

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 180-03

ORDER ON REMAND FROM CAREER SERVICE BOARD

IN THE MATTER OF THE APPEAL OF:

EDWARD J. MAES, Appellant,

vs.

DENVER SHERIFF'S DEPARTMENT, DEPARTMENT OF SAFETY,
and the City and County of Denver, a municipal corporation, Agency.

On April 4, 2006, this appeal was remanded to the Hearing Officer by the Career Service Board for a show cause hearing and an evidentiary hearing to determine the amount of back pay due to the Appellant. The matter was heard by Hearing Officer Valerie McNaughton on May 13 and 19, 2008. Based upon the following findings of fact and conclusions of law, the below order is entered in this matter:

I. Procedural History

On Nov. 10, 2003, Appellant Edward J. Maes was terminated from his position as a Deputy Sheriff Captain by the Denver Sheriff's Department (Agency). After a hearing on Appellant's appeal of that action held in June 2004, the termination was reversed, and the penalty modified to a four-week suspension. On August 3, 2005, the Career Service Board upheld reversal of the termination, but modified the penalty to a demotion to the position of Deputy Sheriff.

On April 4, 2006, this appeal was remanded to the Hearing Officer by the Career Service Board for a hearing to determine the amount of back pay due to the Appellant. The matter was held in abeyance pending the outcome of Appellant's civil action in Denver District Court. That action concluded with an order affirming the decision of the Career Service Board on June 5, 2007, and the appeal was reset for hearing on the issues remanded from the Board.

II. Exhibits and Stipulations

The parties stipulated to the following exhibits: Agency's exhibits 7 – 10, and Appellant's exhibits C – K. Agency exhibits 2, 4 – 6, 11, 12, and Appellant exhibits A, B, O, P and R were admitted during the hearing.

The parties stipulated to the following facts:

1. The period of time for which back pay must be determined is the date of Appellant's termination, Nov. 10, 2003, to the date of his reinstatement to the position of Deputy Sheriff, which occurred on August 15, 2005.

2. Collective bargaining agreements (CBAs) set the annual salary for a Deputy Sheriff at \$48,684 for 2003, \$50,724 for 2004, and \$52,248 for 2005. [Exh. 8-29.]

3. In addition to his salary, Appellant is entitled to collect longevity pay at the rate of \$2,100 per year.

4. Appellant is entitled by contract to collect a uniform allowance of \$450 for 2004, and a balance of \$37.50 remaining for 2003. The Agency has already paid Appellant \$450 in uniform pay for 2005.

5. Appellant is entitled by contract to a shift differential of 75 cents per hour if he works a shift which includes certain hours.

III. Issues

1. What is the amount of back pay due to Appellant based on his termination from Nov. 10, 2003 to August 15, 2005, including base pay, and amounts due under the collective bargaining agreement for longevity, uniform allowance, holidays, sick, vacation, overtime, and off-duty earnings?

2. Should back pay be offset by Appellant's interim earnings, failure to mitigate his damages, unavailability to work based on loss of his driving privileges, or his request for a continuance in these appeal proceedings?

IV. Findings of Fact and Conclusions of Law

Appellant submitted a chart which he prepared as a settlement document on his claim to base and other pay. Appellant calculated the numbers included under the columns for holiday pay, shift differential, lost off duty income and overtime pay as estimates and/or compromise figures in order to achieve settlement without a hearing. [Exh. A]. The Agency submitted a summary of sick and vacation leave accruals and its calculation of back pay due. [Agency's Summary of Setoffs; Agency's Summary of Leave Accruals, filed May 19, 2008].

A. Back Pay

i) Lost Salary

The parties agreed by stipulation that Appellant would have received \$50,724 in salary if he had worked in 2004. They also stipulated that he lost income from Nov. 10 to

Dec. 31, 2003 at an annual salary rate of \$48,684. The amount of that lost income for 2003 is \$6,956.19 (\$48,684 divided by 52 weeks times 7.43 weeks¹). The parties stipulated that Appellant lost income from Jan. 1 to Aug. 14, 2005 was at the annual salary of \$52,248. Thus, lost salary for 2005 is \$32,584.67 (\$52,248 divided by 52 weeks times 32.43 weeks²). Appellant's total lost salary for the period of his removal is \$90,264.86.

ii) Longevity Pay

It is undisputed that Appellant would have received as longevity pay the amounts of \$350 in 2003, \$2,100 in 2004, and \$1,225 in 2005, a total of \$3,675. [Exh. A.]

