

LURETHA M. STRIBLING, ESQ.
1030 South Avenue West, Suite 1A
Westfield, New Jersey 07090
(908) 403-0113
Attorney for the Plaintiff
Attorney ID No. 0008452004
lmstribling@verizon.net

IN THE MATTER OF FRANK JAMES,
ESSEX COUNTY, DEPARTMENT OF
CORRECTIONS

SUPERIOR COURT NEW JERSEY
APPELLATE DIVISION

DOCKET NUMBER:A-002840-23

Civil Action

**APPELLATE BRIEF FOR
APPELLANT**

LURETHA M. STRIBLING, ESQ.
NOVEMBER 24, 2024

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TABLE OF TRANSCRIPTS

There are no transcripts.

TABLE OF JUDGMENTS

**In the Matter of Frank James, Essex County Department of Corrections,
OAL Docket Number CSR 03008-21, Decided February 15, 2022 at the Office
of Administrative Law by the Hon. Barry E. Moscovitz, ALJ**

**In the Matter of Frank James, Essex County Department of Corrections,
CSC Docket Number 2021-1348 Decided June 20, 2022**

**In the Matter of Frank James, Essex County Department of Corrections,
CSC Docket Number 2024-415, Decided April 10, 2024**

PROCEDURAL HISTORY

Frank James (James or Appellant) was employed as a Correctional Police Officer for the County of Essex. (Pa1) On March 9, 2020, Appellant was served with a Preliminary Notice of Disciplinary Action seeking his removal from employment at the Essex County Correctional Facility. (Pa2) Appellant was charged with incompetency, inefficiency, or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a), conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7) and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). (Pa2) Appellant waived the internal hearing and subsequently was issued a Final Notice of Disciplinary Action on February 26, 2021 which removed him from his position of Correctional Police Officer effective March 9, 2020. (Pa2)

Appellant appealed his removal from employment by filing the appeal with the Civil Service Commission (Commission) on March 11, 2021. (Pa3) Appellant sought a hearing. (Pa3) The Commission forwarded the Appeal to the Office of Administrative Law for a hearing. (Pa3) The hearing was conducted before the Hon. Barry Moskowitz, ALJ and the removal was reversed by decision of the ALJ on February 15, 2022. (Pa3, Pa15) The Commission agreed with the ALJ's decision and entered the CSC decision on June 15, 2022. (Pa31) Appellant was returned to work on July 28, 2022. (Pa22)

STATEMENT OF FACTS

Frank James (James or Appellant) was hired by the Essex County Correctional Facility in August of 2014 and underwent training to become a Correctional Police Officer. (Pa8) Appellant performed his job responsibilities following policy and procedure. (Pa8) Appellant was accused of giving an inmate contraband. (Pa2) Appellant was terminated from his position on March 9, 2020 wherein he received the following charges: incompetency, inefficiency, or failure to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause. (Pa2) Appellant was removed from employment and an appeal was filed of his removal and the matter was transmitted to the Office of Administrative Law where a hearing was conducted. (Pa3) After the hearing, the Administrative Law Judge and the Civil Service Commission (Commission) reversed the removal. (Pa15, Pa31) The ALJ and Commission ordered that Appellant be reinstated to his position and awarded reasonable counsel fees, all back pay, benefits and seniority which was to cover the date of removal from his position to the date of reinstatement to his position. (In the Matter of Frank James, Essex County Department of Corrections (CSC Decided June 15, 2022). (Pa15, Pa31) Appellant was reinstated to his job on July 28, 2022. (Pa22)

When Appellant was returned to his position of Correctional Police Officer, he was awarded back pay which failed to take into consideration and provide money

for the pay step increases which should have been received on September 1, 2018 and September 1, 2022. (Pa22) Appellant was subjected to a 57 % tax on his lump sum retroactive pay which resulted in his paying taxes in the amount of \$110,000. (Pa22). The employer has refused to handle the pension payments and as a result, Appellant makes pension payments directly to Police and Firemen's Retirement System (PFRS) himself which results in paying a higher amount. (Pa22)

After time was spent attempting to resolve the noted issues with the employer, an Appeal was filed with the Civil Service Commission in 2024 and a decision was issued on the date of April 10, 2024.(Pa19, Pa22) In the Appeal, Appellant sought to have the back pay corrected to include the two pay raise increase steps, to have the tax of his back pay which resulted in a 57% tax rate remedied and Appellant sought an order to require the Appointing Authority to make the pension payments to PFRS directly from his pay rather than placing him in the position of having to make the pension payments. (Pa19, Pa22) The Civil Service Commission (Commission) entered an Order on the date of April 10, 2024. (Pa28) Per the Commission, regarding the pay step increases it was determined that the issues were not timely raised because the request to the Commission was not presented until 11 months after Appellant was reinstated to his job.(Pa28) The Commission cited to the Administrative Code, N.J.A.C. 4A:2-1.1(b) to support their determination that the step pay raise issue was not timely raised, but, the Commission determined that they

did not have jurisdiction on this issue of pay step increases because the issue was a salary dispute which is not reviewable by the Commission. (Pa29) The Commission also determined that they lacked jurisdiction to address adverse tax consequences and was not able to award damages on this issue. (Pa29) The Commission made it clear that they also lacked jurisdiction to compel the Appointing Authority to withhold pension payments from Appellant's pay and make the pension payments. (Pa29) The Commission determined that there was no showing of sufficient cause to award Counsel Fees. (Pa29)

Appellant now seeks relief on the issues of failure to pay to Appellant retroactive pay step increases which should have been included in back pay. (Pa22) In addition, relief is sought for the extreme tax rate that Appellant was subjected to when he received his lump sum back pay. (Pa22) Appellant finally seeks to have the pension payments that are being made to PFRS deducted from his pay by the Appointing Authority and sent directly to PFRS. (Pa23).

