



STATE OF NEW JERSEY

In the Matters of Victor Vazquez and
Rocco Duardo, City of Hackensack
Police Department

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket Nos. 2022-1258 and
2022-1259

Back Pay and Counsel Fees

ISSUED: May 2, 2022 (SLK)

Victor Vazquez and Rocco Duardo, Police Officers with the City of Hackensack, represented by Charles J. Sciarra, Esq., request back pay and counsel fees in accordance with the Civil Service Commission (Commission) decision rendered on July 21, 2021.

By way of background, in *In the Matter of Victor Vazquez, et al.* (CSC, decided March 27, 2019), the petitioners’ removals were modified to six-month suspensions due to charges from the “64 Prospect Avenue” matter. As such, they were entitled to back pay from six months from their initial date of separation until their actual dates of reinstatement. There were also separate charges against the petitioners seeking their removal because the Bergen County Prosecutor’s Office indicated that their conduct in the 64 Prospect Avenue matter undermined the ability of the Prosecutor’s Office in several ongoing matters in which the officers were involved, which led to it dismissing certain criminal matters, and it indicated that additional cases may be impacted. The Prosecutor’s Office indicated that a decision about their ability to testify in future cases would be made on a case-by-case basis, based on the holdings in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 450 U.S. 150 (1972). The Commission, in *In the Matter of Victor Vazquez, et al.* (CSC, decided July 21, 2021), reversed the petitioners’ removals for the “Brady” matter as the Prosecutor’s Office did not call for the removal of the petitioners, but indicated that their functioning as Police Officers would be on a case-by-case basis. Therefore, the Commission awarded counsel fees pursuant to *N.J.A.C. 4A:2-2.12* solely for the fees

incurred in the “Brady” matter. The Commission reiterated that the petitioners were to receive back pay as previously awarded pursuant to *N.J.A.C.* 4A:2-2-10. The record indicates that the petitioners were reinstated on June 10, 2021. However, the parties were unable to reach an agreement on back pay and counsel fees.

In their requests, the petitioners argue that they have demonstrated mitigation efforts as they applied to different employers and earned wages, although much less than they earned as Police Officers. They indicate that in the Commission’s March 27, 2019 decision, their removals were modified to six-month suspensions and they should have been reinstated on or about August 9, 2018. The petitioners contend that they had no duty to mitigate since August 9, 2018. They also believe that their back pay should not be reduced by unemployment benefits received based on *In the Matter of Acevedo v. Flight Safety International, Inc.*, 448 *N.J. Super.* 185 (App. Div. 2017) where the Appellate Division reversed the trial court’s decision to reduce the plaintiff’s damages awarded in a Law Against Discrimination matter by the unemployment benefits the plaintiff received as the Court found that the employer was not entitled to reduce a contract damage award by the amount of unemployment compensation the employee received. The petitioners present that they are each entitled to lost wages from August 9, 2018 to June 10, 2021, in the following amounts: \$60,914 in 2018, \$123,656 in 2019, \$126,129 in 2020, and \$68,036.80 in 2021. Additionally, Vazquez indicates that he is entitled to \$45,731.48¹ and Duardo indicates that he is entitled to \$48,656.88² in lost contractual payments.

Vazquez certifies that in 2018, he made \$9,238.83 and in 2019 he made \$6,380.55 as an Uber driver. He presents that he applied for positions in February 2018 with Demase Trucking, in October 2018 with Crown Signs, in February 2019 with Atlantic Uniforms, in April 2019 with PSE&G, in May 2019 with Society Staffing (based on a May 5, 2019 email), in May 2019 with Northern Architectural Systems for a Safety Officer position (based on a May 11, 2019 email), in May 2019 for Delivery Driver – Pharmacy Services (based on a July 25, 2019 email which indicated that he applied on May 20, 2019), in July 2019 with Wave Crest, in August 2019 with GXC Inc. (based on Ziprecruiter), in September 2019 with Acacia Network, in October 2019 with Interstate Hotels & Resorts for a Temporary Loss Prevention Officer position (based on an October 30, 2019 email), in January 2020 with United Staffing Solutions for a Blood Bank Technician (based on Ziprecruiter), in March 2020 for Council for Airport as a Pilot, in March 2020 as a Field Supervisor (based on Ziprecruiter), in April 2020 with Council for Airport as a Selector (based on Ziprecruiter), and in April 2020 with Council for Airport as a Port Authority Police Officer (based on

¹ Vazquez certifies that he is entitled to \$19,681.48 in holiday pay, \$22,500 for not being enrolled in the appointing authority’s health care based on a \$5,000 per year annual payment, and \$3,550.00 for clothing allowance.

