



STATE OF NEW JERSEY

In the Matter of Richard Morales,  
Newark School District

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

CSC Docket No. 2020-2659

Request for Back Pay

ISSUED: SEPTEMBER 18, 2020 (SLK)

Richard Morales, a Supervising Plumber with the Newark School District (NSD), represented by Anthony Pope, Esq., requests that the Civil Service Commission (Commission) enforce its order of back pay as determined in *In the Matter of Richard Morales* (CSC, decided January 15, 2020).

By way of background, Morales was removed effective March 6, 2019.<sup>1</sup> Thereafter, in *In the Matter of Richard Morales* (CSC, decided January 15, 2020), the Commission adopted the Administrative Law Judge’s recommendation to modify the removal to a 30 working day suspension. Additionally, the Commission ordered that the appointing authority send Morales to diversity training. Further, the Commission ordered that Morales be granted back pay, benefits and seniority from the conclusion of the 30 working day suspension until the actual date of reinstatement. Subsequently, in *In the Matter of Richard Morales* (CSC, decided March 12, 2020), the Commission granted the NSD’s request for reconsideration, but reaffirmed its January 15, 2020 decision.

In his request, Morales presents that he was unemployed for nine months. He represents that prior to his employment with the NSD, he was self-employed as a

<sup>1</sup> The Commission’s decision indicates that Morales’ removal was effective, March 4, 2019. However, the parties in this matter indicate that his removal was effective March 6, 2019, which is consistent with the Final Notice of Disciplinary Action.

plumber. Morales indicates that even during his employment with the NSD, he worked as a self-employed plumber after school hours and on the weekends. He states that he could not collect unemployment benefits due to his self-employment. Additionally, Morales indicates that he could not find new or part-time employment with a different plumbing company due to his self-employment. He presents that his gross income from self-employment was \$25,800 in 2018 and \$25,000 in 2019. Morales also states that he applied to work for the Nutley Board of Education, but he was not selected for the position. He represents that he made a net profit of \$3,000 to \$8,000 from self-employment while working for the NSD.

Morales states that on February 4, 2020, he submitted his Affidavit of Mitigation to the NSD explaining his self-employment, his attempts to grow the business which he started in 2011, and the monies earned during the mitigation period. He indicates that the NSD responded on May 1, 2020, which is after the 60 day period to resolve back pay as ordered in the Commission's January 15, 2020 decision, that he did not mitigate his unemployment because he did not seek other employment or the assistance of an employment service. Therefore, he argues that the NSD waived its right to dispute back pay and seeks full back-pay for the nine months. Additionally, Morales submits a July 6, 2020 Affidavit of Mitigation to the Commission for the period of March 1, 2019 until his reinstatement on December 20, 2019. He indicates that he was self-employed during this time and made \$3,744 in 2018 and \$20,528 during the nine-month period he was not employed with the NSD. Morales states that he grew his business by \$16,784. Further, considering his typical \$3,500 per year in self-employment, he presents that he mitigated his back pay by at least \$13,000. He reiterates that he could not collect unemployment due to his self-employment.

In response, the NSD, represented by Bernard Mercado, Esq., asserts that Morales did not meet his obligation to mitigate damages as he conceded in his affidavit that he did not seek employment. Additionally, it presents that he has not provided his 1040 tax return to identify the total amount of income he received for the Commission to determine mitigated back pay. Further, the NSD argues that his enforcement action is 10 days beyond the time permitted and should be dismissed. It presents cases where the Commission denied back pay where the appellant did not make sufficient efforts to mitigate. The NSD indicates that Morales' gross salary during the 2018-2019 school year was \$87,997 (\$338.45 daily rate) and \$89,453 (\$344.05 daily rate) for the 2019-2020 school year. It presents that Morales was separated on March 6, 2019 and reinstated on January 15, 2020, which was 83 days at his 2018-2019 salary and 142 days at his 2019-2020 salary. Therefore, the NSD indicates that his gross salary during the time of separation was \$28,091.35 for 2018-2019 and \$48,855.10 for 2019-2020 for a total \$76,946.45 of unmitigated gross salary, minus all standard salary and tax deduction. Also, it states that since Morales does not claim that he expended any monies to maintain his health insurance, no reimbursement is owed to him.

The NSD presents 18 job postings during the separation time, four of which were public entities, where Morales could have applied. Additionally, he could have attended this agency's employment fair. It argues that Morales' self-employment does not eliminate his need to seek employment to mitigate damages. Additionally, his admission that he could not receive unemployment benefits is logical as one can only collect unemployment if one makes a good faith effort to seek employment. Moreover, it contends that Morales' statement that he did send one resume to a public entity during the separation period is an admission that he needed to actively engage in seeking outside employment to mitigate. Also, while he claims he could not apply to private employers while he had his own business, there was nothing to stop him from seeking employment from another public employer.