POINT I

THE CIVIL SERVICE COMMISSION IN THE ORDER ENTERED ON JUNE 15, 2022 REQUIRED THAT APPELLANT BE REINSTATED TO HIS POSITION, GIVEN BACK PAY, SENIORITY, COSTS AND COUNSEL FEES. THIS ORDER INCLUDED RETROACTIVE PAY STEPS WHICH SHOULD HAVE BEEN INCLUDED IN BACK PAY, HOWEVER, THE CIVIL SERVICE COMMISSION IN ERROR UNREASONABLY VIEWED RETROACTIVE PAY STEP INCREASES AS A SALARY DISPUTE (Pa31, Pa28, Pa29)

The standard employed in reviewing an agency decision is to determine if the administrative agency engaged in determinations that were arbitrary, capricious or unreasonable or where the determination lacked fair support in the evidence. In re Carter, 191 N.J. 474, 482 (2007). See also, In re Timofai Sanitation, Inc., Discovery Dispute, 252 N.J. Super. 495 (Decided December 27, 1991). A well-established principle in Appellate Court review of agency decisions is that an agency decision will not be disturbed unless the agency findings are arbitrary, capricious, unreasonable or lacking fair support in the evidence. Campbell v. Dep't. of Civil Serv. 39 N.J.556, 562 (1963). The Appellate Court is not bound by the agency's interpretation of the legal conclusions or statutory interpretations. Mayflower Sec. Co. v. Bureau of Sec. 64 N.J. 85, 93 (1973). The focus of the Appellate Court on

appeal and in reviewing an administrative action is limited to three inquiries: (1) whether the agency's action violates the express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant facts. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing Russo v. Bd. of Trs. Police and Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). Where an agency's decision meets those criteria, the Appellate Court will defer to the agency's expertise and knowledge in a given field. In re Stallworth, 192 N.J. 19, 28 (2007)

Our Administrative Code set forth at N.J.A.C. 4A:2-2.10(d), permits an award of back pay to a reinstated public employee, which encompasses "regular wages" and benefits including "vacation and sick leave credits and additional amounts expended by the employee to maintain his or her health insurance coverage" which would have been earned during a period of removal determined to have been improper. "Unless otherwise ordered," the award shall be calculated from the effective date of the employer's improper action to the date of the employee's actual reinstatement to the payroll." N.J.A.C. 4A:2-2.10(e). In re Ferro, 2024 N.J. Super. Unpub. LEXIS 1483 (Decided July 8, 2024).

In this matter, the Appellate Court made an unreasonable determination based on the facts of this case. As previously noted in this writing, Appellant was charged with a number of workplace violations, significant among the charges being bringing contraband into the prison. The issue centered on a USB drive that an inmate had and which Appellant thought might contain pornography and Appellant took possession of the USB drive. At this very time period there were multiple codes in the prison which resulted in Appellant needing to respond to the codes. At the end of Appellant's shift, the USB drive which had been taken from the inmate and placed in Appellant's pocket of his bullet-proof vest, was placed in his locker. The following day, the USB drive was returned to the inmate as it was learned that it only contained movies. It was this return of the USB drive to the inmate that resulted in another officer making a complaint against Appellant and claiming that he had brought contraband into the prison and had given it to the inmate. Subsequently, Appellant was served with a Preliminary Notice of Disciplinary Action citing bringing contraband into the prison and other charges as noted in the Statement of Facts. Appellant waived the internal hearing and was served with a Final Notice of Disciplinary Action and was terminated. With the Appeal filed to the Civil Service Commission, the matter was transferred to the Office of Administrative Law. After a hearing, Hon. Barry Moskowitz, Administrative Law Judge (ALJ) ruled in Appellant's favor finding that the Appellant was credible, that some of the witnesses

for the Appointing Authority were not credible and that the Appointing Authority had not met their burden. Per N.J.A.C. 4A:2-1.4(a), when the appeal involves major disciplinary action, the appointing authority has the burden of proof. There was a failure by the Appointing Authority in satisfying the standard which is that the burden of proof is by a preponderance of the evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (Decided April 2, 1962). In the Order rendered by the ALJ, the Court wrote “Given my findings of fact and conclusions of law, I **ORDER** that James be reinstated to his position of correction officer, that he be **AWARDED** all back pay, seniority, and costs including all attorney fees associated with this appeal, and that this case against him be **DISMISSED**.”

In the period of time after the ALJ entered the decision, it was adopted by the Civil Service Commission. Appellant returned to work and was given retroactive back pay, vacation time and sick time and received a lump sum payment of back pay. The back pay was not fully calculated because there was a failure to include the back pay that Appellant was entitled to because of the pay step increases that took place in the period that he was terminated and through to the time of reinstatement. Appellant had been terminated from employment in 2020 and reinstated to work in 2022. Appellant missed out on the three pay step increases which would have been in 2020, 2021 and 2022. The increased pay associated with the steps was not included in the retroactive pay. Appellant by way of prior counsel

attempted to work out the retroactive pay step increases with the Appointing Authority by submitting the issue to the County of Essex to address, but he was not successful. When the County of Essex personnel responsible for handling back pay were put on notice that Appellant was owed back pay, a great deal of time was taken by the County of Essex in addressing back pay. There was ongoing communication with personnel at the County of Essex to provide back pay and this communication took place from June 2022 through to November 2022. Prior Counsel filed an Appeal to the Civil Service Commission in August of 2023 specifically discussing the failure of the Appointing Authority to pay retroactive pay step increases as a part of the retroactive pay. A reading of the Order from the ALJ would include pay step increases which is part of retroactive pay and also related to seniority. The ALJ's Order noted that Appellant was to receive all back pay. The Civil Service Commission erred in the decision rendered after the August 2023 Appeal and said in the decision dated April 10, 2024 that the Commission would not have jurisdiction over the issues. The Commissioner wrote, "Although the appellant couches his claims in terms of back pay, whether he was entitled to receive a pay step increase on a particular date is in fact a dispute over salary." This determination is in error as the request for retroactive pay step increases is part of the back pay which would provide to the Appellant all of the money that he was entitled to in the period from termination to reinstatement to his position. The provision of retroactive pay step

increases is inherent in the award of back pay. The Appointing Authority failed to include in the retroactive back pay requirement, the inclusion of retroactive pay step increases from September 2020, September 2021 and September 2022. As noted in the ALJ's Order, Appellant was entitled to all back pay.