² Duardo certifies that he is entitled to \$19,681.48 in holiday pay, \$2,975.40 for out-of-pocket medical expenses, \$22,500 for not being enrolled in the appointing authority’s health care based on a \$5,000 per year annual payment, and \$3,550.00 for clothing allowance.

Ziprecuriter). He submits three articles to support his claim that the appointing authority's disparaging remarks against him in the media made it difficult for him to find a job. Vazquez states that his wife was the household's only source of income and he stayed home to provide childcare as it was more cost effective to remain home than to find outside childcare assistance. Further, he indicates that due to the Covid-19 pandemic, it was more difficult to find employment. Vazquez also certifies that he is entitled to 52.5 vacation days, seven personal days, and 52.5 sick days.

Duado certifies that in 2018, he made \$32,644.50 working for Professional Security Consultants, in 2019 he made \$2,635.50 working for Professional Security Consultants and \$15,191.10 working for Interstate Drywall Corporation, and in 2020, he made \$14,182.71 for Interstate Drywall Corporation. Additionally, he states that he applied for multiple jobs online, including, but not limited to positions with Amazon and PSE&G. He submits emails, mostly from Amazon and PSE&G, that indicate various job opportunities. Duado submits three articles to support his claim that the appointing authority's disparaging remarks against him in the media made it difficult for him to find a job. Duado also certifies that he is entitled to 66.5 vacation days, seven personal days, and 52.5 sick days.

In support of the petitioners' request for attorney's fees, they seek a departure from the constraints of *N.J.A.C.* 4A:2-2.12 setting fees at \$200 per hour, which is an amount Sciarra was previously awarded from the Commission. Instead, the petitioners request Sciarra's rate that he receives in non-Civil Service matters, which is \$495 per hour. The petitioners present that the subject "Brady/Giglio" matter was a new and novel situation involving the argument that a third-party correspondence, the Prosecutor's alleged letter, could result in a finding on the employability of a civil servant. Despite the fact that the letter indicates that future cases involving the officers would be dealt with on a case-by-case basis, the appointing authority advocated that they must be terminated. The petitioners assert that only after an enormous amount of briefing, oral arguments, and fact finding on the issue in this case of first impression was the appointing authority's argument rejected. They note that although the matter involved four officers, there is only one attorney's office making an application for fees. The petitioners' request the \$495 per hour rate for Sciarra based on his years of experience as a trial attorney and they submit documentation that indicates that he has been awarded this rate in other matters. Regarding the specific fee arrangement, they indicate that they were members of the PBA Legal Defense Plan. However, the appointing authority chose to have two separate matters, 64 Prospect Avenue and the Brady matters, and the funds in the plan were exhausted in the 64 Prospect Avenue matter. Therefore, the petitioners argue that there is no specific fee arrangement with the union that would benefit the appointing authority. In fact, they assert that many hours in the 64 Prospect Avenue were uncompensated because they did not prevail. Therefore, the petitioners argue that *N.J.A.C.* 4A:2-2.12(d) does not apply. They seek \$110,184.50 in attorney fees based on an hourly rate of \$495 for Sciarra and an hourly rate of \$150 for his

associate, Frank Cioffi. They also seek \$4,549.32 in costs for a total of \$114,733.82. The petitioners submit a statement from their counsel itemizing their attorneys' time and costs for their representation in the Brady matter.

In response, the appointing authority, represented by Raymond R. Wiss, Esq., asserts that the petitioners were required to mitigate their loss of pay from August 10, 2018 until June 10, 2021. It presents that the Commission's decision in the Brady matter was July 21, 2021, and they were reinstated June 10, 2021. Therefore, under *N.J.A.C.* 4A:2-2.10(d)5, there was no time that the petitioners were not required to mitigate. The appointing authority argues that the petitioners' argument that they did not have a duty to mitigate after the Commission's March 27, 2019, decision involving the 64 Prospect Avenue matter is incorrect as the Brady matter is the only relevant matter in determining the mitigation time. Further, it presents that under *N.J.A.C.* 4A:2-2.10(d)3, the petitioners' back pay awards must be reduced by unemployment benefits received. The appointing authority notes that the petitioners have not provided their unemployment benefits received or the time periods that they received them and this information is needed to determine their reduction in back pay. It cites Civil Service cases including one where Sciarra's office acknowledged that back pay was to be reduced by unemployment benefits received. Additionally, the appointing authority notes that the cases cited by the petitioners are not a Civil Service cases.

