



STATE OF NEW JERSEY

In the Matter of Keith Martinez,
Hudson County, Department of
Corrections

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2024-582

Request for Back Pay and
Counsel Fees

ISSUED: November 27, 2024 (HS)

Keith Martinez, a County Correctional Police Officer with Hudson County, Department of Corrections, represented by Stuart J. Alterman, Esq., requests back pay and counsel fees in accordance with *In the Matter of Keith Martinez, Hudson County, Department of Corrections* (CSC, decided February 1, 2023).

As background, the appointing authority issued Final Notices of Disciplinary Action (FNDAs) that respectively suspended the petitioner for 60 working days, commencing September 2, 2021, and 90 working days, commencing November 23, 2021, on charges of incompetency, inefficiency, or failure to perform duties; insubordination; inability to perform duties; and neglect of duty. Upon his appeals, the matters were transmitted to the Office of Administrative Law for hearings. Following a consolidated hearing and the Civil Service Commission's (Commission) *de novo* review, the Commission modified the 60 working day suspension to a 40 working day suspension (CSC Docket No. 2022-581) and reversed the 90 working day suspension (CSC Docket No. 2022-582). The Commission ordered that the petitioner be awarded a total of 110 days of mitigated back pay, benefits, and seniority. Because the 90 working day suspension was reversed, the Commission also ordered that the petitioner be awarded reasonable counsel fees for only that matter and ordered that the counsel fees were not to exceed 50% of the total counsel fees for both matters. However, the parties were unable to agree on the amount of back pay or counsel fees due to the petitioner, and the petitioner requested Commission review.

In his request, the petitioner seeks \$31,730.82 in gross back pay. He certifies that for the timeframe covering the 150 working days that he was suspended originally, he collected no unemployment compensation because he was denied such benefits. He also indicates that while suspended, he earned no wages from other employment as a substitute for his lost salary. Instead, the petitioner states, he lived off his savings.

Additionally, the petitioner seeks counsel fees (initially) in the amount of \$26,520.00. Specifically, Mr. Alterman presents an affidavit of services by his law firm Alterman & Associates, LLC, referencing only CSC Docket No. 2022-582 (the 90 working day suspension). In support, Mr. Alterman submits an invoice that is to the attention of the administrator of the Policemen's Benevolent Association's Legal Protection Plan (LPP). The invoice notes that Mr. Alterman performed 46 hours of work; that associate Arthur J. Murray, Esq. performed 42.4 hours of work; and that the hourly rate was \$300.00 for both attorneys (\$300.00 x 88.40 hours = \$26,520.00).¹ Per the affidavit of services, Mr. Murray was admitted to the bar in 1995 and is licensed to practice before the New Jersey Supreme Court, the United States District Court for the District of New Jersey, the Court of Appeals for the Third Circuit, and the United States Supreme Court. The majority of Mr. Murray's practice is litigation, including civil, chancery, commercial, and agency.² The invoice also seeks the following costs: \$20 for the appeal fee; \$42.50 for a photocopy expense; and transcript expenses in the amount of \$247.50.³ The affidavit of services describes the case as "a typical disciplinary matter."

In response, the appointing authority, represented by Andrew B. Brown, Esq., maintains that the request for counsel fees is not supported by a retainer agreement and does not reflect the 50% reduction in fees called for in the Commission's prior decision. Similarly, according to the appointing authority, there is nothing supporting the petitioner's claim that his unemployment insurance claim was denied, and he failed to assert that he made any effort to find gainful employment during the time he was out of work. Accordingly, the appointing authority contends that there is an assumption that no such effort was made.

¹ The invoice also notes that a paralegal performed 1.2 hours of work at an hourly rate of \$100.00. It is noted that *N.J.A.C. 4A:2-2.12* contains no provision regarding compensation for anyone other than an associate in a law firm or a partner or equivalent in a law firm.

² Although the affidavit does not describe Mr. Alterman's qualifications, the Commission takes notice that the website of Alterman & Associates describes him as the firm's primary attorney and that Judiciary records indicate that he was admitted to the bar in 1987. Thus, Mr. Alterman may be deemed a partner or equivalent with more than 15 years of experience in the practice of law.