It is requested that the Appellate Court reverse the determination made by the Civil Service Commission by recognizing that the retroactive pay step increases are part of the back pay which should have been awarded to Appellant. It is requested that the Appellate Court Order the Appointing Authority to grant to Appellant retroactive pay step increases with the increase in pay awarded per each step that Appellant is entitled to.

POINT II

THE APPOINTING AUTHORITY HAD AN OBLIGATION TO PROVIDE RETROACTIVE PAY STEP INCREASES WHEN APPELLANT PREVAILED AT THE HEARING AT THE OFFICE OF ADMINISTRATIVE LAW AND WAS REINSTATED TO EMPLOYMENT WITH REQUIREMENT TO PROVIDE BACK PAY AND BENEFITS. (Pa15, Pa31)

The issue of paying retroactive pay increases when an employee is returned to work after termination or suspension requires that the employer pay to the

employee retroactive pay going back to the date of leave from the job through to the date of reinstatement and this retroactive pay includes payment of pay increases that were awarded to other staff during the time period. Monto v. Board of Trs., 2014 N.J. Super. Unpub. LEXIS 1154, p. 19 (Decided May 21, 2014). In the cited matter, Arthur G. Monto, Jr. and William Karasik, Jr. had previously worked as Police Officers at the Sparta Police Department. Id. at 1. Monto enrolled in PFRS in 1993 and Karasik enrolled in PFRS in 1991. Id. at 1. In March of 2003, both police officers filed Whistleblower Complaints pursuant to the Conscientious Employee Protection Act (CEPA) because they had reported that a police detective and a police records clerk were having an inappropriate sexual relationship. Id. at 2. After filing the CEPA complaint, both police officers were repeatedly subjected to investigations and were terminated from employment on October 4, 2004. Id. at 2. The litigation went to trial and the jury found in favor of both police officers and awarded each of them \$700,000. Id. at 2. Prior to the trial moving to the punitive damages phase, the City of Sparta settled with both police officers. Id. at 3. The matters settled for \$1,900,000.00. and the police officers waived any further entitlement to compensatory damages, punitive damages, back wages, future wages, attorney's fees and costs. Id. at 3. The termination from employment for both officers were vacated and they were reinstated. Id. at 4. The reinstatement covered the period of termination which was from October 4, 2004 through and including the date of

reinstatement. Id. at 4. Both officers agreed to file paperwork with the township for retirement following the reinstatement date. Id. at 5. The police officers were reinstated for one day and the PFRS board ruled that the pension credit would not be given to Monto and Karasik for any period after October 1, 2004. Id. at 6. The police officers, Monto and Karasik filed an appeal. Id. at 7. The Appellate Court cited to N.J.A.C. 17:1-2.18 titled Service and salary credit: award of back pay governs awards of back pay and applicable service credit and provides in pertinent part: (a) A member who appeals the suspension or termination of the member's employment and who, by award or settlement becomes entitled to full pay for all or a portion of that employment for the period of such suspension or termination shall receive service credit for the period covered by the award or settlement provided a full normal pension and, if applicable the contributory group life insurance contribution is received from the member or is deducted from the value of the award. The member must receive full back pay, including normal salary increases before mitigation and the contributions will be computed on the basis of salaries that the employee would have earned for the reinstated suspended or terminated period. Id. at 8; (b) If the member waives an award of back pay, then the member cannot receive service or salary credit for the period of the award. Id. at 8-9. The Appellate Court ruled that in this case, by nullifying the terminations and restoring Monto and Karasik to the same position as if they had worked through to the present time, the

final judgment had the unequivocal effect of entitling Monto and Karasik to back pay from the date of termination to the date of their reinstatement. Id. at 11-12. Had they never been terminated from employment, each officer would have been contractually entitled to salary and increases in the years that they worked along with service credit. Id. at 12.

In the instant matter, Appellant was terminated from employment and after the hearing in the Office of Administrative Law, he received a ruling in his favor and was restored to his position of County Correctional Police Officer in August of 2022. Per the Court Order, Appellant was to receive all back pay, seniority and costs including attorney fees associated with the appeal. In light of the statute noted above, N.J.A.C. 17:1-2.18 titled Service and salary credit: award of back pay governs awards of back pay and applicable service credit and provides in pertinent part: (a) A member who appeals the suspension or termination of the member's employment and who, by award or settlement becomes entitled to full pay for all or a portion of that employment for the period of such suspension or termination shall receive service credit for the period covered by the award or settlement provided a full normal pension and ... the member must receive full back pay, including normal salary increases before mitigation and the contributions will be computed on the basis of salaries that the employee would have earned for the reinstated suspended or terminated period. This clause appears to refer to step pay increases which per

the Appellant's contract are normal salary increases which are based on steps applicable to years of service. The Appellant was entitled to full back pay which includes pay step increases. The County of Essex provided back pay but failed to include the pay step increases which Appellant is entitled to.

It is requested that the Appellate Court determine that the Appointing Authority must pay to Appellant the step pay increases that he is entitled to for the period of time that he was terminated and up to the date of reinstatement.