The appointing authority argues that the petitioners have not made reasonable efforts under *N.J.A.C.* 4A:2-2.10(d)4 to mitigate back pay and acknowledges that under *N.J.A.C.* 4A:2-2.10(d)5 that the employer has the burden of proof. The appointing authority asserts that since the petitioners have failed to disclose the amounts or when unemployment benefits were received, they are not entitled to a presumption of mitigation. Regarding Duardo, he certifies that he earned \$32,644.50 in 2018, only around \$18,000 in 2019, and only \$14,182.71 in 2020. Therefore, based on a \$25 per hour salary for 40 hours per week, which would be \$1,000 per week, it asserts that Duardo has many weeks where he did not work and highlights that he did not work in 2021 prior to his reinstatement. Specifically, the appointing authority presents that Duardo did not indicate any applications in 2018, only seven emails in 2019, two emails in 2020 and four emails in 2021, which merely reflect positions, but do not reflect actual applications. Concerning Vazquez, it presents that while he indicated he earned income from Uber in 2018 and 2019, he did not state how long he worked as an Uber driver in these years and, therefore, it cannot determine if he made reasonable efforts for the entirety of these years and it does not appear that he worked at all in 2020 or 2021 prior to his reinstatement. It requests that the Commission withhold its decision on whether the petitioners properly mitigated their back pay award until the petitioners provide all relevant information.

Regarding counsel fees, the appointing authority argues that the application for counsel fees and costs is excessive and should be denied. It presents that under

N.J.A.C. 4A:2-2.12(c)3, the amount awarded to a partner in a law firm is between \$175 to \$200. Further, *N.J.A.C.* 4A:2-2.12(d) provides that the range may be adjusted based on a specific fee arrangement with the employee's negotiations representative and such fee arrangement must be disclosed. The appointing authority presents that Sciarra acknowledges that there was a fee agreement, but argues that since the funds were exhausted in the 64 Prospect Avenue matter, it does not apply to the Brady matter. It argues that Sciarra's statement does not establish that the fee agreement does not apply, and he should be required to disclose it. Further, the appointing authority notes Sciarra does not state that there was no specific fee agreement between himself and the petitioners and he should be required to disclose this as well. The appointing authority argues that the hourly rate in the fee agreement with the PBA should be the hourly rate in this matter. It also argues that even assuming that an hourly rate adjustment is to be considered under *N.J.A.C.* 4A:2-2.12(c), the criteria for an adjustment is not met as while the subject matter may have been a novel issue before the Commission, it was not complex. Further, while petitioners' attorneys may have spent substantial time on this matter, this is reflected based on the number of hours that the petitioners seek reimbursement. Also, the appointing authority contends that it is immaterial that four appellants were being represented by the petitioners' attorneys as there was only one issue involved. Moreover, it argues that Sciarra's rate in non-Civil Service matters is irrelevant to this matter and they have not presented Civil Service cases where Sciarra received such a rate.

Concerning the presented billable time, the appointing authority asserts the petitioners' counsel fees incurred in pursuing their back pay is not recoverable. *See In the Matter of David Hopkins* (CSC, decided March 13, 2014). Further, it indicates that it has not acted unreasonably or delayed in carrying out the order in the Brady matter. It contends that the petitioners' counsel fees on November 1, 2, 15, 17, 18, 19, and 20 in 2021, for a total of 25.40 hours, were regarding the present application for back pay and are not recoverable. It argues that the petitioners' counsel fees for travel time to and from the hearing is not reimbursable and there were entries submitted from Sciarra and Cioffi for travel on June 26, 27, July 30, August 7, and August 26 in 2019 for travel time. Since the petitioners' counsel did not specifically itemize their travel time, it assumes one and one-half hours in travel from their office in Clifton to the court in Newark and back to their office on those days. It calculates seven and one-half hours for each of them or 15 hours in total for travel which must be disallowed. The appointing authority presents that the \$975.90 for photocopying and \$25.79 for delivery charges that is sought should also be disallowed. It argues that under *N.J.A.C.* 4A:2-2.12(a), the fees in connection with the appointing authority's appeal to the Appellate Division must be disallowed. It presents that the petitioners' counsel presented time regarding the Appellate Division appeal on July 28, August 2, September 1, September 2, September 3, September 7, September 16, September 20, and September 21 in 2021, for a total of 24.95 hours, which must be disallowed.

