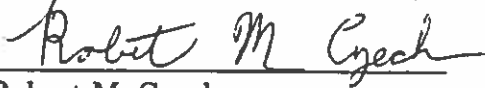
With respect to back pay, the appellant presents that the appointing authority has agreed that his mitigated wage loss is \$27,380.37. Plus, the appellant has asked for health care expenses including \$420.56 for an MRI and \$319.48 for health benefits coverage paid directly to the appointing authority and, although given the opportunity to respond, it has not provided any argument or evidence to dispute this claim. However, *N.J.A.C. 4A:2-2.10(d)* provides for reimbursement of payments made to *maintain* health insurance coverage. The appellant's entitlement to reimbursement for maintaining health insurance coverage does not apply to any medical expenses and/or prescription drug expenses incurred during the period of his separation from employment from the appointing authority. See *e.g., In the Matter of Shannon Stoneham-Gaetano and Maria Ciuffo* (MSB, decided April 24, 2001). Therefore, the Commission finds that the appellant is not entitled to reimbursement of \$420.56 for the MRI but the appointing authority shall pay the appellant \$27,699.85 for mitigated back pay and provide an accounting of accumulated benefits within 30 days of the issuance of this decision. The Commission denies the appellant's request for additional attorney fees for the preparation of its submission for back pay as the attorney fees award is only for fees incurred related to the proceedings at the OAL and the proceedings at the departmental level.

ORDER

Therefore, it is ordered that this request for reconsideration and request for additional counsel fees be denied. However, the appellant's request for payment of back pay in the amount of \$27,699.85 and an accounting of accumulated benefits is granted and the appointing authority shall make this payment and accounting to the appellant 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 19th DAY OF OCTOBER, 2016



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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Attachment

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Records Center