POINT III

APPELLANT WAS SUBJECTED TO AN EXHORBITANT TAX RATE OF 57% ON THE LUMP SUM PAYMENT OF BACK PAY RECEIVED AFTER BEING REINSTATED TO EMPLOYMENT PER THE DECISION OF THE CIVIL SERVICE COMMISSION AND A REMEDY IS SOUGHT (Pa22, Pa29)

In Eschelman v. Agere Sys., the court addressed the issue of the lump sum award of back pay. Eschelman v. Agere Sys., 554 F.3d 426, 440 (Decided January 30, 2009. Eschelman prevailed on her Complaint filed under the Americans with Disabilities Act. Id. at 430. Eschelman received a lump sum award after experiencing success at trial and post-trial a motion was filed to obtain an additional

monetary award to offset the negative tax consequences of the lump sum back pay. Id. at 440. The main goal of the employment discrimination statutes is to make persons whole who have been subjected to unlawful discrimination. Id. at 440. The district courts have wide discretion in achieving a just result with regard to the relief granted in a case. Id. at 440. Ultimately, the goal is to restore the injured party to the status quo, the position that the person would have been in if not subjected to the adverse employment action. Id. at 440. Back pay is a remedy for employment discrimination that a person has been subjected to. Id. at 441. With regard to a lump sum payment of back pay, it has the effect of placing an employee in a higher tax bracket and the employee is then subjected to a higher tax on the money awarded as back pay. Id. at 441. Some courts have required that the employer pay a larger amount of money which will serve to offset the tax consequences. Sears v. Atchison, Topeka & Santa Fe Ry. Co., 749 F.2d 1451, 1456 (10th Cir. 1984). Another equitable remedy employed to offset the increased tax consequences of a lump sum payment is to award prejudgment interest. Eschelmann supra at 442. In Eschelmann, additional money was awarded to her to offset the negative tax consequences of receiving a lump sum payment. Id. at 442.

In the instant matter, Appellant was without employment from 2020 to 2022. The Commission ordered that Appellant be reinstated with all back pay. As a result of this, Appellant received an award of \$198,000. The tax consequences of receiving

this lump sum payment of back pay was \$110,000. Appellant was taxed at the level of 57%. What is sought is an analysis of the award of lump sum back pay and whether the tax on this payment was proper. In the event that the tax on this lump sum back pay award was not proper, it is requested that the Appellate Court fashion a remedy which could be an enhancement of the back pay award to make the Appellant whole or alternatively, the assessment of prejudgment interest on the award received by the Appellant. While the award of back pay has already been accomplished, the circumstances in this case should result in a remedy for how lump sum payments of back pay are treated going forward. In this case, if the Appellate Court is able to fashion a remedy specific for this case, such relief would be appreciated. That remedy could include an enhancement to the back pay award or a requirement that prejudgment interest be awarded in this case and in other cases when lump sum back pay is awarded.

It is requested that the Appellate Court address the issue of lump sum back pay and establish parameters with regard to how the payments are to be made to avoid the harsh tax consequences that befell the Appellant. It is requested that the Appellate Court consider enhancing the lump sum back pay award or alternatively, assessing prejudgment interest that the employer would be responsible for paying to the Appellant.

POINT IV

WHEN APPELLANT WAS REINSTATED TO EMPLOYMENT, HIS PENSION PAYMENTS WERE TO BE PAID FROM HIS PAYCHECK EACH PAY PERIOD BY THE EMPLOYER TO POLICE AND FIREMEN'S RETIREMENT SYSTEM PENSION PROGRAM, HOWEVER, THE EMPLOYER HAS REFUSED TO SUBMIT PAYMENT WHICH RESULTS IN APPELLANT HAVING TO SUBMIT PAYMENTS TO PFRS PENSION PROGRAM WHICH ARE PAID AT A HIGHER RATE (Pa22, Pa29)

Employees enrolled in the Police and Firemen's Retirement System (PFRS) Pension Program are required to make pension payments with each pay period. When an employee is terminated from employment, the employee is able to cash out the money that has been contributed to the pension program by the employee. In this case, Appellant after being terminated from employment cashed out the money that he had contributed to the pension program. The payment to the pension program had been based on the salary of \$59,000. When Appellant was reinstated, he was required to pay the money that was cashed out back into the pension program. The amount that he is paying back at this time is based on his higher salary which requires that he make payments at the rate of \$400.00 per pay period when had the payback of pension payments been based on the salary of \$59,000, Appellant would

be paying back the amount of \$300.00 per pay period. In addition, the Appointing Authority will not deduct the pension payments from Appellant's salary, so, he is required to make the payments himself directly to the pension program which results in the need to make a higher payment amount.

It is requested that the Appellate Court in review of this concern require that the Appointing Authority make the pension payments for Appellant which is the norm. In addition, it is requested that the Appointing Authority coordinate with PFRS pension program and that Appellant be allowed to make pension payments based on the salary of \$59,000.

CONCLUSION

For all of the reasons set forth in this Appellate Brief, case law, court rules, statutes, administrative codes and documents submitted in the Appendix that the Appellant be granted the relief sought.

Luretha M. Stribling

Luretha M. Stribling

Attorney for the Appellant

DATED: November 24, 2024



OFFICE OF THE COUNTY COUNSEL

Hall of Record, Room 535, Newark, New Jersey 07102

973.621.5003 --- 973.621.4599 (Fax)

www.essexcountynj.org

Joseph N. DiVincenzo, Jr.

Essex County Executive

Jerome M. St. John

Essex County Counsel

January 27, 2025

Via eCOURTS

Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
P.O. Box 006
Hughes Justice Complex
Trenton, New Jersey 08625

**Re: In the Matter of Frank James, Essex County Department of
Corrections
Docket No. A-2840-23T4**

Dear Mr. Orlando:

This Office represents the Respondent, Essex County Department of Corrections (the "County"), in this appeal. Pursuant to R. 2:6-2(b) and R. 2:6-4(a), please accept this letter brief in lieu of a more formal brief in support of the County's opposition to Appellant, Frank James' ("Appellant") appeal.