Regarding other requests, the appointing authority argues that out-of-pocket medical expenses, \$22,500 due to the petitioners opting out of the appointing authority's healthcare, and clothing allowance expenses should be disallowed.

The appointing authority presents, based on its Chief Financial Officer's (CFO) certification, that each petitioners' gross salary (inclusive of holiday pay) from August 10, 2018 to December 31, 2018 was \$49,199.80, in 2019 was \$129,839, in 2020 was \$132,435, and from January 1, 2021 to June 10, 2021 was \$61,758.48 for a total of \$373,232.28. Further, pursuant to the collective negotiations agreement, the petitioners are entitled to seven personal days based on one (pro-rated) day in 2018, two days in 2019, two days in 2020, and two days in 2021. Additionally, Duardo has 19 accrued vacation days in 2020 and nine and one-half days (January 1, 2021 to June 30, 2021) in 2021 for a total 28.5 vacation days and Vazquez has 15 accrued vacation days for 2020 and seven and one-half (January 1, 2021 to June 30, 2021) in 2021 for a total of 22.5 vacation days. Moreover, the petitioners are entitled to 42.5 sick days for the relevant time period. Concerning healthcare benefits, the appointing authority argues that the petitioners' claim that they are entitled to an annual \$5,000 payment is not true as the appointing authority never received a waiver from them opting out of healthcare.

In reply, the petitioners reiterate their position that they are not required to mitigate, but not withstanding, they have provided sufficient mitigation efforts. They present that the appointing authority chose to issue two separate FNDAs, the 64 Prospect Avenue and the Brady matters. The petitioners state that in the March 27, 2019 decision that concerned the 64 Prospect Avenue matter, the Commission modified the petitioners' removals to six-month suspensions, which meant that their suspensions were from February 9, 2018 until August 9, 2018. Thereafter, in the July 10, 2021 decision that involved the Brady matter, the Commission reiterated that the petitioners were entitled to back pay from their initial separation to their actual date of reinstatement. Therefore, the petitioners argue that they are entitled to full back pay and counsel fees. In the petitioners' attorney's certification, their counsel describes their efforts to resolve the back pay issues. Concerning counsel fees, the petitioners present that the appointing authority offers no support for its claims that their counsel received payment from the defense plan while litigating the 64 Prospect Avenue matter and reiterate their position that the 64 Prospect Avenue matter is not relevant to this matter. The petitioners present that their counsel made an OPRA request to the appointing authority for its invoices for both the 64 Prospect Avenue and Brady matters.

In further response, the appointing authority highlights that the petitioner's counsel has refused to supply the specific fee agreement between either the PBA or the petitioners as required and, therefore, the petitioner's claim for an exorbitant rate of \$495 per hour for Sciarra cannot be evaluated. Additionally, the appointing authority indicates that the petitioners have not provided information regarding

their unemployment benefits as required and, therefore, it argues whether the petitioners have sufficiently mitigated cannot be determined until they have done so.

In further reply, Sciarra certifies that he billed 657.35 hours for the Brady matter. Further, they present that the appointing authority's counsel's billings indicate that its counsel billed 2,700 for the 64 Prospect Avenue and 1,200 hours for the Brady matters. The petitioners argue that these bills demonstrate that the appointing authority demonstrated a non-stop approach to use every mechanism of litigation to engage in a never-ending assault on the officers in these matters. They argue that the fact that their counsel's firm was able to keep up with the appointing authority's strategy, illustrates the value of their counsel's time as the appointing authority counsel spent twice as much time on the Brady matter as their counsel did. The petitioners present that the Commission has previously awarded Sciarra hourly rates of \$130, \$150 and \$200. They contend that Sciarra has more than earned the \$495 per hour rate that they request for this matter.