iii) Shift Differential

Appellant testified that he was working the two a.m. to noon shift at the time of his termination, and he would have continued to bid that shift based on his preference to get evenings off, and to work with the deputies on the early shift that he knew and trusted. Based on his eighteen years of seniority and his knowledge of other staff's seniority, he believes he would have continued to rank in the top 5% of employees in terms of seniority in the period between his termination and reinstatement. Since assignments were based on seniority, Appellant was of the opinion that he would have been able to win any shift on which he bid. The applicable CBAs grant an additional \$.75 per hour in pay for employees working that shift, as it includes the hours of 4 to 5 a.m. [Exhs. 7-29; 8-32.] Appellant claims he would have earned an additional \$3,170.50 from Nov. 2003 to Aug. 2005 as a result of shift differential pay. [Exh. A.]

Appellant admitted on cross-examination that he was not assigned to the early morning shift when he was returned to work in August 2007, and that he has not successfully bid that shift, or his preferred assignment at the jail, since that time. The Agency does not question Appellant's calculation of shift differential pay, but argues that his ability to successfully bid that shift was speculative.

Appellant's inability to maintain his preferred morning shift when reinstated tends to prove either that he did not maintain his favorable bidding status because of a change in his seniority relative to other staff, or that he was negatively affected by his discipline or long absence. I do not consider the effect of his absence on his ability to bid, since his termination has been overruled. However, it is possible that staffing changes occurring from late 2003 to mid-2005 would have affected Appellant's ability to bid his preferred early morning shift. It is also possible that the Agency determined that its needs required Appellant's change of assignment to the hospital on a different shift not of his choosing. If

¹ There are 7.43 weeks between Nov. 10, the date of Appellant's termination, and Dec. 31, 2003.

² There are 32.43 weeks between Jan. 1 and Aug. 14, 2005, the day before Appellant's reinstatement.

so, Appellant would not have earned the claimed shift differential.

The Department awards shifts during an annual bidding process under the CBA. It is reasonable to conclude that Appellant would have maintained his favorable bidding rights for the 2004 contract year, even if he had been demoted immediately in 2003 rather than being removed from the workplace, as I must assume for purposes of determining lost back pay for the demoted position. I find that it is more likely than not that whatever conditions caused Appellant's reassignment in mid-2005 also existed at the beginning of the 2005 bidding process. Therefore, I find that Appellant would have been able to continue to bid and work the 2 a.m. to noon shift until Jan. 1, 2005. It appears that the correct annual increase for shift differential is \$1,608.75 per year, which is \$.75 times 2,145, the number of hours worked by deputy sheriffs in a year. Thus, the shift differential for 2003 is \$222.90 (7.43 weeks times 40 hrs/wk times .75/hr). The shift differential for 2004 is \$1,608.75 (2145 hrs/yr times .75/hr.). Total lost shift differential is \$1,831.65.

iv) Uniform Allowance

Appellant was entitled under the CBA to \$37.50 for 2003 and \$450 for 2004 as a uniform allowance, which totals \$487.50.

v) Holiday Pay

Appellant testified that he consistently attempted to work as many hours as possible in order to maximize his base pay for retirement purposes. Deputy Sheriff Michael Jackson corroborated that testimony by his observation that Appellant "was always working." The Agency presented no contrary evidence.

Holidays are paid at the rate of time and a half the base rate of pay for Appellant's ten-hour shift. [Exhs. 7-16, 8-16.] The CBA sets base pay as the annual salary plus longevity and shift differential pay, divided by 2,145 hours. [Exh. 7-9, 7-16; testimony of Appellant.] Appellant's Exhibit A calculated that he would have worked four holidays in 2003, ten in 2004, and seven in 2005, for a total of \$7,392. During cross-examination, Appellant admitted three mistakes on that exhibit, which reduced the number of holidays in 2003 and 2005 by one day each, but added one day for 2004. Specifically, Appellant admitted that there was no election day in 2003, that there were eleven, not ten, holidays in 2004, and that he was on vacation on Labor Day in 2005, and therefore did not work that holiday. The Agency did not dispute this corrected evidence, but asserted that the contract only allows payment for holidays actually worked.

Back pay awards are based upon pay and benefits lost because of an agency action determined to be improper under the Career Service Rules. The award is not dependent on a finding that the pay was actually earned under the contract, only that it would have been earned absent the overruled agency action.

