

Michael A. Bukosky, Esq. -NJ Attorney ID # 015891992
9 Yeomans Lane
Allendale, NJ 07401
(201) 906-6083
mbukosky@northeastlaborlaw.com
Attorney for Appellant

IN THE MATTER OF	:	SUPERIOR COURT OF
VINCENT ANTENUCCI, DIVISION	:	NEW JERSEY:
OF STATE POLICE, DEPARTMENT	:	APPELLATE DIVISION
OF LAW AND PUBLIC SAFETY	:	
	:	DOCKET NO.: A-004037-23
	:	
	:	APPEAL FROM THE CIVIL
	:	SERVICE COMMISSION
	:	CSC DOCKET NO.: 2024-
	:	2589
	:	July 24, 2024
	:	
	:	
	:	

**APPELLANT STATE TROOPERS NCO ASSOCIATION'S (VINCENT
ANTENUCCI) BRIEF IN SUPPORT OF APPEAL**

Of Counsel and On the Brief:
MICHAEL A. BUKOSKY, ESQ.
Attorney ID#: 015891992

TABLE OF CONTENTS

TABLE OF AUTHORITIES	-ii
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY.....	4
STATEMENT OF FACTS.....	8

POINT I

FUNDAMENTAL FAIRNESS REQUIRES THAT A REQUEST FOR A WAIVER CONSIDER WHETHER OR NOT AN ACTUAL OVERPAYMENT OCCURRED (Pa4, Pa103).....	13
---	-----------

POINT II

THE SQUARE CORNERS DOCTRINE REQUIRES THAT CIVIL SERVICE DISCLOSE COMPETENT EVIDENCE THAT AN OVERPAYMENT IN FACT OCCURRED (not raised below)	20
--	-----------

POINT III

THE AGENCY DECISION WAS NOT REASONABLE (not raised below).....	25
CONCLUSION.....	26

APPENDIX TABLE OF CONTENTS

Final Administrative Action of the Civil Commission, Request for Waiver of Repayment of Salary Overpayment, CSC Docket No.: 2024-2589, Issued: July 24, 2024.....Pa1

Correspondence to Director Nicholas F. Angiulo regarding Request for Waiver Pursuant to *N.J.A.C.* 4A:3-4.21, Docket No.:2019-3633, Dated June 7, 2024.....Pa7

EXHIBIT “A” Decision and Award received from the Public Employment Relations Commission before Arbitrator Brian W. Kronick Docket No.: AR-2021-424, Issued May 21, 2024.....Pa11

EXHIBIT “B” Opinion and Award received from the Superior Court of New Jersey, Appellate Division, Docket No.: A-2165-19, Argued October 12, 2021 - Decided October 27, 2021, Before Judges Rothstadt and Mayer, On appeal from the New Jersey Civil Service Commission, Docket No.: 2019-3633.....Pa34

EXHIBIT “C” Post Hearing Brief on behalf of State Troopers NCO Association and Grievant Sgt. Antenucci, OER No.: 14950, Docket No.: AR-2021-424, Before Arbitrator Brian W. Kronick, Dated March 6, 2024¹.....Pa45

EXHIBIT “D” Reference Case In re Stumpf, Superior Court of New Jersey, Appellate Division, June 1, 2017.....Pa115

TABLE OF AUTHORITIES

¹ This brief is submitted pursuant to R.2:6-1 as part of the agency record below and as an integral document relied upon in the petition to Civil Service.