In further response, the appointing authority emphasizes that it was not until the Commission's July 21, 2021 decision that the petitioners needed to be reinstated and they were reinstated June 20, 2021, which means that the applicable time for mitigating back pay is August 9, 2018 to June 20, 2021. It presents that the petitioners' argument that the Commission's March 27, 2019 decision in the Prospect Avenue matter ended their duty to mitigate is incorrect as the July 21, 2021 decision date in the Brady matter is the applicable date concerning the duty to mitigate. Further, the appointing authority argues that the petitioners have not rebutted the evidence presented by it that they have failed to mitigate their back pay. Additionally, it contends that it has rebutted any presumptions that the petitioners have mitigated their back pay by virtue of their receipt of unemployment benefits as the petitioners have refused to disclose the amount of unemployment benefits that they received and the periods that they received them. Therefore, the appointing authority argues that their applications for back pay should be denied. Regarding counsel fees, it asserts that the petitioners' arguments that the funds in the PBA plan were exhausted in the 64 Prospect Avenue matter is not grounds for their counsel to not disclose the agreement with the PBA and Sciarra should be required to disclose it as it was an agreement that provides coverage for legal fees. Moreover, the appointing authority contends that if there was no such agreement, then there would be a separate agreement with the petitioners; however, that has not been indicated. Therefore, the appointing authority argues that if Sciarra refuses to submit the fee agreement, the petitioners' request for counsel fees should be denied. Also, it notes that the petitioners have not disputed that counsel fees in pursuit of back pay, travel time, delivery and photocopying time, and time in connection with appeals are not recoverable. Similarly, the petitioners have not disputed that out-of-pocket medical expenses, retroactive clothing allowance, and limited vacation leave are not recoverable. Regarding the petitioners' request for \$495 hourly rate for Sciarra, the appointing authority notes that it is not arguing that his time was excessive, only his

rate. Further, it presents that there is no logical nexus between the amount of time its counsel spent on these matters and the request for a \$495 hourly rate for Sciarra. Additionally, the appointing authority contends that its counsel's billings for the 64 Prospect Avenue case are also irrelevant.

In further response, the petitioners present the that there is a Legal Protection Plan (LPP) which covered the petitioners in the 64 Prospect Avenue matter. They indicate that their coverage was maxed out in the defense of the 64 Prospect Avenue matter. However, they indicate that the PBA agreed to represent them in the Brady matter. The petitioners indicate that if their counsel was not successful in obtaining legal fees from the appointing authority, they agreed to accept an \$150 per hour rate. However, as they were successful, they are seeking an attorney's fee award based on Sciarra's usual hourly rate. The petitioners reiterate their position that this is not an LPP case and the \$495 per hour rate for Sciarra's time is appropriate.

In further reply, the appointing authority asserts that the petitioners' last submission indicates that \$150 per hour is the applicable rate for the attorney's fee award.

CONCLUSION

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:2-2.12(a) 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:2-2.12(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:6-1.2(g) provides that appointing authorities may establish procedures for the scheduling of vacation leave. Vacation leave not used in a calendar year because of business necessity shall be used during the next succeeding year only and shall be scheduled to avoid loss of leave.

N.J.A.C. 4A:6-1.3(f) provides that unused sick leave shall accumulate from year to year without limit.

Initially, it is noted that the record indicates that the petitioners' six-month suspensions ended on August 9, 2018, and they were reinstated June 10, 2021. The petitioners argue that they are not required to mitigate back pay from the Commission's March 27, 2019³ decision (64 Prospect Avenue), which modified their removals to six-months suspensions, until their actual reinstatement on June 10, 2021. However, the appointing authority also issued separate disciplinary charges (Brady) related to the subject incident, in which it sought to remove the petitioners, and the Commission did not reverse the Brady charges until July 21, 2021. Therefore, since the petitioners remained removed until the Commission issued the Brady

³ The petitioners actually argue that there is no period that they need to demonstrate mitigation. However, it is unclear why they believed that they did not need to mitigate between August 10, 2018 and the March 27, 2019 decision.

decision, the Commission finds that July 21, 2021 decision is the final decision that determines the petitioners' mitigation period under *N.J.A.C.* 4A:2-2.10(e). Therefore, the Commission finds that the petitioners had a duty to mitigate their back pay award from August 10, 2018 until June 9, 2021.

