



STATE OF NEW JERSEY

In the Matter of Van Jenkins
CSC Docket No. 2019-201

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Request for Back Pay and Counsel
Fees

ISSUED: OCTOBER 17, 2018 (SLK)

Van Jenkins, a Mechanic with the City of Camden, represented by James Katz, Esq., requests back pay and counsel fees in accordance with the Civil Service Commission (Commission) decision rendered on May 2, 2018.

By way of background, the petitioner was removed for violating the appointing authority's Drug and Alcohol Policy and a second chance agreement. The petitioner appealed his removal to the Commission, which transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case. In its final decision, the Commission reversed the removal and ordered the petitioner's reinstatement be subject to a return to work drug test. Specifically, the Commission ordered that should the petitioner pass the drug test, he should be immediately reinstated and receive back pay from August 30, 2017 to the date of his reinstatement and counsel fees in accordance with *N.J.A.C. 4A:2-2.12*. See *In the Matter of Van Jenkins* (CSC, decided May 2, 2018). Subsequently, the petitioner passed the return to work drug test and was reinstated on June 11, 2018. However, the parties were unable to reach an agreement on back pay and counsel fees.

In the instant matter, the petitioner asserts that he is entitled to back pay from August 30, 2017 to June 11, 2018 (separation period) and reasonable counsel fees. He indicates that his gross salary during the separation period was \$41,507.77¹ based on

¹ The record indicates that the appellant initially indicated that his annual salary was \$53,426 and his gross salary during the separation period was \$41,507.57. Thereafter, the appointing authority stated that his gross salary during the separation period \$46,028.19. Subsequently, the appellant

his annual salary of \$53,426. The petitioner presents that he collected \$17,602 in unemployment benefits and states that if this amount is deducted from back pay, the appointing authority is obligated to pay this money back to State Unemployment to protect him if he is subsequently laid off or separated from employment within the next year and he needs to collect unemployment benefits. In the alternative, the petitioner indicates that he is willing to waive this requirement if the appointing authority agrees to repay all the money to State Unemployment should he need to collect unemployment benefits and his ability to collect is impacted by the appointing authority's failure to repay the benefits. He also states that he is entitled to all vacation, personal days and sick time which he would have otherwise been entitled during the separation period. Further, the petitioner requests that he should be entitled to an extended period of time to use this time, or alternatively, paid in cash for vacation days in which he is unable to use during the remainder of this year. He asserts that since he did not receive any medical benefits during the separation time, health benefits contributions should not be deducted from his back pay. The petitioner submits a certification describing his efforts to secure employment during the separation period in an attempt to mitigate his loss of pay; however, he was unable to secure such employment. With respect to counsel fees, his attorney submits a certification outlining his services which included 114.4 billable hours. His attorney indicates that he is billing \$17,160 for these services based on an hourly rate of \$150 per hour per his contract with the petitioner's union. Additionally, his attorney describes his experience as a partner since 2006 for a law firm that specializes in employment and labor law. Further, his attorney certifies that there was a \$2,570.92 expert fee, \$20 appeal fee and \$64 in travel expenses to and from Hamilton, New Jersey. The total request for counsel fees and costs is \$19,814.92.

In response, the appointing authority, represented by Ilene M. Lampitt, Assistant City Attorney, describes the background in this matter and reiterates the appointing authority's arguments as to why it believes it should not have to pay back pay or reasonable attorney's fees. It indicates that the petitioner's gross pay during the separation period was \$41,507.57.

In reply, the petitioner presents that the appointing authority has not challenged the amount of back pay requested, his mitigation efforts or the amount of attorney's fees. Instead, the appointing authority has made a misplaced argument on the threshold issue as to whether he is entitled to back pay and reasonable counsel fees. However, the petitioner asserts that these issues have already been decided and the appointing authority's dissatisfaction with that decision is not a basis to deny him

stated that his gross salary during the separation period was \$46,028.12. In response, the appointing authority indicated that it made an error and the appellant's salary during the separation period was \$41,507.57. Based on the appellant's gross salary and the 40 weeks and two days that he was separated, the \$41,507.57 figure would appear to be the appellant's accurate gross salary during the separation period.

in this matter. The petitioner requests that appointing authority should be required to make these payments within seven days of the Commission's decision.

CONCLUSION

Initially, it is noted that the appointing authority has not made any arguments or presented any information concerning the issues in this matter. Instead, it reiterates arguments concerning the petitioner's entitlement to back pay and counsel fees. Under *N.J.A.C.* 4A:2-1.6, within 45 days of receipt of a decision, a party to the appeal may petition the Commission for reconsideration. Accordingly, as it well past 45 days from when the Commission issued its prior decision concerning the petitioner's right to receive back pay and counsel fees, the Commission will not consider the appointing authority's arguments in this matter.

