COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION
One Ashburton Place
Boston, MA 02108
(617) 727-2293

JOSEPH McDOWELL,
Appellant

v.

CITY OF SPRINGFIELD,
Respondent

D-05-148

RULING ON MOTION TO CLARIFY ORDER ON REMAND

On March 24, 2011[1], the Civil Service Commission ("Commission") allowed Mr. McDowell's appeal in part such that his April 15, 2005 termination of employment as a provisionally promoted Deputy Director of Maintenance in the Parks, Buildings and Recreation Management Department was modified to a 6-month suspension from April 15, 2005 to October 15, 2005, he was reinstated to his permanent civil service position as a Carpenter for the time period from October 16, 2005 to his indictment on April 13, 2007 for tax law violations, and he was terminated from his employment as a Carpenter on November 27, 2007 when he was convicted of tax law violations.

The Respondent appealed the Commission decision to Superior Court, which affirmed it. City of Springfield v. Civil Service Commission and McDowell, Hampden Superior Court, C.A. #2010-0697 (May 2, 2012). The Respondent filed an appeal in the Appeals Court and the Supreme Judicial Court transferred the appeal to its own docket. The Supreme Judicial Court affirmed Mr. McDowell's termination but reversed the Superior Court's ruling in part, holding that the Respondent did not have the authority to suspend Mr. McDowell without pay upon his mere indictment for filing false tax returns. Specifically, the Court determined,

> McDowell was not properly suspended during the period from October 15, 2005, the date on which the six-month suspension ordered by the commission would have been completed, to November 27, 2007, the date of McDowell's conviction. The case is remanded to the Superior Court for entry of an order remanding the case to the commission for further proceedings consistent with this opinion.
> City of Springfield v. Civil Service Commission and another, 469 Mass. 370, 383 (2014).

[1] The initial decision in this case was issued on May 6, 2010 effective July 1, 2010. The Respondent subsequently filed a motion for reconsideration of the Commission's decision. Mr. McDowell filed an opposition thereto. On March 24, 2011, the Commission revised its May 6, 2010 decision.

Pursuant to the Supreme Judicial Court's decision, the Hampden Superior Court issued a decision providing, " It is ORDERED and ADJUDGED: That judgment is hereby entered reversing the ruling of the Civil Service Commission and remanding the case to the Civil Service Commission for further proceedings consistent with the opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts." City of Springfield v. Civil Service Commission and McDowell, Hampden Superior Court, C.A. #2010-00697 (October 6, 2014). I note that the Supreme Judicial Court reversed the Commission decision in part only, as noted above.

As a result of the ruling of the Superior Court decision remanding this case to the Commission, on February 29, 2015 the Commission ordered,

> "That Mr. McDowell's employment is terminated effective November 27, 2007. In addition, Mr. McDowell's reinstatement, "without loss of compensation or other rights" pursuant to G.L. c. 31, s. 43, to the position of Carpenter prior to his termination is hereby revised from the period from October 16, 2005 to April 13, 2007 to the period from October 15, 2005 to November 27, 2007. Since the Commission previously ruled that Mr. McDowell was deemed reinstated until April 13, 2007 and was to compensate him until that time, this decision requires the Respondent to compensate Mr. McDowell for the period from April 13, 2007 to November 27, 2007 to the extent it has not otherwise done so."

On March 10, 2015, the Appellant filed a Motion to Clarify Order on Remand (Motion to Clarify) "… to require that the Respondent … compensate Mr. McDowell for the period from October 15, 2005 to November 27, 2007 at a Carpenter's rate[]…" and that " … [t]he City has advised the Appellant that it will not compensate the Appellant based on the Order of Remand but will seek further proceeding (sic) before the Commission. …" Id. Specifically, the Appellant states that the Respondent objects to payment because the Order on Remand does not specify the amount to be paid notwithstanding the Respondent's own calculation that the base pay to be paid is $119,585.28.[2] The Appellant adds that he is due 7.5 weeks of vacation pay for 2006 and 2007 and thirty (30) days of sick time for 2006 and 2007. By email dated April 4, 2015, the Appellant states more specifically that he is owed $8,124 for vacation pay and $6,499 in sick time pay. I held a status conference on the Motion to Clarify in Springfield on April 8, 2015 at which I ordered the Appellant to produce tax records to indicate any income he received for the pertinent period he was not paid by the Respondent in order to identify any mitigation of the compensation to be paid to the Appellant and I ordered the Respondent to produce the sick leave and vacation provisions of the collective bargaining agreement for the pertinent time (Agreement between the City of Springfield/Springfield Finance Control Board and Springfield Public Building Tradesmen Association, Effective Date: July 1, 2006, Termination Date: June 30, 2009 (CBA)). The parties' documentation was due on April 29. The Appellant produced certain tax records and the Respondent produced certain provisions of the CBA in a timely manner.