Regarding back pay, the appointing authority's CFO certifies that the petitioners' gross salaries (inclusive of holiday pay) from August 10, 2018 to December 31, 2018 was \$49,199.80, in 2019 was \$129,839, in 2020 was \$132,435, and from January 1, 2021 to June 10, 2021 was \$61,758.48 for a total of \$373,232.28. The petitioners have not refuted the CFO's certification.

Vazquez certifies that in 2018 he made \$9,238.83 and in 2019 he made \$6,380.55 as an Uber driver. He presents that he submitted one job application in 2018 after August 9, 2018, and nine job applications in 2019. The appointing authority argues that it cannot determine if Vazquez made reasonable efforts to mitigate during this time since he has not provided information about when he worked, and he has not provided information about how much he received in unemployment benefits and for what time period. Under *N.J.A.C.* 4A:2-2.10(d)iv the determination as to whether the employee has made reasonable efforts to find suitable employment is largely based on factors that the appointing authority is to submit regardless of what information the petitioners provide such as the job market and the existence of advertised and suitable employment opportunities. However, the appointing authority has not submitted any information in this regard. Further, *N.J.A.C.* 4A:2-2.10(e)v provides that the burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. Therefore, the Commission finds that Vazquez sufficiently mitigated his back pay from August 10, 2018 to December 31, 2019. The Commission also finds that the petitioners' argument that its back pay is not to be reduced by unemployment benefits received based on non-Civil Service cases is misplaced as, under *N.J.A.C.* 4A:2-2.10(d)3, in Civil Service cases, 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. Therefore, the Commission finds that Vazquez is entitled to a back pay award in 2018 of \$49,199.80, less whatever portion of the \$9,238.83 he earned from Uber that was earned from August 10, 2018 to December 31, 2018, less unemployment benefits that were received from August 10, 2018 to December 31, 2018. The Commission also finds that Vazquez is entitled to a back pay award in 2019 of \$129,839 less the \$6,380.55 he earned from Uber in 2019, less unemployment benefits received in 2019. Therefore, Commission finds that Vazquez is entitled to a total gross back pay award of \$179,038.80, less income earned as described above and unemployment benefits received from August 10, 2018 to December 31, 2019.

Concerning 2020 and 2021, Vazquez certifies that between January 2020 and April 2020, he submitted five job applications. However, he does not indicate any

employment in 2020. Instead, Vazquez explains that he chose to stay at home to care for his children while his wife worked as it was more cost effective to remain at home. Additionally, Vazquez did not submit any employment or job applications in 2021 prior to his reinstatement. 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. Therefore, the Commission finds that Vazquez has failed to make reasonable efforts to mitigate his back pay award in 2020 and 2021 and he is not entitled to back pay during this time. *See In the Matter of Ryan Marsh* (CSC, decided February 17, 2021).

Duardo certifies that in 2018 he made \$32,644.50 working for Professional Security Consultants, in 2019 he made \$2,635.50 working for Professional Security Consultants and \$15,191.10 working for Interstate Drywall Corporation, and in 2020, he made \$14,182.71 for Interstate Drywall Corporation. As Duardo has submitted employment in 2018 to 2020 and the appointing authority has not submitted information to determine that his efforts were not reasonable as stated above, the Commission finds that Vazquez sufficiently mitigated his back pay from August 10, 2018 to December 31, 2020. Therefore, the Commission finds that Duardo is entitled to a back pay award in 2018 of \$49,199.80 less whatever portion of the \$32,644.50 he earned from Professional Security Consultants that was earned from August 10, 2018 to December 31, 2018, less unemployment benefits that were received from August 10, 2018 to December 31, 2018. The Commission also finds that Duardo is entitled to a back pay award in 2019 of \$129,839, less the \$35,280 he earned in 2019, less unemployment benefits that were received in 2019. Additionally, the Commission finds that Duardo is entitled to a back pay award in 2020 of \$132,435, less the \$14,182.71 he earned in 2020, less unemployment benefits that were received in 2020. Therefore, Commission finds that Duardo is entitled to a total gross back pay award of \$311,473.80, less income earned and unemployment benefits received from August 10, 2018 to December 31, 2020.

Concerning 2021, Duardo only presents job postings from PSE&G and there is no indication of any applications he submitted. Additionally, he does not indicate that he earned any income in 2021. Therefore, the Commission finds that Duardo has failed to make reasonable efforts to mitigate his back pay award in 2021 and he is not entitled to back pay during this time. *See Marsh, supra*.

