



STATE OF NEW JERSEY

In the Matter of Adam Austino,
Vineland, Police Department

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

CSC Docket No. 2024-2361

Back Pay and Counsel Fees

ISSUED: February 5, 2025 (KMG)

Adam Austino, a Police Captain with the Vineland Police Department (Vineland), represented by Katherine D. Hartman Esq., petitions the Civil Service Commission (Commission) to determine back pay, benefits and counsel fees in accordance with its decision rendered on March 20, 2024.

By way of background, the appointing authority issued a Final Notice of Disciplinary Action removing the petitioner, effective October 21, 2022. Upon the petitioner's appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing. Following a hearing and the Commission's *de novo* review, the Commission found that the petitioner's removal was not justified and ordered his immediate reinstatement. The Commission also ordered mitigated back pay, benefits and seniority from the first date of separation to his reinstatement. Finally, the Commission ordered that the petitioner was entitled to counsel fees as all charges were dismissed.

In the instant matter, the petitioner maintains that, based upon the Commission's March 20, 2024, decision, he is entitled to back pay, benefits, seniority and counsel fees for the full period of his separation from employment. In this regard, he argues that there is no dispute that the gross amount owed to him for back pay is \$85,830 for the period from October 21, 2022 to April 30, 2023, when he was returned to full pay status pursuant to *N.J.S.A. 40A:14-201*. The petitioner maintains that he received \$20,904 in unemployment benefits in 2022 and 2023, and he submits a list of employers he claims he applied to from "10/23" to "1/29," and from "1/29" to "4/27"

he simply states, “Applications via Indeed (Archive deleted).”¹ Therefore, he claims he is owed \$64,926 (\$85,830 in gross pay, minus \$20,904 unemployment benefits) in back pay.

Furthermore, the petitioner argues that he should be awarded interest on the monies owed since March 20, 2024, as the appointing authority failed to immediately reinstate him as ordered in the Commission’s decision.

With regard to counsel fees, the petitioner argues that his attorney is owed \$58,837 (280.18 hours of work, multiplied at a rate of \$210 per hour). In support, Ms. Hartman submits a certification of services. She indicates that she has been an attorney practicing in the area of police discipline for her entire 32-year career. She maintains that this matter was particularly difficult, as there were 14 days of hearing, and three interlocutory appeals were filed with this agency during the pendency of the hearing. Ms. Hartman maintains that the Fraternal Order of Police Legal Protection Plan (Legal Plan) paid her at a rate of \$125 per hour (\$42,418.50) and reimbursed her out-of-pocket expenses. However, she contends that she is entitled to be reimbursed at a rate of \$210, which is less than her \$265 hourly rate.

The petitioner also asserts that the appointing authority has refused to pay his counsel fees as required by the Commission’s decision, since the Legal Plan paid the fees. The petitioner argues that the appointing authority’s position is frivolous and must fail. In this regard, the petitioner notes that the pursuant to *N.J.S.A. 11A:2-22*, the Commission has the authority to order an appointing authority to pay counsel fees and costs. Moreover, he asserts that although he was not directly responsible to pay the legal fees and costs, that, in and of itself, is not a basis to refuse to pay the counsel fees. In this regard, the petitioner notes that he is required to seek counsel fees and costs and reimburse the plan for the same. Finally, the petitioner argues that the appointing authority is not entitled to a windfall simply because he was a member of the Legal Plan.

In response, the appointing authority, represented by William F. Cook Esq., asserts that the petitioner is not entitled to any back pay or counsel fees because the petitioner failed to provide the appointing authority with an affidavit setting forth all income received during the separation, or a “fee application” within 30 days of the Commission’s decision.² The appointing authority maintains that as the petitioner failed to timely provide this information, no legitimate dialogue was possible between them. In this regard, the appointing authority notes that the petitioner did not provide any affidavit of mitigation until May 16, 2024, and a fee affidavit was not

¹ The list was broken out into one-week periods of time. He also indicates that he “researched” a career change to teacher and notes he attended college for a teacher certification from “1/29” through “4/27.”

² These time frames are not jurisdictional but are intended to attempt to get the parties to resolve back pay or counsel fees expeditiously. As such, failing to strictly adhere to this timeframe is not a basis to deny back pay.

received until May 7, 2024. The appointing authority maintains that, even if the “woefully late submissions could be considered,” the petitioner’s request for back pay and counsel fees should be denied.