Concerning his personal tax returns, the NSD presents that Morales has failed to show how much income he earned during his separation in 2019 as he failed to produce his Form 1040 to show how much income he earned from any source. Additionally, although Morales produced his Schedule C Profit or Loss filing, it states that this form is not even signed or accompanied by a Form 9325 that confirms e-filing with the IRS and is not accompanied by the addendums that explain its detail. Further, the NSD presents that Morales indicated in his original certification that he only received \$25,000 in gross income in 2019 while his Schedule C indicated gross income of \$101,679 in 2019, which is more than his gross pay of \$79,946.45 and, therefore, undermines his claim for back pay.

Regarding Morales' statement about the NSD's timeliness, the Commission did not decide its reconsideration motion until March 13, 2020. Therefore, the NSD response on May 1, 2020 was well within the 60-day time for it to respond to the back-pay award. Further, under the 60-day time-period, Morales was required to file his request for enforcement by May 12, 2020. Therefore, his May 22, 2020 request for enforcement should be dismissed for not being timely based on Morales' own reasoning.

In reply, Morales presents that he took reasonable efforts to expand his business. He argues that Commission cases define "reasonable efforts" to include reviewing classified advertisements in newspapers, applying for suitable positions, attending job fairs, visiting employment agencies, networking with other people, and distributing resumes. Morales states that he used reasonable efforts to mitigate his back pay by networking with other people, word of mouth from clients, advising his network that he is available to take on more timely cases, and distributing his business card, including to people at The Home Depot. He presents that the determination as to whether the employee made reason efforts is based on the circumstances. In this case, the circumstances involved a self-employed individual trying to grow his business. He submits his Schedule C tax forms from 2018 and 2019 to show that he grew his business by \$17,000, which was 600% growth, during the mitigation period. Morales asserts that the NSD cited older cases to support its position that he needed to apply for jobs during his suspension. However, he argues

that this matter is distinguishable from those cases as this matter involves an individual who was self-employed and worked diligently to grow his business. Morales presents that his salary during his suspension was \$79,946.45 and he mitigated his damages by at least \$13,000 through self-employment. Therefore, he claims he is owed approximately \$63,964 from the NSD. Morales states that the NSD has provided no legal authority for its position that growing one's business, as opposed to seeking third-party employment, is not a sufficient effort to mitigate his back pay under these circumstances. Further, he did not actively apply to public sector jobs because he did not believe he could secure one based on the outstanding allegations against him. Additionally, Morales indicates that he did not apply for private sector jobs because such jobs would be in competition with his efforts to grow his business. As requested by the NSD, he submits his full 1040 tax forms. He asserts that he was not late in filing his motion to enforce back pay as he was under the impression that he would receive back pay after the Commission's March 13, 2020 decision. It was only after he was reinstated in April and he started to receive a pay check did he realize that he was not receiving back pay. Thereafter, Morales' counsel reached out to the NSD on April 24, 2020, and it responded on May 1, 2020. Therefore, he argues that the 60-day period did not start until May 1, 2020 and his motion to enforce his back pay award was well within the 60 day time frame.

In further response, the NSD asserts that since this agency directed that all submissions be submitted by June 24, 2020, Morales' reply is late and should not be considered by the Commission. It reiterates its argument that Morales' failure to actively seek outside employment and instead focus on his self-employment, does not meet his obligation to mitigate his back pay award. NSD presents that the cases that it cited are within the past 10 years, are cited by the Commission and his argument that its position is not supported by legal authority is without merit. It states that Morales' argument that he should receive full back pay regardless of his self-employment income would provide him a windfall in the form of a double salary, which is clearly not intended by statute, case law or the Commission. The NSD contends that his statement about his seeking private employment was a self-created "conflict of interest," which is without any basis in law and does not justify why he did not seek public employment.

The NSD states that Morales' tax returns are incomplete for the relevant period. Further, the tax returns show that he received more income than he originally claimed in his affidavits without any breakdown as to what he earned versus what his wife/join filer earned, which inhibits the ability to determine exactly how much additional income was earned during the relevant period. It asserts that without W-2s or additional documentation as to what his individual earnings were, there is no way to determine how much additional income he earned during the separation to calculate a mitigated back pay award. The NSD states that if the Commission attempts to determine his back pay without this additional information, then all income should be imputed to him. It also argues that despite Morales' claim that his \$101,679 income earned during his separation is a gross amount not to be

used ahead of his net income after tax deductions, the law is clear that back pay awards are determined by gross amounts earned, not amounts after taxes are taken. Therefore, if the Commission is going to use his self-employment income for mitigation purposes, the NSD argues that he is not entitled to back pay because he earned more income than he would have received during his separation.

In reply from a request from this agency, Morales clarifies that after accounting for the 30 working day suspension as ordered by the Commission, he is entitled to 53 days of back pay based on his 2018-2019 salary and not 83 days. Additionally, he clarifies that he did receive back pay from January 15, 2020 until his reinstatement in April 2020, and he did not earn any income in 2020 prior to January 15, 2020.