I find that Appellant would have worked a total of 20 holidays during the relevant

time period, and therefore Appellant would have earned \$1,099.35 in holiday pay in 2003. (Base pay is \$48,684 + \$2,100 longevity pay + \$1,608.75 shift differential = \$52,392.75, divided by 2145 hours per year equals \$24.43 per hour. [Exh. 7-9, 7-27.] The hourly rate of \$24.43, times 15 (1 1/2 times 10-hour shift), times 3 holidays equals \$1,099.35 in holiday pay for 2003.)

I find that Appellant would have earned \$4,187.70 in holiday pay in 2004. (Base pay is \$50,724 + \$2,100 longevity pay + \$1,608.75 shift differential = \$54,432.75, divided by 2145 hours per year = \$25.38 per hour. [Exh. 7-9, 7-27.] That hourly rate of \$25.38, times 15 hours per day, times 11 holidays, equals \$4,187.70.)

I find that Appellant would have earned \$2,348 in holiday pay in 2005. (Base pay is \$52,248 + \$2,100 longevity pay³ = \$54,348, divided by 2145 hours per year = \$25.34 per hour. [Exh. 8-4, 8-29]. \$25.34 x 15 hours per day x 6 holidays = \$2,280.60.) Therefore, the total holiday pay Appellant would have earned if allowed to work all desired holidays is \$7,567.65.

vi) Overtime

Appellant testified, and several witnesses corroborated, that Appellant consistently worked overtime to maximize his pay and base pay for retirement. Appellant stated he worked an average of ten hours a week of overtime, for which he earned pay at the contract rate of time and a half. Appellant estimated his overtime losses for settlement purposes at \$20,964 for the period he was removed from his employment.

I find that Appellant would have worked at least ten hours of overtime a week for the time period at issue. Based on the above hourly rates of pay, lost overtime for 2003 was \$2,722.72 (\$24.43/hr. x 15 (time and a half for 10 hours) x 7.43 weeks). In 2004, Appellant lost \$19,796.40 in overtime pay (\$25.38/hr. x 15 x 52 weeks). In 2005, lost overtime for the 32.43 weeks before Appellant was returned to work was \$12,326.64 (\$25.34/hr. x 15 x 32.43 weeks). I find that total lost overtime for that period was \$34,845.76.

vii) Off-duty Employment

Appellant estimated for settlement purposes that he lost \$16,800 in income from off-duty security assignments for outside employers based on his termination from his position in the Sheriff's Department. The Agency argues that such income is not recoverable, since its source would have been a third party, not the Agency.

The authority of the Career Service Hearing Office to award back pay is derived from CSR § 19-55, which requires a decision affirming, modifying or reversing the agency action challenged by the appeal. An action is modified or reversed only if it is not

³ I have found that Appellant is not entitled to shift differential for the year 2005, and therefore no amount is included in the calculation of base pay for that year.

warranted under the Career Service Rules. When an agency termination decision is modified to a demotion, all direct results of that agency action must likewise be modified. Those results include reinstatement to the demoted position, restoration of lost pay at the rate applicable to the new position, and payment of benefits lost as a result of the termination. Compare Lanes v. State Auditor's Office, 797 P.2d 764, 766-67 (Colo.App. 1990) (decided under the Colorado State Personnel System).

In contrast, ordinary contract damages for breach of an employment agreement are broader in scope. "The normal remedy focuses upon the employee's reasonable expectations based on the promises made by the employer." Tobias Lit Wrong Discharge Claims § 8:02, citing Murray on Contracts, § 221, p. 442 (1974). The Hearing Office lacks jurisdiction to award damages for breach of contract, including consequential damages arising from Appellant's expectations of opportunities for secondary employment based on his status as a Deputy Sheriff. Reversal of the Agency action focuses only on the direct results of that action alone, and not damages flowing from the parties' expectations of earnings from third parties. As a result, Appellant's request for lost income arising from lost secondary employment opportunities from companies desirous of hiring deputy sheriffs for private security assignments is denied.

Therefore, Appellant's total pay for salary, longevity pay, shift differential, uniform allowance, holiday pay and overtime is \$138,672.41.

B. Offsets from Back Pay

Appellant claims that CRS § 8-2-119(1) prohibits an employer from offsetting any amounts from a back pay award other than amounts awarded for unemployment benefits. Appellant cites Hanover v. Barbour, 171 P.3d 223 (Colo. 2007) in support of this argument. That case was decided under a statute that was held to supersede the common law duty to mitigate damages in the event a school board fails to provide a probationary teacher with timely notice of its decision not to renew the teacher's contract for the following school year. Hanover, *supra* at 230; Teacher Employment, Compensation, and Dismissal Act (TECDA), CRS § 22-63-203(3). Appellant has cited no similar statute that may be applicable to this appeal.