[2] The Respondent computed this amount by indicating that the Carpenter base pay at the pertinent period of time was $27.08 per hour, that Carpenters worked forty (40) hours per week and that the pertinent time period was 110 weeks plus two (2) days. Motion to Clarify, Exhibit A.

I held a phone status conference on April 29, 2015 to assess the parties' progress in determining the amount to be paid to the Appellant by the Respondent in view of the information they had produced. The Respondent averred that the tax documents provided by the Appellant were insufficient, confusing and that they conflicted with information in the criminal case involving the Appellant's tax reporting conviction, precluding determination of the amount the Appellant earned from his contracting business at the pertinent time and, therefore, determination of the amount to be paid to the Appellant after mitigation. At my suggestion, the Respondent indicated that he would depose the Appellant to inquire about the tax documents he had produced. The deposition was conducted in or about June 17, 2015. A transcript of the deposition, including referenced exhibits[3], was filed at the Commission. The deposition transcript indicates the Appellant's criminal conviction required him to pay the IRS $57,800 for underreporting his income to the IRS in 2000 through 2004. Transcript, pp. 32-34. The deposition transcript further indicates that in 2006 the Appellant earned $11,943 from his contracting business in 2006 and $2,911 in 2007 from his contracting business. The tax documents for 2005 show no discernable income from the Appellant's contracting business that year. The parties submitted memoranda at the end of July stating their respective positions regarding the amount of compensation to be paid to the Appellant in view of the information obtained through the deposition.

The parties' positions after the deposition regarding the amount of compensation to be paid to the Appellant remain essentially unchanged. They agree only that the base pay for the pertinent time is $119,585.28. The Appellant continues to aver that he is entitled to compensation for lost base pay (without mitigation), as well as vacation and sick leave time. The Respondent asserts that the Appellant was obliged to mitigate his lost base pay and to compensate the Appellant for vacation and sick leave would compensate the Appellant twice for those leave days since the base pay would compensate him for the entire pertinent time period, whether he was working or on vacation or sick leave during that period. Further, the Respondent argues that the CBA precludes compensation for unused vacation and sick leave when an employee is terminated as here[4]. The CBA provides the following regarding vacation and sick leave,

> 26.6A **Effective July 1, 2001**, upon retirement or death of an Employee irrespective of the position held, shall be paid at the rate of thirty ($30.00) dollars per day for all sick leave accrued by said employee at the time of the Employees (sic) death while in the service of the Employer, or retirement from municipal service. …
>
> 26.8 Sick leave payments and credits shall automatically terminate on the date of the retirement or separation from service of the Employer of an Employee.

[3] There were five (5) exhibits to the deposition: 1) a 2007 document (apparently from the criminal case against the Appellant) listing the amount of income the Appellant reported in the years 2000 – 2004; 2) IRS report regarding the Appellant's 2005 taxes (showing income only from the Respondent); 3) the Appellant's 2006 IRS filing; 4) IRS report regarding the Appellant's 2006 taxes; and 5) the Appellant's 2007 IRS filing.

[4] The Respondent does not dispute the number of vacation and sick leave days for which the Appellant asserts that he is entitled to compensation.