With regard to the petitioner’s request for back pay, the appointing authority agrees that the \$64,926 (\$85,830 in gross pay, minus \$20,904 unemployment benefits) the petitioner indicate he was owed, is correct. However, the appointing authority maintains that the petitioner has failed to satisfy his duty to mitigate, and thus, he is not entitled to any back pay. In this regard, the appointing authority notes that the petitioner states in his affidavit that “he had no outside income that reduces my back pay entitlement, other than the unemployment benefits I received.” The appointing authority argues that the petitioner was required to set forth all income received during the period of separation, not just income that the petitioner personally believes would reduce his back pay entitlement. Moreover, the appointing authority argues that the petitioner’s claimed mitigation efforts were essentially nonexistent. Specifically, it notes that although he claimed in his affidavit that he submitted various application, he “conveniently states they were destroyed” and he provides no further documentation or information by which it could independently verify his claims. The appointing authority further argues that the petitioner’s list of positions that he has applied for is not sufficient to show that there was a good faith effort to mitigate.

The appointing authority also claims that pursuant to the 180-day rule, he was returned to pay status, effective April 30, 2023. *See N.J.S.A. 40A:14-201*. However, it argues that the petitioner was still required to mitigate after April 30, 2023, and since the petitioner fails to provide any information regarding his mitigation efforts after April 27, 2023, he is not entitled to any back pay award after April 30, 2023. In this regard, the appointing authority claims that the petitioner intentionally omitted his tax returns in an effort to prevent a reduction in his back pay.

As to counsel fees, the appointing authority argues that there was no fee agreement between the petitioner and his attorney as Ms. Hartman was paid by the Legal Plan and that despite the claims of the petitioner’s attorney to the contrary, the petitioner did not incur any legal fees and that the Legal Plan has paid Ms. Hartman in full. The appointing authority further asserts that Ms. Hartman is not entitled to increase the amount of fees greater than those set forth in the agreement. *See N.J.A.C. 4A:2-2.12(d)*. (“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”). The appointing authority argues that Ms. Hartman is contracted under the Legal Plan which sets forth her hourly rate. The appointing authority further asserts that Ms. Hartman should not recover fees connected with Appellate Division proceedings, including interlocutory appeals. It contends that *N.J.A.C.4A:2-2.12*, only permits fees of services in the departmental hearing and before the Commission.

CONCLUSION

Back Pay

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. Pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain their health insurance coverage during the period of improper suspension or removal. *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 online 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. *N.J.A.C.* 4A:2-2.10(d)4. Finally, *N.J.A.C.* 4A:2-2.10(d)5 states that employees 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 the 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 unemployment insurance benefits received.

As to the matter regarding petitioner not submitting his tax returns to the appointing authority, *N.J.A.C. 4A:2-2.10(g)2* states that the petitioner shall submit an affidavit setting for all income received during the separation. Here petitioner submitted an affidavit stating that he has made a good faith effort to find employment and further states that he has had no outside income that reduces his back pay entitlement other than unemployment benefits. Additionally, petitioner has provided his 2022 and 2023 form 1099-G which shows petitioner's unemployment compensation. While petitioner has does not provide his tax returns to the appointing authority, *N.J.A.C. 4A:2-2.10(g)2* makes no reference to which documents must be submitted outside of an affidavit setting for all income received during the separation, which petitioner has complied with. Furthermore, the appointing authority has failed to submit any additional evidence or information that would contradict the petitioner's affidavit.

Importantly, the appointing authority argues that the petitioner failed to sufficiently mitigate during the applicable period. Under *N.J.A.C. 4A:2-2.10(d)4* the determination of whether the employee has made reasonable efforts to find suitable employment will consider all relevant circumstances, including the disciplinary action taken, the nature of the employee's public employment, their skills, education, experience, the job market, available suitable job opportunities, common job-seeking methods, and any other pertinent factors. The burden of proof shall be on the employer to establish that the employee has not made a reasonable effort to find suitable employment. Here, the employer has not made a reasonable effort to show that the petitioner did not make a reasonable effort to find suitable employment, failing to provide sufficient evidence that the petitioner neglected any of the relevant factors outlined. The only effort that the appointing authority made to show that the petitioner did not make a reasonable effort to mitigate is by claiming that the list of job applications that the petitioner provided were insufficient. The Commission disagrees. While not the paragon of organization, the Commission has no reason to question that the petitioner did indeed submit applications. In this regard, it notes that the petitioner's receipt of unemployment benefits supports his job search efforts, and the appointing authority has presented no persuasive evidence to conclude otherwise.