Moreover, the Hanover court did not rely on CRS § 8-2-119(1) in its determination that the teacher had no duty to mitigate. Instead, it cited with approval "the general, long-held proposition that in contract disputes between employers and employees, where employees are wrongfully terminated, they have an obligation to mitigate damages." Fair v. Red Lion Inn, 943 P.2d 431 (Colo.1997); Corfman v. McDevitt, 142 P.2d 383 (1943); Saxonia M. and R. Co. v. Cook, 4 P. 1111 (1884).

The Supreme Court has upheld a federal district court's decision not to offset unemployment compensation benefits from back pay under the National Labor Relations Act. "Since no consideration has been given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received." N.L.R.B. v.

Gullett, 340 U.S. 361 (1951). The Tenth Circuit affirmed a similar ruling, noting a district court decision that distinguished between payments made by an employer, which may be offset, and "awards by the state in furtherance of a separate social policy." As to the latter, it was held that the trial court did not abuse its discretion in failing to offset the amount of the award. "[T]his reasoning was particularly persuasive in that case because under the application Colorado Employment Security Act, Section 8-73-110(2), C.R.S. 1973, an employee who receives an award of back pay must repay the Colorado Division of Employment and Training all benefit payments made for the period during which a back pay award was received." E.E.O.C. v. Sandia Corp., 639 F.2d 600, 625 (10th Cir. 1980), citing Pedrayra v. Cornell Prescription Pharmacies, Inc., 465 F.Supp. 936 (D.Colo. 1979).

The statute cited by Appellant likewise requires repayment of unemployment awards to the Division of Employment, albeit by the employer, not the employee. The apparent intent of the law is to assure credit back to the unemployment compensation fund from back pay awards, rather than to limit offsets from back pay, in contravention of the common law on damages. In keeping with the common law, offsets from back pay awards under the Career Service Rules are not limited by C.S.R. § 8-2-119.

i) Partial payment

Appellant concedes that he received a check for \$8,974.00 dated Aug. 19, 2005 that he understood was an advance payment of lost back pay. [Exh. 10.] Therefore, that amount will be subtracted from the back pay award.

ii) Interim earnings

The employer has the burden to prove the defense of failure to mitigate damages by evidence that the employee failed to take reasonable steps to minimize his damages. C.R.C.P. 8(c); Fair v. Red Lion, *supra*. Failure to mitigate is excused if mitigation would require inordinate or unreasonable measure or if there were reasonable grounds for the failure. Berger v. Security Pac. Info. Sys., Inc., 795 P.2d 1380, 1385 (Colo.App. 1990). What constitutes reasonable efforts to mitigate is a question of fact. Fair v. Red Lion, *supra*.

The Agency claims that it is entitled to an offset for Appellant's interim wages earned to replace his lost income from the Sheriff's Department. Appellant earned \$8,592 in 2004, and \$36,911 in 2005, a total of \$45,503. I find that Appellant earned these amounts as replacement income for his salary at the Sheriff's Department, and that back pay will be offset by Appellant's interim earnings in the amount of \$45,503.

iii) Imputed earnings for failure to mitigate

The Agency claims it should receive an offset for amounts Appellant could have earned if he had made reasonable efforts to mitigate his damages. Appellant argues that he was unable to find employment in the law enforcement field, his chosen career,

despite his efforts to do so, because the Agency's publicity about the discharge caused damage to his reputation for integrity within the law enforcement community. Appellant presented into evidence an article headlined, "Links to gang alleged in firing: Jailer accused of ties to Mexican Mafia kin". [Exh. R, Rocky Mountain News, Dec. 5, 2003.] The article implied that Appellant fraternized with gang members and secretly removed a gang database from the crime unit. Appellant testified that former Undersheriff Fred Oliva held a press conference about the allegations against him, and local television Channel 4 did a story on his termination. Shortly after his termination and during his efforts to find employment, Appellant was informed by one police agency that law enforcement "wouldn't touch me" unless the allegations were overturned. Appellant concluded that he would have to seek employment in a different line of work, although his work experience and skills were in law enforcement.

Appellant earned \$8,592 in 2004 and \$36,911 in 2005 from the installation of home security alarm systems and various temporary jobs. Appellant testified that he sent numerous applications for open positions to security firms, restaurants, airlines and other companies, spoke to different law enforcement agencies, attended four job fairs, searched the internet for job opportunities, and submitted resumes to various companies who had positions matching his experience and skills. [Exhs. B – K.] Appellant testified that he was eager to find replacement income in order to support himself and assist his daughter with college expenses, but that he was unsuccessful. He stated that his inability to help caused a breach with his daughter. Because his income was insufficient for his needs, he took cash out of his deferred compensation account, and ultimately filed for bankruptcy protection.