If an Employee is terminated for reasons other than fault of his own and subsequently reinstated or re-employed, within two (2) years, he shall be credited with accrued sick leave due at the time of termination. …

26.4 In July, 1982 and on the last working day of each calendar month for the duration of this AGREEMENT, each member of the bargaining unit shall be credited with 1.25 days of sick leave, provided that anything herein to the contrary notwithstanding, in any calendar month in which an Employee accumulates three (3) or more separate absences, due to illness and/or any unauthorized absence whether with or without pay, such Employee shall not accrue such credit for that month. …

33.1 All Employees regularly employed shall be granted an annual vacation of not less than ten working days without loss of pay, provided, however, that all Employees who have never been discharged or who have never voluntarily left the employ of the Employer and who have a total period of five (5) years (sic) service in the aggregate shall be granted an annual vacation of fifteen (15) working days without loss of pay; provided, further that Employees who have never been discharged and who have a total period of ten (10) years or more of service in the aggregate shall be granted an annual vacation of twenty (20) working days without loss of pay in the aggregate …

A person shall be deemed to be 'regularly employed' within the meaning of this Section if he has actually worked for the EMPLOYER for thirty (30) weeks during the twelve (12) months preceding the first day of January in such year. …

33.3 Whenever the employment of any person subject to ARTICLE 33 is terminated during a year by dismissal through no fault or delinquency on his part, or by resignation, retirement or death, without his having been granted the vacation to which he is entitled under ARTICLE 33, he, or in the the-case (sic) of his death, his beneficiary, shall be paid at the regular rate of compensation payable to him at the termination of his employment, an amount in lieu of such vacation; provided, that no monetary or other allowance has already been made therefor. …

(CBA)(emphasis in original)

The Appellant avers that the Respondent bears the burden of proof on the issue of mitigation of damages, the Respondent failed to elicit evidence of mitigation at the underlying Commission hearing and, therefore, the Respondent waived the opportunity to obtain such evidence. Further, the Appellant states that he " … dedicated no additional time, post-discharge[]" to his contracting business which may be deducted from his compensation in mitigation. Appellant's Memorandum. On the issues related to mitigation, the parties dispute the effect here of the decisions in McKenna v. Comm. of Mental Health, 346 Mass. 674 (1964), Maynard v. Royal Worcester Corset Co., 200 Mass. 1 (1908), Sheriff of County v. Jail Officers and Employees of County, 465 Mass. 534 (2012), Kaltsas v. Duralite Co., 4 Mass.App.Ct. 634 (1976) and Kroeger v. Stop & Shop Co., 13 Mass.App.Ct. 310 (1982).

Under the Maynard decision in 1908, it was determined that even if the private sector employer had the burden of proof that the former employer found that the plaintiff "… either

found, or, by the exercise of proper industry in the search, could have procured other employment of some kind reasonably adapted to his abilities …." Id. at 6. Maynard involved a Plaintiff whose private sector employment was terminated without cause and did not involve a collective bargaining agreement. In McKenna, relying on the decision in Maynard, the court held that a public employee seeking to recover back salary in connection with a writ of mandamus ordering reinstatement to his job, cannot "voluntarily remain idle and expect to recover the compensation stipulated in the contract from the other party." Id. at 676. However, the McKenna court also adopted the rule that when a discharged employee fails to make the appropriate effort to mitigate damages, the employer could have shown what the former employee could have earned in other similar work. Id. at 677. In the instant case, and unlike in McKenna, the Appellant produced certain income information. In Sheriff of Suffolk County, also relying on Maynard, the Court found that the public employer had waived the ability to seek mitigation of the employee's compensation claim because the employer did not raise the issue within ninety (90) days of the arbitrator's decision, pursuant to G.L. c. 150C, ss. 11 and 12. Id. at 592-93. That statute is distinguishable from the instant case inasmuch as this case does not involve arbitration. In addition, the time period for which Mr. McDowell is to be compensated for termination of his employment prior to his conviction has varied through the Commission's decision, the decision of the Superior Court, and the decision of the Supreme Judicial Court. The Supreme Judicial Court remanded the case to the Superior Court "for an entry of an order remanding the case to the commission for further proceedings consistent with this opinion" and the Superior Court subsequently similarly remanded the case to the Commission. *Supra*. As in the Kaltsas court case, income earned by a former private sector employee from family businesses while he also worked for Duralite, cannot be used to offset backpay unless the amount they earned from the family business increased after they were fired by Duralite. Id. at 636. Mr. McDowell, like the plaintiff in Kaltsas, had been conducting his personal contracting business when he was employed by Springfield, although Mr. McDowell avers that he only conducted his personal contracting business after the business hours of the City of Springfield. However, the plaintiff in Kaltsas had an employment contract that explicitly allowed for non-competing employment at the time he was employed by Duralite. Further, there was no collective bargaining agreement referenced in Kaltsas. In addition, Mr. McDowell has no record of income beyond his city employment in 2000 – 2005, having been convicted of failing to report income 2000 to 2004. Mr. McDowell has reported income from his contracting business in 2006 and 2007. Having not reported income from his contracting business in 2005, as indicated in his deposition, Mr. McDowell cannot now, under these circumstances, argue that he earned less in the pertinent time period here, October 15, 2005 to November 27, 2007, than he earned in 2000 to 2005. Therefore, Kaltsas is distinguishable. In Kroeger, a former corporate vice president was allowed " … to recover certain retirement benefits under a deferred compensation agreement with a forfeiture for competition clause…" which clause the court found too onerous. Id. p. 310. Unlike the instant case, the former employee's termination in Kroeger "involv[ed] no misconduct", nor an interpretation of a collective bargaining agreement. Id.