³ More specifically on transcript expenses, the invoice notes a May 26, 2022 transcript expense for \$300.00 and a June 29, 2022 transcript expense for \$195.00 for total transcript expenses of \$495.00. However, the parties split these transcript expenses, and the appointing authority previously reimbursed the petitioner for half, or \$247.50.

In reply, the petitioner objects to the appointing authority's position that because he lived off savings and did not secure alternative employment, the amount of back pay should be lessened. The petitioner argues that it is exceedingly difficult to find employment when one has to tell the hiring party that one is only looking for temporary work and will definitely be leaving in less than 150 days. The petitioner states that during his suspension, he did inquire with a Newark trucking company as to its need for temporary truck drivers, and the company responded in the negative. It was at that time, per the petitioner, that he decided to use his suspension time to take some vacation and personal time for himself while supporting himself during those suspension days with money from his personal savings.

In support, the petitioner submits a certification from the president of his collective negotiations unit, who certifies that in his eight years as a member of the union executive board, the appointing authority has never, in the context of a suspension case (versus a removal case), sought to reduce or lessen back pay because an individual officer lived off of personal savings during the period of suspension. The president also proffers that requiring an officer to find and secure alternative employment during a period of mere suspension versus a period of removal would be patently unfair and would hoist upon a suspended officer an almost impossible task of trying to convince an employer to undertake the expense of hiring and training an individual for a finite period of time. In the president's view, such a policy also leads to the unanswerable question of what would be the cutoff of being forced to find employment or risk receiving less back pay. Any cutoff, per the president, would be random and artificial.

In reply, regarding counsel fees, the appointing authority states that Mr. Alterman's affidavit of services reflects fees for only a single matter. It argues that the affidavit does not contain any evidence of an agreement to support the claim for fees in excess of those set forth in *N.J.A.C.* 4A:2-2.12(c). Further, according to the appointing authority, because only one invoice has been submitted and the Commission clearly limited counsel fees to 50% of the total for both matters, it is unable to determine whether these fees are appropriate. Moreover, the appointing authority contends, even if the invoice for the second matter is presented, it will be nearly impossible to determine whether there is an overlap on the time entries between the two matters to determine whether the 50% limitation has been reached.

Regarding back pay, the appointing authority argues that it is clear that the petitioner made no effort to find reasonable employment pursuant to *N.J.A.C.* 4A:2-2.10(d)4 as the petitioner's submission completely ignores his obligation to do so. Accordingly, the appointing authority infers that he failed to make any effort to secure employment and is thus not eligible for back pay. *See In the Matter of William Able, City of Newark*, Docket No. A-5106-18 (App. Div. June 14, 2021) (Commission denied an employee back pay where applications for seven positions in three years did not constitute a reasonable effort to secure employment).

Subsequently, the Division of Appeals and Regulatory Affairs requested that Mr. Alterman submit a copy of the LPP and the invoice for the 60 working day suspension (CSC Docket No. 2022-581). In reply, Mr. Alterman did not provide an actual copy of the LPP, but he described its terms as follows. The LPP is a secondary plan as its directives so state. Authorized law firms, such as Alterman & Associates, LLC, only accept LPP payment when allowed per the LPP's directives. If the employee prevails, through a firm's representation, then that firm is allowed to charge its normal hourly rates. If the employee is not successful, then the firm must lower its hourly rates to \$150.00 and can submit its invoice to the LPP for payment. However, there is no signed fee agreement, *per se*. Mr. Alterman also submitted the invoice for the 60 working day suspension. This invoice notes that the attorneys involved performed 54.40 hours of work at an hourly rate of \$150.00 ($\$150.00 \times 54.40 \text{ hours} = \$8,160.00$) and seeks \$20 in costs for the appeal fee. Mr. Alterman urges the Commission to focus on the total number of hours rather than the hourly rate. Thus, he proposes that the setting of counsel fees should proceed as follows. His firm billed a total of 142.8 hours for both matters. Since the Commission limited reimbursement to no more than 50% of the total, setting of counsel fees should be based on 50% of 142.8 hours or 71.4 hours at \$300.00 per hour for a total of \$21,420.00.

