



STATE OF NEW JERSEY

In the Matter of William
Hendrickson, Jr., Department of
Community Affairs

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

CSC Docket No. 2019-1725

Request for Back Pay

ISSUED: FEBRUARY 27, 2020 (SLK)

William Hendrickson, Jr., represented by Arnold S. Cohen, Esq., requests back pay, seniority, benefits and a salary adjustment.

By way of background, the appeal of William Hendrickson, Jr., an Inspector 1, Fire Safety with the Department of Community Affairs, of his removal, on charges, was before Administrative Law Judge Caridad F. Rigo (ALJ), who rendered her initial decision on December 21, 2015, recommending modifying the removal to a six-month suspension. As the Civil Service Commission (Commission) did not have a quorum at the time, the ALJ's recommended decision was deemed adopted as the final decision per *N.J.S.A. 52:14B-10(c)*. Thereafter, this agency issued a March 21, 2016 letter indicating that since the appellant's removal had been modified, he was entitled to back pay, benefits and seniority for the period six months after the onset of his separation until he was actually reinstated.¹

In his request, the appellant presents that he was terminated on September 4, 2014 and reinstated on October 15, 2018.² He submits a list of jobs that he applied for while unemployed. However, he indicates he was unable to find a steady job. The appellant indicates that he earned \$18,255.13 in employment and received \$15,652

¹ Due to appeals to the New Jersey Superior Court, Appellate Division and the New Jersey Supreme Court and the Commission's prior lack of quorum for matters involving the International Federation of Professional and Trade Engineers (IFPTE), the current decision has been delayed.

² Personnel records confirm that these were the dates of his separation and reinstatement.

in unemployment benefits for a total of \$33,907.13 while unemployed. Additionally, the appellant presents that he is currently being paid at the rate that he was paid in 2014, which is \$52,502.84, or Step 3 of the salary schedule. He asserts that he should be paid at the 2018 rate, which is \$61,327.00, Step 7 of the current salary schedule based on his accrued seniority after serving his suspension. Additionally, the appellant indicates that he has not received any accrued vacation, sick days, personal time, his annual clothing allowance or seniority for the time he was out after serving his suspension.

In response, the appointing authority, represented by Steven M. Gleeson, Deputy Attorney General, disputes that it owes back pay. It states that the ALJ's initial decision did not order back pay. The appointing authority presents that while the ALJ modified the disciplinary penalty that the appellant received, going from removal to a six-month suspension, she did not order any back pay. Further, due to the Commission's lack of quorum, the ALJ's decision was deemed adopted. It argues that because the ALJ's initial decision modified the disciplinary penalty rather than reversed it, no decision was made regarding back pay. The appointing authority cites *N.J.A.C. 4A:2-2.10(a)*, which states that, "the Commission shall award back pay, seniority or restitution of a fine" where the penalty "has been reversed." In contrast, where a penalty "is modified" then "such items may be awarded." Therefore, it argues that the plain language of this regulation requires back pay only when the penalty has been reversed. The appointing authority argues that when an employee has his or her penalty modified then pay back is permitted but not required. Additionally, it argues that according to *N.J.A.C. 4A:2-2.10(a)*, the Commission itself, and not its staff, must order the back pay and it is not aware any Commission decision or order awarding back pay in the present matter.

In reply, the appellant states that it is not true that the Commission did not order back pay as it ordered back pay in its March 21, 2016 letter.

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, in pertinent part, 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. It further indicates:

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.

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:2-2.10(g) provides that if settlement on an amount cannot be reached, either party may request, in writing, Commission review of the outstanding issue.

Initially, the Commission notes that the appointing authority has not cited any case where an employee's removal has been modified to a suspension, where the employee was not entitled to back pay from the end of the suspension period until reinstatement subject only to the limitations found in *N.J.A.C. 4A:2-2.10(d)*. In this regard, its arguments in regard to *N.J.A.C. 4A:2-2.10(a)* are misplaced. Regardless, even assuming the sufficiency of that argument, in this case, it is clear that the appellant is entitled to back pay from the period after his six-month suspension to his reinstatement. In this regard, the New Jersey Supreme Court found that the appellant's infraction was not worthy of removal and that he was required to be reinstated to employment. *See In the Matter of William R. Hendrickson, Jr.*, 235 N.J. 145 (2018). Accordingly, as indicated in this agency's March 21, 2016 letter, since the appellant's removal has been modified, he is entitled to back pay, benefits and seniority for the period six months after the onset of his separation, which was on September 4, 2014, until his reinstatement, which was on October 15, 2018. Further, the Commission finds that the appellant has made sufficient mitigation efforts and his back pay award shall be reduced only by \$33,907.13, which is the total amount that the appellant certifies that he received for employment and unemployment benefits during the mitigation period, plus other deductions that are normally withheld. Additionally, the appellant's back pay award shall be calculated to include increments and across-the-board adjustments and his current salary shall be adjusted to a rate that includes increments and across-the-board adjustments.

As to benefits, the appellant is entitled to all accrued sick time from the date after the suspension up to his reinstatement, since sick leave can accumulate from

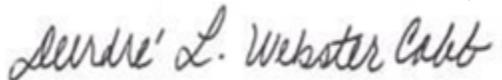
year to year without limit. *See N.J.S.A. 11A:6-5 and N.J.A.C. 4A:6-1.3(f); See also, In the Matter of John Raube, Senior Correction Officer, Department of Corrections, Docket No. A-2208-02T1 (App. Div. March 30, 2004).* Regarding vacation time, upon his reinstatement, the appellant was entitled to carry forward over his 2017 allotment only since vacation leave not taken in a given year can only be carried over to the following year. *See N.J.S.A. 11A:6-3(f) and N.J.A.C. 4A:6-1.2(f); See also, In the Matter of Donald H. Nelsen, Jr., Docket No. A-2878-03T3 (App. Div. February 4, 2005); In the Matter of John Raube, Senior Correction Officer, Department of Corrections, Docket No. A-2208-02T1 (App. Div. March 30, 2004).* Further, the appellant is not entitled to “personal” days as administrative leave that is not used during the calendar year is forfeited. *See N.J.A.C. 4A:6-1.8(e).* Finally, the appellant is not entitled to receive a retroactive clothing allowance for the time he was not working for the appointing authority. *See N.J.A.C. 4A:2-2.10(d).*

ORDER

Therefore, it is ordered that the appellant’s request for back pay, seniority and benefits is granted as described above. The appellant’s request for accrued personal days and a retroactive clothing allowance is 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 26th DAY OF FEBRUARY, 2020



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