In the instant matter, the parties agree to the proposed amount that the petitioner would receive if he were to receive any back pay. The appointing authority has provided an analysis of the back pay for the petitioner to which he would be paid: \$25,645.15 for back pay during those dates of October 21, 2022; \$53,106.69 for back pay during the dates of January 1, 2023 to April 30, 2023; \$3,631.38 for back pay during the dates of April 30, 2023 and December 31, 2023; and \$3,446.77 for back pay during the dates of January 1, 2024 and March 16, 2024.

Accordingly, the Commission finds that pursuant to *N.J.A.C. 4A:2-2.10*, the petitioner is entitled to back pay for the period from October 21, 2022, to his

reinstatement effective March 16, 2024. Pursuant to *N.J.A.C. 4A:2-2.10(d)*⁵, the petitioner's mitigation period ended on March 16, 2024.³ Accordingly, the Commission finds that the petitioner is entitled to an award of \$85,830 in gross wages the appointing authority has indicated the petitioner was entitled to between October 21, 2022 and March 16, 2024, less a mitigation deduction of \$20,904, based upon the total unemployment benefits the petitioner received between October 21, 2022 and March 16, 2024, totaling \$64,926⁴.

As to interest, the Commission finds no basis to award interest as it is clear that the appointing authority had legitimate reason to question the petitioner's entitlement. Moreover, as he is entitled to back pay only reduced by monies earned from March 20, 2024 to the date of his actual reinstatement, interest is not warranted. *See N.J.A.C. 4A:2-2.10(5)* and *N.J.A.C. 4A:2-2.11*. Although, if it has not already done so, the Commission orders the appointing authority to reinstate the appellant to his position.

Counsel Fees and Costs

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* states that, subject to the provisions of *N.J.A.C. 4A:2-2.12(c)* and *(d)*, the following fee ranges shall apply in determining counsel fees: 1. Associate in a law firm: \$100 to \$150 per hour; 2. Partner or equivalent in a law firm with fewer than 15 years of experience in the practice of law: \$150 to \$175 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 to \$200 per hour. However, 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

³ Normally, as the petitioner was returned to the payroll on April 30, 2023, he would not be entitled to back pay after that period. However both parties agree that certain amounts after that date, to March 16, 2024, would constitute reimbursable back pay.

⁴ The Commission notes that this amount is subject to normal deductions pursuant to *N.J.A.C. 4A:2-2.10(d)*².

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.

In the instant matter, the Legal Plan sets counsel fees at a rate of \$125 per hour. The petitioner argues that despite the Legal Plan paying the counsel fees for the petitioner, the petitioner is still required to seek fees and costs to reimburse the Legal Plan for the said counsel fees under section 18C of the Legal Plan. In addition, the petitioner argues that pursuant to *N.J.A.C. 4A:2-2.12(e)*, the Commission has the discretion to assess fees based on the circumstances of the particular manner, and therefore, the counsel fees should instead be reimbursed at a rate of \$210 per hour, instead of the \$125 as provided for under the Legal Plan. While the assertion that the Commission can assess fees based on circumstances is correct, the petitioner has not presented any compelling reason why the Commission should award an hourly rate higher than the rate prescribed by the Legal Plan. In this regard, while the record in this matter was voluminous, it did not involve any novel legal issues that warrant a higher fee. Therefore, based on the foregoing, the Commission finds that the rate that Ms. Hartman is entitled to be reimbursed at in this matter is the \$125 hourly rate as indicated in the Legal Plan. Thus, the petitioner should be reimbursed counsel fees in the amount of \$35,022.50 (280.18 total hours multiplied by \$125).

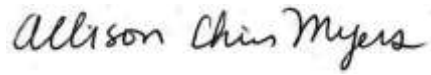
Finally, the Commission notes that the New Jersey Rules of Professional Conduct 1.5(a) clearly state that an attorney must provide “the basis or rate of the fee... in writing to the client.” Here, the Legal Plan clearly sets out the basis and rate of the fee, in writing to the client. It is unclear if the appointing authority was opining that absolutely no fee agreement is in place between the petitioner and Ms. Hartman or if the appointing authority is stating that the agreement in the Legal Plan establishes a fee agreement between the petitioner’s union and Ms. Hartman. Regardless, the appointing authority’s assertion does not disallow petitioner from seeking counsel fees. Therefore, the Commission finds that the petitioner is entitled to reimbursement for \$35,022.50 in counsel fees.

ORDER

Therefore, it is ordered that Adam Austino be awarded gross back pay in the amount of \$64,926 as set forth above within 30 days of the issuance of this decision. Additionally, it is ordered that the petitioner be reimbursed counsel fees in the amount of \$35,022.50 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 5TH DAY OF FEBRUARY, 2025



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