### CONCLUSION

*N.J.A.C.* 4A:2-2.10 provides, in pertinent part, that:

- (a) 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.

\* \* \*

- (d) 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.

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.

5. An employee shall not be required to mitigate back pay for any period between the issue date of a Civil Service 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.

\* \* \*

7. If an employee also held other employment at the time of the adverse action, the back pay award shall not be reduced by earnings from such other employment. However, if the employee increased his or her work hours at the other employment during the back pay period, the back pay award shall be reduced by the earnings from such additional hours.

\* \* \*

10. Funds that must be repaid by the employee shall not be considered when calculating back pay.

- (e) Unless otherwise ordered, an award of back pay, benefits and seniority shall be calculated from the effective date of the appointing authority's improper action to the date of the employee's actual reinstatement to the payroll.

\* \* \*

Initially, regarding any comments made by the parties concerning the timeliness of their responses, the Commission finds that both parties have acted in a timely manner. In this regard, the "60 days" referred to is neither statutory or regulatory and is a standard imposed by the Commission to try to facilitate the settlement of back pay issues. However, the Commission will not dismiss a valid claim for back pay, or the valid submission of information, arguments or documents from either party in such a matter based on the purported time period.

With respect to the Morales' mitigation efforts, there is no mandatory obligation that the only acceptable manner that an employee can mitigate an award of back pay is to seek employment from a third party. Instead, under *N.J.A.C. 4A:2-2.10(d)4iv*, the determination as to whether the employee has made reasonable efforts to find suitable employment shall be based on the totality of the circumstances. In this matter, Morales already had a plumbing business prior to his suspension. Further, Morales' 2018 tax return indicates that in 2018, his gross sales from this business were \$25,700, his cost of goods sold was \$18,200 and his gross income was \$7,500. Additionally, his 2019 tax return indicates that his gross sales from this business were \$101,679, his cost of goods sold was \$62,429 and his gross income was \$39,250. Therefore, given that Morales already had an established business that was suitable based on his experience and skillset as a plumber, and based on his efforts to grow that business as evidenced by him increasing his gross sales by approximately four times and his gross income by approximately five times, the Commission finds

that Morales' efforts to mitigate his back pay through self-employment, rather than seeking third-party employment, were reasonable under the circumstances.

Referring to the mitigation amount, based on Morales' 2019 tax return, which includes a Profit and Loss Statement, and his certification and follow-up clarification, the Commission finds that Morales earned \$39,250 during the mitigation period, which was his 2019 gross income. Other expenses for his business are not to be used to further reduce his self-employment income as only gross income is to be considered under *N.J.A.C. 4A:2-2.10(d)4* and not profit for tax purposes. Additionally, it is noted that contrary to the NSD's claim, separate tax documentation for Morales' wife's income is unnecessary as Morales has certified that his sole source of income was from his self-employment and additional tax forms from his 2019 tax return are also unnecessary as the Profit and Loss Statement, which includes gross sales and cost of goods sold, provides the necessary information to provide gross income. Moreover, as Morales already had an established business prior to his separation and only income that is an increase in employment is to be considered for mitigation purposes, the Commission finds that Morales' mitigation amount is to be reduced by his gross income from self-employment in 2018, which was \$7,500 based on his 2018 tax return's Profit and Loss Statement. *See N.J.A.C. 4A:2-2.10(d)7*. Therefore, the Commission finds that Morales' mitigated his back pay award by \$31,750 (\$39,250 - \$7,500).

Concerning the back pay amount, the record indicates that Morales' unmitigated salary during the back pay time period is \$66,792.95, which is based on 53 days at the daily rate of \$338.45 for the 2018-2019 school year, which is \$17,937.85, and 142 days at the daily rate of \$344.05 for the 2019-2020 school year, which is \$48,855.10. Therefore, the Commission finds that Morales is owed gross back pay in the amount of \$35,042.95 (\$66,792.95 - \$31,750).

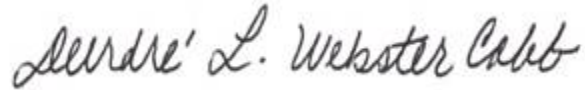
### **ORDER**

Therefore, the Commission grants Richard Morales gross back pay in the amount of \$35,042.95. The Newark School District shall submit payment, subject to the provisions of *N.J.A.C. 4A:2-2.10(d)2*, to Morales within 30 days of the receipt 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 DAY 16<sup>th</sup> OF SEPTEMBER, 2020



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Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
Division of Appeals  
& Regulatory Affairs  
Civil Service Commission  
Written Record Appeals Unit  
P.O. Box 312  
Trenton, New Jersey 08625-0312

c: Richard Morales  
Anthony Pope, Esq.  
Nafisah Hunter  
Bernard Mercado, Esq.  
Records Center