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JUDGMENTS, ORDERS, AND RULINGS

In the Matter of Frank James, Essex County Department of Corrections, OAL Docket Number CSR 03008-21, Decided February 15, 2022 at the Office of Administrative Law by the Hon. Barry E. Moscovitz, ALJ (Pa1-18)

In the Matter of Frank James, Essex County Department of (Pa31-33)

Corrections, CSC Docket Number 2021-1348, Decided
June 20, 2022

In the Matter of Frank James, Essex County Department of
Corrections, CSC Docket Number 2024-415, Decided
April 10, 2024 (Pa28-30)

PRELIMINARY STATEMENT

The primary issue in this appeal is whether the Civil Service Commission's (the "Commission") denial of Appellant Frank James' ("Appellant") request for increased back pay and other related tax and pension claims is arbitrary, capricious, or unsupported by substantial credible evidence. On April 10, 2024, the Commission decided that Appellant's request was untimely filed, and it lacked jurisdiction over each of Appellant's claims. Appellant has failed to show that the Commission's decision warrants reversal under the relevant standard. Consequently, Respondent, Essex County Department of Corrections (the "County"), submits that this Court must affirm the Commission's decision and deny Appellant's appeal.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On March 9, 2020, the County served Appellant with a Preliminary Notice of Disciplinary Action, charging him with incompetency, inefficiency, or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. (Pa2).¹ Appellant waived the internal hearing. (Pa2). On February 26, 2021, the County issued a Final Notice of Disciplinary Action,

¹ "Pa" refers to the Appellant's appendix.

removing Appellant from his position as a corrections officer, effective March 9, 2020. (Pa2).

Upon Appellant's appeal of his removal, the Commission transmitted the matter to the Office of Administrative Law (the "OAL") for a hearing. (Pa3). Following a hearing, the Honorable Barry Moskowitz, ALJ, ordered, on February 15, 2022, that the Appellant's removal be reversed, and that the Appellant be reinstated to his position as a corrections officer, and he be awarded all back pay, seniority, and costs, including all attorney fees. (Pa15). In a decision, dated June 15, 2022 and issued on June 20, 2022, the Commission adopted and accepted the Findings of Fact and Conclusion as contained in the OAL's decision. (Pa31). Appellant was reinstated on July 28, 2022. (Pa28).

Appellant sent the Commission a request, dated August 10, 2023, for enforcement of the Commission's Order regarding back pay. (Pa28). In an order, issued on April 10, 2024, the Commission denied Appellant's request. (Pa29).

COUNTERSTATEMENT OF FACTS

In its decision, issued on June 20, 2022, the Commission ordered that the Appellant be granted back pay, benefits, and seniority from the first date of

separation to the actual date of reinstatement. (Pa32). The Commission further ordered that:

[t]he parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2).

(Pa33).

Appellant did not contact the Commission regarding a back pay dispute within sixty days of the Commission's decision, issued on June 20, 2022. (Pa28). More than a year after the Commission's decision was issued, Appellant contacted the Commission with a request, dated August 10, 2023, for enforcement of the Commission's order regarding back pay and other related claims. (Pa28). Appellant alleges that the back pay amount of \$198,617.00, awarded to him by the County, is inaccurate because it did does not account for pay step increases that he believes he should have received on September 1, 2018 and September 1, 2022. (Pa28). Appellant also complained about an alleged 57% tax rate on his lump sum payment from the County. (Pa28-29). In addition, Appellant alleged that the County has refused to take his pension

payments from his bi-weekly salary since his reinstatement. (Pa29). Finally, Appellant sought counsel fees for his request. (Pa29).

On April 10, 2024, the Commission issued a decision denying Appellant's request. (Pa28-29). As to Appellant's allegations regarding missed pay step increases in September 1, 2018 and September 1, 2022, the Commission found that these issues were not timely raised. (Pa29). The Commission further found that even if Appellant's issues were timely raised, it would not have jurisdiction over them. (Pa29). Finally, the Commission determined that it did not have jurisdiction to award damages for adverse tax consequences of Appellant's receipt of a lump sum back pay amount; or to order the County to withhold pension payments from Appellant's salary since reinstatement. (Pa29). The Commission denied Appellant's request for counsel fees. (Pa29).

STANDARD OF REVIEW

It is well-settled law that the Appellate Division must give due deference to an agency's decision unless it is arbitrary, capricious, unsupported by substantial credible evidence contained in the record, or a violation of express or implicit legislative policies. In the Matter of Juvenile Detention Officer Union County, 364 N.J. Super. 608, 614 (App. Div. 2003). See also In re Taylor, 158 N.J. 644, 656-57 (1999); In re CAFRA Permit No. 87-0959-5, 152 N.J. 287,

304 (1997); Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 71 (1985). A determination by the Commission will not be upset unless it is affirmatively shown that it is arbitrary, capricious, or unreasonable or lacks fair support in the record. Karins v. City of Atlantic City, 152 N.J. 532, 540 (1998); Henry v. Rahway State Prison, 81 N.J. 571, 589 (1980).

Moreover, a strong presumption of reasonableness attaches to a decision of the Commission. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001). Thus, a court must affirm the Commission's decision if the evidence supports the decision, even if the court may question the wisdom of the decision or would have reached a different result. Campbell v. New Jersey Racing Commission, 169 N.J. 579, 587 (2001).

The Legislature created the Commission as the regulatory agency responsible for overseeing all public employment in this State and vested the Commission with broad supervisory power, including over suspensions and dismissals. See N.J.S.A. 11A:2-14. In light of this authority, the court will not interfere in the Commission's exercise of authority unless its determination is "patently incompatible with the language and spirit of the law." In re Hudson Cty. Probation Dep't., 178 N.J. Super. 362, 371 (App. Div. 1981) (quoting

Walsh v. Civil Service Dep't., 32 N.J. Super. 39, 44 (App. Div. 1954), certif. granted, 17 N.J. 182 (1955) (subsequently dismissed).