I find that Appellant made reasonable efforts to mitigate his damages. The publicity surrounding his discharge constitutes reasonable grounds for his failure to find comparable work in the field of law enforcement and sufficient replacement income. Therefore, imputed earnings will not be offset against the back pay award.

iv) Deduction for period when Appellant lost driving privileges

The Agency argues that Appellant was disqualified from employment with the Sheriff's Department from Jan. 29, 2004, the date on which his license was suspended, until Nov. 3, 2004, when his license was reinstated. A valid driver's license is a requirement "for the duration of employment" as a Deputy Sheriff. [Exh. 2-5]. As a result, the Agency contends that Appellant's back pay should be offset by the amount of earnings covering the period of suspension, and that he should not be credited with vacation and sick leave for that time.

Appellant testified that he had a traffic accident while driving in January 2004. He learned during a traffic stop on Oct. 28, 2004 that his license was suspended as a result of that accident. Appellant did not receive notice of that suspension prior to that day. On Nov. 3, 2004, Appellant's driving privileges were reinstated after he filed a request for reinstatement and proof of insurance at the Department of Motor Vehicles. As a member of the Fraternal Order of Police, Appellant assisted other officers whose driving privileges

had been suspended. In those instances, the Agency would place the officers off duty, and would permit the officers to take personal leave to obtain reinstatement. After reinstatement, the officers were allowed to continue their employment. If an officer was not able to get his driver's license back, the Agency would reassign him to a position that did not require driving. Appellant presented the testimony of one former deputy sheriff who lost his license, was disqualified, and accepted a demotion to an administrative support position. [Testimony of Maurice Oroy.]

The evidence indicates that the suspension was based on Appellant's failure to submit proof of insurance after an accident, which may be quickly remedied by submission of proof of current insurance coverage. Appellant testified that he would not have waited any longer than necessary to obtain reinstatement of his driving privileges based on his need to drive, and that it took him less than a week to resolve the problem once he learned of it. The Agency presented no evidence that Appellant would have been disqualified for the entire period of his suspension if he had been at work.

I find that the Agency did not establish grounds for an offset of back pay for the period of suspension. In addition, the Agency is not entitled to offset sick or vacation leave hours for the period from Jan. 29, 2004 to Oct. 28, 2004 based on the suspension. The Agency may offset Appellant's vacation leave balance from Oct. 29 to Nov. 3, 2004 to cover the time Appellant would have needed to obtain reinstatement of his driving privileges.

v) Deduction for delay caused by continuance

On Feb. 4, 2004, Appellant sought a continuance of the hearing in this appeal, which was set for Feb. 18th, in order to complete discovery. No specific date or period of time was requested. The Agency had previously requested a short extension to file its prehearing statement due in part to the complexity of the appeal, and it did not object in February to Appellant's request for continuance. The matter was not reset for hearing until March 17, 2004, at which time it was scheduled for June 9, 2004, a delay of almost four months. After the decision was issued in October 2004, both parties sought review in various forums over the course of the next three and a half years, and unsuccessfully pursued settlement discussions. The hearing on back pay did not commence until May 19, 2008, over four years after the request for continuance.

The Agency asserts that Appellant should be charged with the four-month delay based upon his need for a continuance. It supports that argument by pointing to Appellant's Exhibit P, which shows that Appellant's discovery request was not made until January 27, 2004, a few days before the continuance request.

During the four-year procedural history of this litigation, both parties have taken actions that have lengthened the time to ultimate resolution. The Agency has the burden to prove its right to an offset from back pay. There is no evidence that Appellant sought a delay of four months in order to obtain discovery from the Agency. In fact, the new hearing dates were set by the Hearing Office. The Agency has not established that

Appellant's motion for continuance was made in bad faith or for the purposes of delay, or that it otherwise justifies an offset from back pay. Therefore, back pay will not be offset by pay due between Feb. 18 and June 9, 2004.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency is ordered as follows:

1. To pay to Appellant the amount of **\$84,195.41** in back pay, and
2. To adjust Appellant's vacation and sick leave balances in accordance with this order, without offset for the period during which Appellant's driving privileges were suspended except as indicated in this order.

Done this 20th day of June, 2008.

Valerie McNaughton
Career Service Hearing Officer