

In its de novo review of a disciplinary matter, the Merit System Board has exclusive jurisdiction to determine the proper penalty and is not bound by any provision contained in a collective bargaining agreement. In re Hayes, OAL Dkt. No. CSV 5089-05, 2006 N.J. AGEN LEXIS 210, Merit System Board Decision (January 25, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 635) adopted, which found that where a plumber's driver's license was suspended for a period of 10 years, requiring the appointing authority to either change the plumber's duties or utilize additional personnel to drive him to specified locations, would have been an unreasonable burden to place on an employer for 10 years; because the plumber was unable to perform his duties the appointing authority had good cause to conclude that his return to work was not appropriate. Nevertheless, termination was modified to a resignation in good standing where the parties agreed that the plumber was a good plumber, had satisfactory evaluations, and never had a problem with his work or attendance, and termination would have precluded the plumber from seeking future public employment. In re Seitz, OAL Dkt. No. CSV 2889-05, 2005 N.J. AGEN LEXIS 1083, Final Decision (December 7, 2005).

Initial Decision (2005 N.J. AGEN LEXIS 338) adopted, which found that 30 working-day suspension, rather than 12 working-day suspension, was warranted where a correction officer failed to follow policies, procedures, and rules when he permitted an unauthorized transfer from a prisoner's assigned cell to permit him to share a cell with another prisoner. In re Miller, OAL Dkt. No. CSV 2033-04, 2005 N.J. AGEN LEXIS 1181, Final Decision (September 7, 2005), aff'd per curiam, No. A-0653-05T1, 2006 N.J. Super. Unpub. LEXIS 2123 (App.Div. Oct. 18, 2006).

Receipt of second copy of final notice of disciplinary action did not extend time for filing appeal. *Russ v. Human Services Department*, 95 N.J.A.R.2d (CSV) 647.

County sheriff's officer was required by settlement agreement to submit to psychiatric examinations. *Petescia v. County of Essex*, 92 N.J.A.R.2d (CSV) 388.

4A:2-2.10 Back pay, benefits and seniority

(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.

(b) Where a municipal police officer has been suspended based on a pending criminal complaint or indictment, following disposition of the charges the officer shall receive back pay, benefits and seniority pursuant to N.J.S.A. 40A:14-149.1 et seq.

(c) Where an employee, other than a municipal police officer, has been suspended based on a pending criminal complaint or indictment, following disposition of the charges the employee shall receive back pay, benefits and seniority if the employee is found not guilty at trial, the complaint or indictment is dismissed, or the prosecution is terminated.

1. Such items shall not be awarded when the complaint or indictment is disposed of through Conditional Discharge, N.J.S.A. 2C:36A-1, or Pre-Trial Intervention (PTI), N.J.S.A. 2C:43-12 et seq.

2. Where disciplinary action has been taken following disposition of the complaint or indictment, such items shall not be awarded in case of removal. In case of suspension, where the employee has already been suspended for more

than six months pending disposition of the complaint or indictment, the disciplinary suspension shall be applied against the period of indefinite suspension. The employee shall receive back pay for the period of suspension beyond six months, but the appointing authority may for good cause deny back pay for the period beyond the disciplinary suspension up to a maximum of six months.

(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 and holiday premium pay.

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.

6. Should a Civil Service Commission decision reversing or modifying a removal or reversing an indefinite suspension subsequently be stayed, an individual shall be required to mitigate an award of back pay from the date of the stay through the date of actual reinstatement, in accordance with (d)4i through v above.

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.

8. A back pay award is subject to reduction by any period of unreasonable delay of the appeal proceedings directly attributable to the employee. Delays caused by an employee's representative may not be considered in reducing the award of back pay.

9. A back pay award is subject to reduction for any period of time during which the employee was disabled from working.

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.

(f) When the Commission awards back pay and benefits, determination of the actual amounts shall be settled by the parties whenever possible.

(g) If settlement on an amount cannot be reached, either party may request, in writing, Commission review of the outstanding issue. In a Commission review:

1. The appointing authority shall submit information on the salary the employee was earning at the time of the adverse action, plus increments and across-the-board adjustments that the employee would have received during the separation period; and

2. The employee shall submit an affidavit setting forth all income received during the separation.

(h) See N.J.A.C. 4A:2-2.13 for situations in which certain law enforcement officers or firefighters have appealed a removal that has been reversed or modified.

Amended by R.1992 d.414, effective October 19, 1992.

See: 24 N.J.R. 2491(a), 24 N.J.R. 3716(a).

Redesignated part of existing text in (a) to (d); added new (b)-(c); redesignated existing (b)-(d) to (e)-(g).

Amended by R.1997 d.435, effective October 20, 1997.

See: 29 N.J.R. 3102(a), 29 N.J.R. 4455(b).

Inserted new (d)4; and recodified existing (d)4 as (d)5.

Amended by R.2008 d.215, effective August 4, 2008.

See: 40 N.J.R. 1402(a), 40 N.J.R. 4520(a).

Rewrote (d)3 and (d)4; added new (d)5 through (d)9; and recodified former (d)5 as (d)10.

Special amendment, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).

See: 41 N.J.R. 2720(a).

Substituted "Commission" for "Board" and "Civil Service Commission" for "Merit System Board" throughout; and added (h).

In accordance with N.J.S.A. 52:14B-5.1c, special amendment R.2009 d.221 expires on December 28, 2010.

See: 42 N.J.R. 693(a).

Case Notes

On a backpay claim where a State employee has been removed from employment due to his or her own misconduct but is later reinstated, the availability of substitute employment is relevant to the establishment of a failure-to-mitigate defense by the appointing agency, and the employee's failure to seek substitute employment during separation is not a sufficient basis to deny the claim without any consideration of the availability of such employment. *O'Lone v. Department of Human Services*, 357 N.J. Super. 170, 814 A.2d 665.

Regulation applies in those circumstances where employee has been completely exonerated of the criminal charges, yet there is basis for disciplinary suspension despite employee's exoneration. *Walcott v. City of Plainfield*, 282 N.J. Super. 121, 659 A.2d 532 (A.D.1995).

Merit System Board's adoption of rules regarding back pay for police officers during periods of nondisciplinary suspension requires public notice of anticipated action. *DelRossi v. Department of Human Services (Police)*, 256 N.J. Super. 286, 606 A.2d 1128 (A.D.1992).

Police officer was not entitled to back pay and benefits during period of nondisciplinary suspension resulting from criminal charges. *DelRossi v. Department of Human Services (Police)*, 256 N.J. Super. 286, 606 A.2d 1128 (A.D.1992).

Merit System Board must exercise power to award back pay for periods of nondisciplinary suspension through rule making. *DelRossi v. Department of Human Services (Police)*, 256 N.J. Super. 286, 606 A.2d 1128 (A.D.1992).