In reply, the appointing authority counters that Mr. Alterman's request that the Commission consider the *hours* expended on the two matters rather than the *fees due* "flies in the face" of the Commission's decision, which specifically referred to fees. The appointing authority also questions certain entries on or about the same day describing the same or similar work where the time expended for the matter with the higher fee (the 90 working day suspension) was greater than that expended on the lower-fee matter (the 60 working day suspension):

- On September 1, 2021, a total of 10.2 hours were spent performing the same tasks on both matters: 4.6 hours on the matter on which the fees were lower and 5.6 hours on the matter on which the fees were higher. These tasks were as follows: gather documents provided by the appointing authority; confer with delegate; call to president; office conference with client; review additional docs provided by client; figure out what to do based upon appointing authority treatment of the case and lack of due process.
- On October 15, 2021, a total of 8.5 hours were spent performing the same tasks: 3.9 hours on the matter on which fees were lower and 4.6 hours on the matter on which the fees were higher. These tasks were as follows: review and prepare for phone conference; attend phone conference with judge and adversary; argue over validity of FNDA and discuss discovery issues; teleconference with adversary post conference with court; teleconference with judge; send conference with judge and adversary re issues of consolidation;

review discovery request; draft letter to counsel reinitiating discovery request; call to client, call to delegate.

- On July 7, 2022 and July 8, 2022,⁴ a total of 17.2 hours were spent performing the same tasks – 7.3 hours on the matter on which fees were lower and 9.9 hours on the matter on which fees were higher. These tasks were as follows: review, edit, modify closing; drafting written closing; preparation of final version of written closing and submit to court.

CONCLUSION

Back Pay

Pursuant to *N.J.A.C. 4A:2-2.10(d)*, an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. *N.J.A.C. 4A:2-2.10(d)3* provides that an award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4. Further, *N.J.A.C. 4A:2-2.10(d)4* states that where a removal or a *suspension for more than 30 working days* has been reversed or modified and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts. “Reasonable efforts” may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the employee; the nature of the employee’s public employment; the employee’s skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. *See N.J.A.C. 4A:2-2.10(d)4, et seq.*

Under the above standard, the Commission finds that the appointing authority has sustained its burden of proof. Making inquiry to one prospective employer, then

⁴ The Commission presumes that the appointing authority’s reference to July 7, 2021 and July 9, 2021 was a typographical error as the invoices reflect no entries for those dates.

taking vacation and personal time does not constitute a reasonable effort to secure employment. *See In the Matter of Donald Hicks* (MSB, decided December 20, 2006) (former Merit System Board found that an individual who only presented an affidavit of mitigation containing the names of five potential employers had not demonstrated that he made sufficient efforts to mitigate his damages). The petitioner had an obligation to seek substitute employment in good faith. *See O'Lone v. Dep't. of Human Servs.*, 357 N.J. Super. 170, 184 (App. Div. 2003). The petitioner could have sought employment in any of a number of fields to which he may be suited. In this regard, the Commission notes that an individual is not required to *obtain* employment while attempting to mitigate damages, but merely required to make a good faith effort to *seek* employment. *See In the Matter of Robert Jordan* (MSB, decided June 11, 2008). The totality of the record in this matter clearly indicates that the petitioner did not do so. Therefore, based on the foregoing, the petitioner is not entitled to back pay as he did not make reasonable efforts to mitigate his damages.

The Commission finds it necessary to add the following comments on the certification from the president of the petitioner's collective negotiations unit. The president's indication that in his eight years as a member of the union executive board, the appointing authority has never in a suspension case sought to reduce back pay because an officer lived off personal savings is of no moment because the Commission's role here is to resolve the instant dispute in accordance with the applicable rules. As to the president's suggestion that the Commission can only require reasonable efforts to find suitable employment in cases of removal, he offers no authority for such proposition. The Legislature has provided that the Commission may award back pay to an employee as provided by rule. N.J.S.A. 11A:2-22. N.J.A.C. 4A:2-2.10(d)4, in turn, provides in pertinent part that reasonable efforts are required where the suspension was for more than 30 working days. This regulation provides an administrable rule and has been in place for a number of years. It also both recognizes that some suspensions indeed are of too short a term to realistically require a job search and avoids potential negative economic impacts to appointing authorities. *See* 40 N.J.R. 1402(a) and 40 N.J.R. 4520(a).

