

## Back Pay

<sup>1</sup> Initials are being used as S.A. claims that he could not return to work due to a disability.

S.A., Docket No. A-0327-21 (App. Div. April 13, 2023), affirmed the Commission's decision.

In his request, S.A. states that after attempting to resolve the matter with Northern State Prison, he has not received his back pay despite submitting a mitigation statement.

In response, the DOC, represented by Edward F. Chociey, Jr., Esq., states that it cannot calculate back pay or re-enroll him in the State Health Benefits Program because S.A. has not returned to work. Further, it asserts that S.A. has not reasonably and diligently mitigated his back pay award. The DOC indicates that after the Commission issued its decision reinstating him in 2021, he did not return to duty, and he did not submit proof of income earned or an affidavit of mitigation. Subsequently, after the DOC followed-up with him, in June 2022, S.A. submitted an affidavit of mitigation where he indicated that he was required to seek employment from his union, and he looked for work by going on his union's Local 68 Operating Engineer's website but there were no engineering jobs. Further, S.A. submitted an April 13, 2022, letter from his local union which stated that he had been in touch with his union seeking employment since 2017 but was unable to secure any position under the Local 68's jurisdiction.

Thereafter, on June 16, 2022, the DOC advised S.A. that he must report to work on June 20, 2022, at the East Jersey State Prison Powerhouse. S.A. drove to East Jersey State Prison, but after speaking with a DOC employee, he said he could not work there due to an alleged disability. Additionally, on the same date, after speaking with human resources from Northern State Prison, S.A. agreed to email his explanation as to why he could not work, but he never sent the email. On June 21, 2022, S.A. spoke to human resources who informed him that he would need to submit Americans with Disabilities Act (ADA) forms to receive an accommodation.<sup>2</sup>

The DOC provides that S.A.'s back pay cannot be calculated because he did not return to work. However, it indicates that his gross salary from approximately December 20, 2017, to June 19, 2022, the day before he appeared at East Jersey State Prison, is \$228,616, and his estimated gross salary from June 20, 2022, through April 5, 2024, is \$102,038. Further, since he did not return to work, he is not entitled to health and dental insurance through the State. Additionally, it notes that an employee on an approved unpaid leave can pay for their State health benefits separately, and a removed employee may pay for State health benefits for up to six months through COBRA. However, S.A. chose to do neither.

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<sup>2</sup> There is additional information in the record submitted by DOC regarding the subsequent history of its attempts to have S.A. return to work. As this information is not instrumental in the Commission determining the issue at hand, S.A.'s entitlement to back pay, it has not been presented.

The DOC argues that S.A. failed to use reasonable and diligent efforts to mitigate any back pay award as he admitted that he did not perform any work search other than “my union website.” Additionally, he did not provide any details or documentation that explained his search efforts on the union website, such as how often he searched, other than apparently claiming that there were no engineering jobs on the website from December 20, 2017, through May 31, 2022. Therefore, the DOC argues that S.A. is not entitled to any back pay award. Moreover, S.A. is apparently claiming that he could not work without an accommodation, but he never provided any details to identify the accommodation, nor did he return to duty. Also, in June 2022, S.A. stated that he could not perform essential job functions, such as walking up and down stairs and climbing ladders. Therefore, given these representations and his failure to engage in the interactive process, the DOC contends that any back pay entitlement would be significantly reduced, if not be eliminated, due to his claimed disability pursuant to *N.J.A.C.* 4A:2-2.10(d)9.

In reply, S.A. submits a letter from his local union which indicates that he was in touch with the Union office seeking employment but was unable to secure any position under the Local 68’s jurisdiction. He presents that he received unemployment compensation from February 4, 2018, to August 18, 2018, in the amount of \$10,600. S.A. acknowledges that on June 20, 2022, he drove to East Jersey State Prison, but after speaking with a DOC employee about the assignment, he said that would not be able to work due to his disability and the DOC’s failure to provide health insurance. Further, S.A. provides that he spoke with Northern State Prison’s human resources explaining that he was unable to perform the duties of the position because he was unable to get his medicine as the DOC refused to provide medical insurance. However, although human resources requested that he state this in writing via email, he did not do so as at that time as he was concerned that the DOC would misinterpret the information and use it against him. Human resources also advised that he needed to request an ADA accommodation.<sup>3</sup>

## 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)3 provides 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

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<sup>3</sup> There is additional information in the record submitted by S.A. regarding his disability and the efforts he made to be reinstated. As this information is not instrumental in the Commission determining the issue at hand, S.A.’s entitlement to back pay, it has not been presented.

unemployment insurance benefits received, subject to any applicable limitations set for the in (d)4 below.

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

*N.J.A.C. 4A:2-2.10(d)5* provides that 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(d)9* provides that a back pay award is subject to reduction for any period of time during which the employee was disabled from working.

In this matter, regarding the time from January 9, 2018<sup>4</sup>, through the Commission's May 19, 2021, decision ordering S.A.'s reinstatement, the Commission finds that S.A. is not entitled to any back pay as he failed to make reasonable efforts to find suitable employment during the period of unlawful separation. Specifically, other than a general statement that he looked on his union's website for work and a general statement from the union that S.A. was in touch with it to seek employment, he has provided no evidence that he made any effort such as to how often he went on his union's website or otherwise contacted the union to seek employment through it. Further, it is not a reasonable contention that between January 9, 2018, and May 19, 2021<sup>5</sup>, there was not one suitable position through his union for which he could apply. *See In the Matter of William Able* (CSC, decided June 12, 2019). Also, it is emphasized that S.A. was not required to secure a position, but he only needed to demonstrate that he made *reasonable* efforts to attempt to secure employment. Regardless, if there were no positions available through his union, then for S.A. to have made a reasonable effort, he needed to seek employment outside of his local union. Further, if comparable engineering positions were not available to him outside his union, then S.A. needed to seek employment for non-engineering positions. While the Commission need not define what a reasonable effort for a suitable position would have been in this matter, clearly not seeking any employment outside his union's website was not a reasonable effort. Additionally, while under *N.J.A.C. 4A:2-2.10(d)4(v)*, the DOC has the burden of proof to establish that S.A. did not make a reasonable effort to find suitable employment, it was not mandatory that the DOC provide other suitable employment opportunities for S.A. during the period in question as S.A.'s Affidavit of Mitigation alone can be used by the DOC to meet its burden. *See In the Matter of Christopher Ferro* (CSC, decided May 18, 2022) and *In the Matter of Christopher Ferro* (CSC, decided November 2, 2022). Additionally, concerning the time after the Commission's May 19, 2021, decision, as S.A. claimed that he was disabled and could not perform the duties of his position, he is not entitled

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<sup>4</sup> This is 15 working days after S.A.'s removal, effective December 19, 2017.

<sup>5</sup> S.A. indicated that he received unemployment compensation for the period of February 4, 2018, to August 18, 2018, in the amount of \$10,600. There is a presumption that the receipt of unemployment benefits evidences that an employee sufficiently mitigated during the period of separation, since searching for employment is a condition to receiving such benefits. However, this presumption may be rebutted where the appellant did not make a diligent effort to seek employment, which is the case here.

to any back pay under *N.J.A.C. 4A: 2-2.10(d)9*.<sup>6</sup> Finally, as S.A. has not returned to work, he is not entitled to any other benefits, such as sick and vacation leave, *etc.*

### ORDER

Therefore, the Civil Service Commission orders that this request be denied.

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 16<sup>TH</sup> DAY OF OCTOBER, 2024




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<sup>6</sup> As S.A. has not returned to work although he was given a reinstatement date, the DOC may wish to pursue steps to separate him from employment.