Regarding vacation days, *N.J.A.C.* 4A:6-1.2(g) provides that vacation leave not used in a calendar year shall be used during the next succeeding year only. The Commission finds that, based on the appointing authority's records which have not been responded to, that Vazquez is entitled to 22.5 vacations days and Duardo is entitled to 28.5 vacations days, based on accrued vacation in 2020 and 2021. Further, the Commission finds that under *N.J.A.C.* 4A:6-1.3(f), based on the appointing

authority's records which have not been responded to⁴, that the petitioners are each entitled to receive 42.5 sick days accrued during the separation. Additionally, although there is no entitlement for personal days for local government employees under Civil Service, the Commission finds that petitioners are each entitled to receive seven personnel days accrued during the separation based upon the appointing authority's representation, which has not been disputed.

Referring to the petitioners request for additional holiday pay and retroactive clothing allowance, any holiday pay premium that goes above the amounts stated above the amounts already included in the back pay award above and any claims for a clothing allowance are not recoverable under *N.J.A.C.* 4A:2-2.10(d)1. Concerning the petitioners' claims for the loss of an annual premium for not being enrolled in the appointing authority's health care plan is not the same as an expenditure by the petitioners to *maintain* their health insurance coverage and, therefore, is not recoverable under *N.J.A.C.* 4A:2-2.10(d). Further, Duardo's claim for out-of-pocket medical expenses is not recoverable. See *N.J.A.C.* 4A:2-2.10(d) and *In the Matter of Shannon Stoneham-Gaetano and Maria Ciuffo* (MSB, decided April 24, 2001).

The petitioners also request attorney's fees based on an \$495 hour rate for Sciarra and a \$150 hourly rate for Cioffi. The record indicates that the petitioners received representation from Sciarra and Catrambone, LLC for both the 64 Prospect Avenue and Brady matters under a specified fee agreement, the LPP, where Sciarra and Catrambone, LLC agreed to an hourly rate of \$150. While the petitioners argue that the LPP was only applicable to the 64 Prospect Avenue matter and not the Brady matter because all the funds in the LPP were exhausted defending the 64 Prospect Avenue matter, the Commission finds that per *N.J.A.C.* 4A:2-2.12(d), the LPP is applicable to the Brady matter because it is not relevant that the funds in the LPP were exhausted since it is the appointing authority, and not the defense fund for the LPP, which is responsible for the attorney's fees in this matter.⁵ The petitioners also request under *N.J.A.C.* 4A:2-2.12(e), that Sciarra's rate be adjusted to \$495 per hour. While the petitioners argue that Sciarra's rate should be upwardly adjusted based on the novelty of the issue and the time consumed based on the appointing authority's litigation strategy, the Commission finds that this is accounted for based on the number of billable hours that Sciarra and Cioffi expended in the Brady matter. However, the Commission finds that \$150 per hour is the hourly rate in this matter under *N.J.A.C.* 4A:2-2.12(d), as the issues were not so difficult, nor did they require

⁴ The petitioners' certifications indicate that they are entitled to different amounts of vacation and sick time. However, regarding vacation, they indicate that the time does not reflect the amount of time prior to January 1, 2018. However, vacation time prior to 2020 is not relevant since only one year of vacation may be carried forward under *N.J.A.C.* 4A:6-1.2(g). It is also noted that after the appointing authority submitted its calculation of vacation and sick time, which indicated different amounts than they indicated, they did not respond to the differing amounts.

⁵ Only if there was a subsequent written agreement between Sciarra and Catrambone, LLC and the petitioners upon commencement of the Brady matter calling for \$495 per hour, would the LPP not apply. No such agreement has been produced.

special skills that were beyond regular lawyering for skilled labor and employment lawyers, such as Sciarra and Cioffi, that would require an upward adjustment of the fee agreement.