In reference to 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. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain his or health insurance coverage during the period of improper suspension or removal. *N.J.A.C.* 4A:2-2.10(d)2 provides that 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. *N.J.A.C.* 4A:2-2.10(d)3 provides, in pertinent part, where a removal has been reversed or modified, 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. *N.J.A.C.* 4A:2-2.10(d)4v provides that that burden on 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)10 provides that funds that must be repaid by the employee shall not be considered when calculating back pay. *N.J.S.A.* 11A:6-3e and *N.J.A.C.* 4A:6.1.2(g) provide, in pertinent part, that vacation leave not used in a calendar year because of business necessity shall be used during the next succeeding year only. *N.J.S.A.* 11A:6-5 and *N.J.A.C.* 4A:6.1.3(f) provide, in pertinent part, that unused sick leave shall accumulate from year to year without limit.

In this matter, the petitioner has represented that the amount of pay that he would have received from the time that he was improperly separated, August 30, 2017, to the date of his reinstatement, June 11, 2018, is \$41,507.57, which the appointing authority has not disputed. Additionally, the petitioner indicates that he collected \$17,602 in unemployment benefits. The appointing authority has also not disputed the petitioner's mitigation efforts. Therefore, the appointing authority shall pay the petitioner \$23,905.57 (\$41,507.57 - \$17,602) less the amount of taxes, social security payments, dues, pension payments, and any other sums normally withheld. If at some future date the petitioner is entitled to collect unemployment benefits and the \$17,602 that he received in unemployment benefits interferes with that award

that he would otherwise be entitled to, the petitioner may petition the Commission to address this issue. As to sick leave, the petitioner is entitled to all sick leave accrued during the separation period, as sick leave can accumulate from year to year without limit. With respect to vacation leave, the petitioner is entitled to carry over unused vacation time in 2017; however, that time must be used by the end of 2018. Similarly, unused vacation leave in 2018 may be carried over, but must be used by the end of 2019. As to personal days, the Commission has no authorization to review benefits provided by the local jurisdiction and not specifically awarded by Title 11A of the New Jersey Statutes Annotated. *See In the Matter of James Nance* (MSB, decided October 1, 2003). In reference to medical benefits deductions, it is noted that the appellant presents that he did not receive any medical benefits during this time period and therefore he is not entitled to any further amounts for costs associated with his maintaining health insurance coverage. Further, in this regard, the appointing authority should not deduct any health benefits contributions from his back pay. Additionally, the appointing authority shall provide the petitioner with a full accounting of its deductions and pension contributions when it makes its payment to the petitioner. *See In the Matter of Ronald Dorn* (MSB, decided December 21, 2005).

With respect to counsel fees and costs, *N.J.A.C.* 4A:2-2.12(c) provides, in pertinent part, that a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between \$150 and \$175; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with 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 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(g) provides that reasonable out-of-pocket costs, such as costs associated with expert witnesses, subpoena fees and out-of-state travel, shall be awarded. However, costs associated with normal office overhead shall not be awarded.

In this matter, the petitioner requests \$17,160 for 114.4 hours of legal services rendered from September 11, 2017 through September 11, 2018 based on his attorney's negotiated rate of \$150 per hour with his union. Further, the petitioner's counsel is an experienced partner in a law firm that has a practice concentrated in employment and labor law. As such, the Commission finds it appropriate to award the petitioner counsel fees in the amount of \$17,160. Additionally, the Commission awards the petitioner \$2,570.92 for expert fees. However, the petitioner is not entitled to \$64 in travel expenses to and from Hamilton, New Jersey as only out-of-state travel expenses are to be awarded. Further, the petitioner is not entitled to the

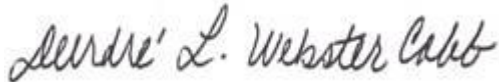
\$20 appeal fee as this is a non-reimbursable processing fee under *N.J.A.C. 4A:2-1.8(a)*. See *In the Matter of Vincent Fiscella, Jr.* (CSC, decided March 27, 2018).

ORDER

Therefore, it is ordered that the appointing authority pay the petitioner gross back pay in the amount of \$23,905.57. Additionally, the appointing authority shall pay the petitioner's attorney counsel fees in the amount of \$17,160 and costs in the amount of \$2,570.92. The back pay, counsel fees and costs shall be paid within 30 days of the issuance of this decision. If the appointing authority fails to comply within the prescribed time frame, beginning the 31st day after issuance of this decision, it shall be assessed a fine of \$100 per day for each day of continued violation up to a maximum of \$10,000.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17th DAY OF OCTOBER, 2018



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