LEGAL ARGUMENT

POINT I. APPELLANT DID NOT RAISE AN APPEAL TO THE COMMISSION IN A TIMELY MANNER. (Pa28-29).

Regarding Commission appeals, N.J.A.C. 4A:2-1.1(b) provides that “[u]nless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation, or action being appealed.” Here, the Commission explicitly stated in its June 20, 2022 decision that the parties must inform the Commission if there was any dispute as to back pay within 60 days of the issuance of its decision. (Pa33). Appellant did not file his request disputing the back pay amount awarded by the County until August 10, 2023, more than a year after the Commission’s order was issued. (Pa28). Thus, Appellant is time-barred from pursuing any appeal with the Commission regarding the County’s back pay award or other related issues.

Moreover, Appellant did not raise issues regarding his alleged missed pay step increases in a timely manner. On August 10, 2023, Appellant, for the first time, notified the Commission of his contention that the County did not provide

his pay-step increases due on September 1, 2018 and September 1, 2022. (Pa28). Appellant would have reasonably been aware of whether he received such pay step increases from his paychecks around the same dates. However, Appellant's claims regarding his pay step increases were not raised to the Commission for almost five years after the first date and almost a year after the second. It is beyond dispute that Appellant's appeal to the Commission regarding his back pay and related claims is egregiously out of time.

POINT II. THE COMMISSION DOES NOT HAVE JURISDICTION OVER THE ISSUES RAISED IN APPELLANT'S APPEAL. (Pa28-29).

The Commission does not have jurisdiction over any of the issues raised by Appellant in his August 2023 request. First, the Commission does not have jurisdiction over whether Appellant received proper pay step increases because it is a salary dispute, not a back pay issue. (Pa29). The Commission explained that:

[s]alary disputes in local service are not reviewable by the Commission unless the salary of the employee is outside the established range for the job title. In this regard, N.J.S.A. 11A-3—7d and N.J.A.C. 4A:3-4.1(a)2 provide that when a salary range is established for a job title, an employee shall not be paid a base salary below the minimum or above the maximum established for that range. The instant matter does not implicate such issues.

(Pa29).

Second, the Commission, citing N.J.A.C. 4A2-1.5, found that it did not have jurisdiction to award Appellant damages for the adverse tax consequences of the County's lump sum award of back pay. (Pa29). Finally, the Commission determined that it lacked jurisdiction to order the County to withhold pension payments from Appellant's salary since reinstatement. (Pa29). As the Commission suggested, Appellant could instead consult with the Division of Pension and Benefits on this issue. (Pa29). The Commission's findings that it did not have jurisdiction over Appellant's pay step increases, tax, and pension claims, as stated above, are not arbitrary, capricious, or unreasonable, and therefore, should be provided deference.

POINT III. APPELLANT'S CLAIMS ARE NOT APPROPRIATE FOR RESOLUTION BY THIS COURT IN THE FIRST INSTANCE.

"[I]t [is] improper for the Appellate Division to engage in an independent assessment of the evidence as if it were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1990). Therefore, this Court is not the appropriate forum to resolve Appellant's claims in the first instance. In the event that this Court finds that Appellant's appeal was timely filed and the Commission had

jurisdiction over any of the issues raised, this matter should be remanded to the Commission to resolve Appellant's claims.

CONCLUSION

For the foregoing reasons, the County respectfully submits that this Court must affirm the Commission's decision and deny Appellant's appeal.

Respectfully submitted,
OFFICE OF ESSEX COUNTY COUNSEL

s/Jennifer Cacchioli
Jennifer Cacchioli,
Assistant County Counsel
(973) 621-2558
jcacchioli@counsel.essexcountynj.org

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2840-23T4
OAL DOCKET NO. CSR-0287-22

IN THE MATTER OF
FRANK JAMES, ESSEX
COUNTY DEPARTMENT
OF CORRECTIONS

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Civil Action

On Appeal from a Final
Agency Decision of the
Civil Service Commission
CSC Docket No. 2024-415

STATEMENT IN LIEU OF BRIEF ON BEHALF OF
THE NEW JERSEY CIVIL SERVICE COMMISSION
Date Submitted: March 10, 2025

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent,
Civil Service Commission
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
(609) 376-2955
Brian.Ragunan@law.njoag.gov
NJ Attorney ID No. 336622021

BRIAN D. RAGUNAN
Deputy Attorney General
On the Statement

This Statement in Lieu of Brief is filed on behalf of the Civil Service Commission pursuant to Rule 2:6-4(c). Frank James appeals the Commission's April 10, 2024 decision denying his request for back pay. (Pa28-30).¹

James worked as a County Correctional Police Officer with Essex County Department of Corrections ("Essex"). (Pa28). Essex removed James from his employment as a Corrections Officer, effective March 9, 2020, after issuing a Final Notice of Disciplinary Action, charging him with incompetency, inefficiency, or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. (Pa2). He appealed the removal to the Commission, which transferred the matter to the Office of Administrative Law as a contested case. (Pa3). James was reinstated on June 15, 2022, following an administrative hearing and the Commission's de novo review. (Pa28).

The Commission awarded reasonable counsel fees and mitigated back pay, benefits, and retroactive seniority credit from his separation from employment to the actual date of reinstatement from March 9, 2020, through July 27, 2022. Ibid. On August 10, 2023, James filed a letter with the Commission requesting enforcement of his back pay. (Pa28). On September 13, 2023, the

¹ "Pa" refers to James's appendix.

Commission acknowledged receipt of the request and requested more information. (Pa19-20). On September 20, 2023, James responded, informing the Commission that the appointing authority had awarded him \$198,617.000 in back pay on November 10, 2022. (Pa22-23). But James disputed this amount, arguing that his backpay should have accounted for salary step increases he would have received on September 1, 2018, and September 1, 2022. Ibid. Further, James disputed the tax rate of backpay and the appointing authority's refusal to withhold pension payments. Ibid. Finally, James sought counsel fees for his request. (Pa23).