Concerning the billable hours, Sciarra submits a billing statement that indicates that Sciarra and Cioffi spent 366.85 hours on the Brady matter.⁶ The appointing authority presents that its review of the billing statement indicates 25.4 hours⁷ were spent on the pursuit of back pay, which the petitioners have not responded to or otherwise challenged and is confirmed by a review of those entries. *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 where the Commission finds sufficient cause based on the particular case. In the instant matter, the record does not evidence that the appointing authority unreasonably delayed implementing the Commission's 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 the award of counsel fees for time spent on the reinstatement and back pay issues. *See In the Matter of Lawrence Davis* (MSB, decided December 17, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001). The appointing authority also estimates that Sciarra and Cioffi spent 15 hours in travel based on its review of the billing statement,⁸ which the petitioners have not responded to or challenged and is confirmed by a review of those entries. Under *N.J.A.C.* 4A:2-2.12(g), while not limited to out-of-state travel, in-State travel time is not generally awarded. The Commission finds no reason to make an exception in this matter and it shall not be included in the counsel fee award. The appointing authority also presents 24.95⁹ hours that the petitioners' counsel spent regarding related Appellate Division matters, which has not been responded to or challenged by the petitioners, and is confirmed by a review of these entries. As this time was incurred in furtherance of Appellate review, this time shall not be awarded under *N.J.A.C.* 4A:2-2.12(f). Therefore, the Commission finds that the petitioners are entitled to have a counsel fee award in the amount of \$45,225.¹⁰

Regarding expenses, the petitioners request \$4,549.32, which includes \$975.90 for reproduction and copy costs, \$2,919.62 for transcript costs, \$516.66 for investigative costs, \$111.35 service fees, and \$25.79 for Federal Express charges.

⁶ Sciarra also certifies that Sciarra and Cioffi spent 657.35 hours on the Brady case. However, the billing statement only indicates 366.85 hours.

⁷ These represent billings on November 1, 2, 12, 15, 17, 18, 19, and 20, 2021.

⁸ This is based on entries on June 26, and 27, 2019, July 30, 2019, and August 7, and 26, 2019 and the appointing authority's estimate that travel time of one and one-half hours in total to and from Sciarra and Catrambone's office in Clifton and the Office of Administrative Law in Newark.

⁹ This is based on entries on July 28, 2021, August 2, 3, and 4, 2021, September 1, 2, 3, 7, 16, 20 and 21, 2021.

¹⁰ The following hours are excluded: $25.4 + 15 + 24.95 = 65.35$; Thus, $366.85 - 65.35 = 301.5$ hours; $301.5 * \$150 = \$45,225$.

Under *N.J.A.C.* 4A:2-2.12(g), costs that represent normal office overhead will 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 In the Matter of Monica Malone*, 381 *N.J. Super.* 344 (App. Div. 2005). Therefore, the Commission awards \$3,436.28 in expenses.¹¹

ORDER

Therefore, it is ordered that Victor Vazquez be awarded gross back pay in the amount of \$179,038.80 less income earned or unemployment benefits received for the period from August 10, 2018 to December 31, 2019. Vazquez shall also receive 22.5 vacation days, 42.5 sick days and seven personnel days. Vazquez shall provide Hackensack documentation indicating income earned and/or unemployment benefits received from August 10, 2018 to December 31, 2019, within 30 days of receipt of this decision. Upon receipt, Hackensack shall submit payment, subject to the provisions of *N.J.A.C.* 4A:2-2.10(d)2, to Vazquez within 30 days of the receipt of this documentation. Vazquez's request for back pay for 2020 and 2021 and other additional reimbursements/benefits is denied.

Further, it is ordered that Rocco Duardo be awarded gross back pay in the amount of \$311,473.80 less income earned or unemployment benefits received for the period from August 10, 2018 to December 31, 2020. Duardo shall also receive 28.5 vacation days, 42.5 sick days and seven personnel days. Duardo shall provide Hackensack documentation indicating income earned and/or unemployment benefits received from August 10, 2018 to December 31, 2020, within 30 days of receipt of this decision. Upon receipt, Hackensack shall submit payment, subject to the provisions of *N.J.A.C.* 4A:2-2.10(d)2, to Duardo within 30 days of the receipt of this documentation. Duardo's request for back pay for 2021 and other additional reimbursements/benefits is denied.

Additionally, it is ordered that Hackensack shall pay counsel fees in the amount of \$45,225 and expenses of \$3,436.28 within 30 days of the issuance of this decision. Vazquez and Duardo's requests for other fees and expenses are denied.

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

¹¹ This is based on \$2,919.62 for transcript costs and \$516.66 for investigative costs.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF APRIL 2022

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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