Counsel Fees and Costs

N.J.S.A. 11A:2-22 provides that the Commission may award reasonable counsel fees to an employee as provided by rule. 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:2-2.12(c) provides as follows: an associate in a law firm is to be awarded an hourly rate between \$100 and \$150; a partner or equivalent 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 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 is to be awarded an hourly rate between \$175 and \$200. *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: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated; the nature and length of the professional relationship with the employee; and the experience, reputation and ability of the attorney performing the services.

The invoices Mr. Alterman presents are to the attention of the administrator of the LPP. Although he states that the LPP is a secondary plan and that there is no signed fee agreement, *per se*, the Commission has rejected similar arguments and determined that participation in the LPP constitutes a specific fee agreement. *See, e.g., In the Matter of Gary MacDonald* (CSC, decided January 11, 2012), *aff'd on reconsideration* (CSC, decided June 20, 2012); *In the Matter of Francesco Grupico and Roy McLeod* (CSC, decided September 16, 2009). Nevertheless, the Commission finds that Mr. Alterman has not justified counsel fees at the requested hourly rate of \$300 for the 90 working day suspension. Extraordinary time and labor were not expended in the underlying disciplinary matter. The matter was not novel in any way and was no more complex than any of the thousands of disciplinary appeals involving major disciplinary action decided over the years by the Commission. It involved a one-day hearing with three witnesses. In this regard, an appeal of a suspension from employment inherently lacks the legal complexity necessary to justify the hourly rate requested and no unique legal experience is needed. Further, the Commission notes that although there is a fee agreement in place in this matter, that is not sufficient, in and of itself, to award a higher fee than those listed in *N.J.A.C.* 4A:2-2.12. Therefore, based on their respective positions in the law firm, qualifications, and years of experience in the practice of law, a reasonable hourly rate for the 90 working day suspension is \$200.00 for Mr. Alterman and \$150.00 for Mr. Murray. *See N.J.A.C.* 4A:2-2.12(c) and (e). As to the 60 working day suspension, there is no basis to disturb the \$150 hourly rate provided for that matter per the LPP.

Turning to costs, *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. *See, e.g.,*

In the Matter of Monica Malone, 381 N.J. Super. 344 (App. Div. 2005). The appeal fee is not a reimbursable cost as per *N.J.A.C.* 4A:2-1.8(a), this is a processing fee. Thus, only the \$247.50 transcript expense falls within the scope of *N.J.A.C.* 4A:2-2.12(g).

The appointing authority questions billing entries for September 1, 2021, October 15, 2021, July 7, 2022, and July 8, 2022 on the basis that although similar tasks were described for both suspension matters, more time was expended on the higher-fee matter (the 90 working day suspension) relative to the lower-fee matter (the 60 working day suspension). The Commission is not convinced that this in and of itself constitutes any compelling reason to find that entries have been improperly inflated. As such, the Commission declines to disturb the number of hours associated with these entries. However, the Commission agrees with the appointing authority that Mr. Alterman's proposed manner of calculating fees – multiplying the preferred higher hourly rate of \$300.00 by 50% of the total hours billed for both matters – is not appropriate in light of the Commission's prior decision. The Commission proceeds below to the determination of reasonable counsel fees and costs due.

Counsel fees and costs for the 90 working day suspension are as follows:

Mr. Alterman: 46 hours x \$200.00 = \$9,200.00

Mr. Murray: 42.4 hours x \$150.00 = \$6,360.00

Costs: \$247.50

Thus, counsel fees for the 90 working day suspension are \$15,560. Counsel fees requested for the 60 working day suspension are \$8,160.00. Therefore, total counsel fees for both matters are \$23,720.00. Total costs for both matters are \$247.50. Applying the 50% limit per the Commission's prior decision, the petitioner is entitled to reimbursement for **\$11,860.00** in counsel fees and **\$123.75** in costs.

ORDER

Therefore, it is ordered that the appointing authority pay Keith Martinez counsel fees in the amount of **\$11,860.00** and costs in the amount of **\$123.75** within 30 days of receipt of this decision.

It is further ordered that Martinez's request for back pay 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 27TH DAY OF NOVEMBER, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
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and
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