On April 10, 2024, the Commission found that the appeal was not raised in a timely manner. (Pa29) (citing N.J.A.C. 4A:2-1.1(b)) ("Unless a different time period is stated, an appeal must be filed within 60 days, which may be extended for good cause, after either the appellant has notice or should reasonably have known of the decision, situation, or action being appealed."). It noted that James did not raise his dispute until August 2023, one year after the latest step increase in 2022 that he alleges he was unlawfully denied and five years after the first. Ibid.

Additionally, the Commission concluded that even if the dispute had been raised timely, it lacked jurisdiction to hear it. Ibid. The Commission concluded, "[a]lthough the appellant couches his claims in terms of back pay, whether he was entitled to receive a pay step increase on a particular date is, in fact, a dispute over

salary.” Ibid. The Commission lacked jurisdiction because “salary disputes in local service are not reviewable by the Commission unless the salary of the employee is outside the established range for the job title.” Ibid.

Finally, the Commission concluded that it lacked jurisdiction to award damages for tax consequences of lump sum back pay under N.J.A.C. 4A:2-1.5. Ibid. In support of this finding, the Commission stated that it lacks jurisdiction over pension disputes as they can be appropriately raised with the Division of Pensions and Benefits. (Pa29, footnote 1).

Having reviewed the merits briefs filed by the primary parties in connection with this appeal, the Commission has determined that the factual and legal issues involved in this appeal do not warrant filing a separate brief. The primary issue raised in this appeal is whether the Commission’s decision finding it lacked jurisdiction to grant step increases was arbitrary, capricious, or unreasonable. Because this matter does not involve a challenge to the validity of the Civil Service statutes or the rules promulgated thereunder, a separate brief on the merits is unnecessary. The primary parties to this appeal have adequately addressed the relevant issues, and the public interest does not require the Commission’s participation.

Nevertheless, the Commission's decision should be affirmed. It is well-established that an agency's determination will not be upset unless it is affirmatively shown that it is arbitrary, capricious, or unreasonable or that it lacks fair support in the record as a whole. Karins v. City of Atl. City, 152 N.J. 532, 540 (1998). A strong presumption of reasonableness attaches to the Commission's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001). Thus, a court must affirm the decision if the evidence supports it, even if the court may question its wisdom or would have reached a different result. Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001).

The only question that the Commission had jurisdiction to address was whether James timely filed his appeal. There was ample support in the record to support its finding that the appeal was untimely. The other issues regarding his entitlement to the step increases are outside the Commission's jurisdiction. (Pa29).

For these reasons, the Commission's decision should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: s/Brian D Ragunan
Brian D. Ragunan

Deputy Attorney General
NJ Attorney ID #336622021
Brian.Ragunan@law.njoag.gov

C: All attorneys of record (via eCourts)

LURETHA M. STRIBLING, ESQ.
1030 South Avenue West, Suite 1A
Westfield, New Jersey 07090
(908) 403-0113
Attorney for the Plaintiff
Attorney ID No. 0008452004
lmstribling@verizon.net

IN THE MATTER OF FRANK JAMES, ESSEX COUNTY, DEPARTMENT OF CORRECTIONS	SUPERIOR COURT NEW JERSEY APPELLATE DIVISION DOCKET NUMBER:A-002840-23 Civil Action APPELLANT REPLY BRIEF
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LURETHA M. STRIBLING, ESQ.
MARCH 23, 2025

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APPELLANT'S RESPONSE TO THE PROCEDURAL HISTORY

The Appellant relies on the Procedural History set forth in the Appellate Brief submitted on behalf of the Appellant. The Appellant was charged with a myriad of workplace violations as noted in the Appellant's Brief. (Pa2). Appellant successfully appealed the disciplinary action which resulted in his termination from employment to the Civil Service Commission on March 11, 2021. (Pa3). The hearing in this matter was conducted by the Hon. Barry Moskowitz, ALJ and the removal from employment was reversed. (Pa3, Pa15). The Civil Service Commission agreed with the decision reached by Judge Moskowitz in a decision dated June 15, 2022. (Pa31). Appellant was to be provided with all back pay, benefits, seniority and reasonable counsel fees. (Pa15, Pa31). The ordered relief was to cover the period of time from termination to reinstatement to his position as County Correctional Police Officer. (Pa15, Pa31). Appellant was returned to work on July 28, 2022. (Pa22). In the period of time after the reinstatement to employment, the County of Essex did not follow the Order of the Court because the awarded relief was not addressed by the County of Essex until November 10, 2022 and when effort to resolve the issues in following the Order from the ALJ and Civil Service Commission proved to be futile, an Appeal was filed with the Civil Service Commission in 2024 and a decision was rendered on April 10, 2024. (Pa19, Pa22).

APPELLANT’S RESPONSE TO THE STATEMENT OF FACTS BY
RESPONDENTS

Appellant relies on the Statement of Facts documented in the Appellant’s Brief. With regard to the Counterstatement of Facts, citation is made to the decision of the Civil Service Commission’s Order which required that the parties needed to inform the Civil Service Commission within 60 days of issuance of the decision if there was a dispute. (Pa33). The County of Essex failed to carry out the Order within 60 days and it was not until November of 2022 that the requirements per the Order were carried out. (Pa41) Appellant could not know until the County of Essex complied with the Order of the Civil Service Commission that there was going to be a dispute and thereafter, Counsel for the Appellant filed an Appeal with the Civil Service Commission. (Pa19, Pa22). Appellant sought to have the back pay corrected to include the two pay raise increase steps, to have the tax of his back pay which resulted in a 57% tax rate remedied and Appellant sought an order to require the Appointing Authority to make the pension payments to PFRS directly from his pay rather than placing him in the position of having to make the pension payments. (Pa19, Pa22)

THE STANDARD OF REVIEW (Pa28, Pa29, Pa31)

The Appellant relies on the Standard of Review as set forth in the Appellant's Brief.