This Commission has also addressed the topic of mitigation. Specifically, in Almeida v. New Bedford School Committee, 23 MCSR 608 (2010), the Commission stated,

> It is also a well–established principle of common law that an injured party is obliged use reasonable, honest and good faith efforts to mitigate any loss suffered by another party's

wrongful actions; although the level of effort that meets the duty to mitigate is not "onerous and does not require success", it does require "reasonable diligence". *See, e.g.*, Assad v. Berlin-Boylston Reg. Sch. Comm., 406 Mass. 649, 656-57 (1990); Conway v. 5 Electro Switch Corp., 402 Mass. 385, 389 (1998); Tosti v. Avik, 400 Mass. 224, 227-28, *cert.den.*, 484 U.S. 964 (1987). *See also* Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir.1983), *cert.den.,* 466 U.S. 950 (1984); Denton v. Boilermakers Local 29, 673 F.Supp. 37, 46-47 (D. Mass. 1987), citing Nat'l Labor Rel. Bd. v. Cashman, 223 F.2d 832 (1st Cir. 1955).

This duty of mitigation is also consistent with the principles of civil service law that an employee seeking equitable relief for a violation of his civil service rights is expected to act reasonably whenever possible to minimize the consequences of the alleged violation of those rights pending a determination of the claim. *See, e.g.*, Act of 1993, c.310 (equitable relief available when appellant's civil service rights are infringed provided appellant establishes that his injury has be caused "through no fault of his own"); Leary v. Town of South Hadley, 22 MCSR 366 (2009)(the proper response to a disputed order is to "obey and grieve"); Ouellette v. City of Cambridge, 19 MCSR 299 (2006)(same). (Id.)

In view of the foregoing, I find that the Respondent is not barred from seeking mitigation of the amount it is to compensate the Appellant, it met its burden such that the compensation to be paid the Appellant is mitigated by $11,943, which is the amount that the Appellant reported to the IRS as income in 2006, and $2,425.80, which represents the ten months in 2007 that the Appellant would have worked prior to being terminated on November 27, 2007.[5] Given the Respondent's minimal income reported in mitigation in 2006 and 2007 and no income from the Appellant's income in 2005, not to mention the Appellant's conviction for failing to report income 2000 to 2004, I am not persuaded that the Appellant used 'reasonable, honest and good faith efforts to mitigate any loss suffered', nor that the harm to him was 'through no fault of his own', under Commission mitigation precedent, *supra*. Further, I find that under the Commission's rulings on mitigation, the Appellant is not entitled to compensation for any proven accrued vacation and sick leave because he is here compensated for all work days between October 15, 2005 and November 27, 2007, whether or not he was working or on vacation or sick leave in that time period. The Commission has no jurisdiction regarding possible compensation to the Appellant for proven accrued vacation and sick leave under the CBA for the pertinent period of time.

Conclusion

The Motion to Clarify is allowed as follows: the Respondent shall compensate the Appellant $105,216.48 for the period October 15, 2005 through November 27, 2007.

Civil Service Commission
/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

[5] Dividing the Appellant's reported annual income in 2007 of $2,911 by twelve yields an average monthly income of $242.58 and an income for the ten months of January through November in the amount of $2,425.80.

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 7, 2016.

Notice:
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