APPELLANT RESPONSE TO POINT I (Pa41)

THE DELAY BY THE COUNTY OF ESSEX IN CARRYING OUT THE ORDER FROM THE CIVIL SERVICE COMMISSION RESULTED IN AN INABILITY TO NOTIFY THE CIVIL SERVICE COMMISSION OF A DISPUTE WITHIN 60 DAYS

As noted previously in this Brief, Appellant was not able to raise issues or notify the Civil Service Commission within 60 days of entry of the Order because the County of Essex failed to carry out the Order until well beyond the 60 day period as noted in the appended letter from Frank M. Crivelli, Esq. (Pa41) Per the details in this letter dated November 12, 2024 which was directed to Jacqueline L. Jones, Director in the Human Resources Department, it was not until November 10, 2022 that Appellant was given back pay. (Pa41). The County of Essex failed to timely address and fulfill the Order from the Office of Administrative Law and Civil Service Commission, therefore, Appellant should not be penalized as a result of experiencing a dispute beyond the 60 day time period. It was after attempts were

made to resolve the issues with the County of Essex that an Appeal was filed to the Civil Service Commission in August of 2023.

APPELLANT’S RESPONSE TO POINT II (Pa28, Pa29)

**THE CIVIL SERVICE COMMISSION DETERMINATION IN THE ORDER
ISSUED ON APRIL 10, 2024 WAS THAT THEY LACKED JURISDICTION,
HOWEVER, THE RELIEF SOUGHT WAS CONSISTENT WITH THE
ORDER RENDERED BY THE CIVIL SERVICE COMMISSION**

Appellant will rely upon the Appellant’s Brief as well as this information provided in response to Point II. In Monto, V. Board of Trs., the Appellate Court cited to N.J.A.C. 17:1-2.18 titled Service and salary credit: award of back pay governs awards of back pay and applicable service credit and provides in pertinent part: (a) A member who appeals the suspension or termination of the member’s employment and who, by award or settlement becomes entitled to full pay for all or a portion of that employment for the period of suspension or termination shall receive service credit for the period covered by the award or settlement provided a full normal pension and if applicable the contributory group life insurance contribution is received from the member or is deducted from the value of the award. The member must receive full back pay, including normal salary increases before mitigation and the contributions shall be computed on the basis of salaries that the

employee would have earned for the reinstated suspended or terminated period. N.J.A.C. 17:1-2.18. cited in Monto v. Board of Trs., 2014 N.J. Super. Unpub. LEXIS 1154, p. 19 (Decided May 21, 2014).

In light of the above noted Administrative Code which appears to refer to step increases which is a back pay issue, it appears that there is no jurisdictional issue. In the event that the Appellate Court determines that the issue is a salary dispute, it is requested that the Appellate Court rule on this issue and require that the County of Essex address this issue and provide the appropriate relief for the Appellant. In that same regard, the exorbitant tax assessed against Appellant's back pay can be addressed by the Appellate Court. It is further requested that the Appellate Court address the issue of deduction of pension payments directly from Appellant's pay by the Appointing Authority with payments required to be paid based on the salary of \$59,000.

It is requested that the Appellate Court address the issues of back pay, the taxes assessed against the back pay and pension payment deductions from the Appellant's pay.

APPELLANT’S RESPONSE TO POINT III (Pa28,Pa29, Pa31)

**APPELLANT’S CLAIMS ARE APPROPRIATELY BEFORE THE
APPELLATE COURT**

Reliance is placed on the Appellant’s Brief and information provided in response to Respondent’s Brief. The standard employed in reviewing an agency decision is to determine if the administrative agency engaged in determinations that were arbitrary, capricious or unreasonable or where the determination lacked fair support in the evidence. In re Carter, 191 N.J. 474, 482 (2007). See also, In re Timofai Sanitation, Inc., Discovery Dispute, 252 N.J. Super. 495 (Decided December 27, 1991). A well-established principle in Appellate Court review of agency decisions is that an agency decision will not be disturbed unless the agency findings are arbitrary, capricious, unreasonable or lacking fair support in the evidence. Campbell v. Dep’t. of Civil Serv. 39 N.J.556, 562 (1963). The Appellate Court is not bound by the agency’s interpretation of the legal conclusions or statutory interpretations. Mayflower Sec. Co. v. Bureau of Sec. 64 N.J. 85, 93 (1973). The focus of the Appellate Court on appeal and in reviewing an administrative action is limited to three inquiries: (1) whether the agency’s action violates the express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the

agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant facts. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing Russo v. Bd. of Trs. Police and Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). Where an agency's decision meets those criteria, the Appellate Court will defer to the agency's expertise and knowledge in a given field. In re Stallworth, 192 N.J. 19, 28 (2007).

This Appeal is properly before the Appellate Court. It is requested that the Appellate Court render a decision on the issues presented including back pay, the exorbitant taxes assessed against the retroactive pay received and the failure of the Appointing Authority to deduct pension payments from Appellant's pay and submit to the Police and Firemen's Retirement System Pension Program.

CONCLUSION

For all of the reasons set forth in this Reply Brief, Appellant's Brief, the Appendix Volume One and the appended Appendix to this writing, case law, Court Rules, Administrative Code and the facts presented in this matter, it is requested that the Appellate Court render a decision on the issues presented including back pay, the exorbitant taxes assessed against the retroactive pay received and the failure of the Appointing Authority to deduct pension payments from Appellant's pay and submit to the Police and Firemen's Retirement System Pension Program.

Luretha M. Stribling

Luretha M. Stribling

Attorney for the Appellant

DATED: March 23, 2025