<u>Chou v. Rutgers,</u> <u>283 N.J. Super. 524, 539 (App.Div.1995), certif. denied,</u> <u>145 N.J. 374 (1996).....</u>	<u>20</u>
<u>Jones v. Dep't of Civil Serv.,</u> <u>118 N.J. Super. 323 (App. Div. 1972)</u>	<u>18</u>
<u>Kutzin v. Pirnie,</u> <u>124 N.J. 500 (1991).....</u>	<u>18</u>
<u>Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer</u> <u>Affairs of Dep't of Law & Pub. Safety, 64 N.J. 85, 93 (1973).....</u>	<u>20</u>
<u>New Concepts for Living, Inc. v. City of Hackensack,</u> <u>376 N.J. Super. 394 (App. Div. 2005)</u>	<u>16</u>
<u>Oliver v. Lawson,</u> <u>92 N.J. Super. 331 (App. Div. 1966)</u>	<u>18</u>
<u>Seaboard v. Borough of Penns Grove,</u> <u>28 N.J. Tax 607 (Tax Ct. 2015)</u>	<u>22</u>
<u>State v. Njango,</u> <u>247 N.J. 533 (2021).....</u>	<u>17</u>
<u>Weston v. State, 60 N.J.36.....</u>	<u>20</u>
<u>W.V. Pangborne & Co. v. New Jersey Dep't of Transp.,</u> <u>116 N.J. 543 (N.J. 1989)</u>	<u>22</u>
<u>Regulations</u>	
<u>N.J.A.C. 4A:2-1</u>	<u>15</u>
<u>N.J.A.C. 4A:3-4.21</u>	<u>15</u>

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Civil Service Decision.....Pa1

PRELIMINARY STATEMENT

This case challenges the Commission's assertion that a State Trooper received a salary overpayment in the year 2012 which then compounded in later years. Civil Service has made the *a priori* presupposition that there was a \$29,000.00 salary overpayment and that this overpayment must have occurred. But there are no competent facts to support such a finding.

After extensive testimony and after an exhaustive exegesis of the agency records a simple fact remains - no competent records have been produced which reveal what happened in 2012 and the relevant years immediately following. Both the witnesses and the records no longer exist. No competent proof of legitimate banking records (electronic or paper) was ever produced which would have provided the only authoritative proof of what actually occurred - other than supposition. What was produced were conclusory spreadsheets, Excel data sheets and self created "reports". An actual overpayment supported by banking records was never produced.

PROCEDURAL HISTORY

On or about May 21, 2019, the employer and Civil Service alleged that they had placed Sgt. Antenucci on the wrong salary step - step eight instead of step six, when he was appointed to the title of Trooper 2, effective August 11, 2012. It was Civil Service who was responsible for confirming the correctness of this placement. The employer then began to unilaterally administer a "claw back" of Sgt. Antenucci's salary in the approximate amount of \$29,000.00. (Pa54)²

On or about June 3, 2019, Sergeant Antenucci filed with Civil Service Commission requesting a waiver of repayment of salary overpayment as directed by his Superior Officer. On December 23, 2019, the Commission denied Sgt. Antenucci's request for a waiver of the repayment of the salary overpayment. The State Troopers Non Commissioned Officer's Association, (STNCO) and Sergeant Antenucci filed an appeal before the Appellate Division. (Pa35)

In its decision of October 27, 2021 the Appellate Division indicated that Sgt. Antenucci could re -apply for a waiver following the decision of the grievance Arbitrator who was tasked with reviewing this matter.(Pa42)

The STNCO prosecuted the grievance under the collective bargaining Agreement.

² PA = Petitioner/Appellants Appendix Vol. I

The Arbitrator declined to address the issue of whether in fact an actual overpayment occurred stating that "While the Appellate Division noted this PERC arbitration, it affirmed the Civil Service Commission final agency decision on the issue the Association seeks to arbitrate". (Pa30) The "issue" sought to be arbitrated was whether an overpayment in fact occurred.

The arbitrator directed that the parties "negotiate a reasonable, and, if necessary, lenient repayment schedule".(Pa32)

Following the arbitrator's decision the STNCOA made an additional waiver petition to Civil Service on June 7, 2024 as the actual issue of a cash overpayment persisted.

Civil service denied the waiver and declined to address the issue of whether an overpayment actually occurred stating that "the Commission declines to address anew the underlying issue as to whether the Appellant was erroneously overpaid in the first place". (See Civil Service Decision, Pa4)

STATEMENT OF FACTS

This matter first came to the attention of Sgt. Vincent Antenucci on May 21, 2019. (Pa54) On that date he met with Lt. Lawrence Yarson and was advised that he was placed on the wrong salary step and that this error compounded over the years resulting in an overpayment in the amount of almost \$29,000.00. (Pa54)

At that meeting Sgt. Antenucci was not provided with any pay stubs, bank records, or other reliable financial evidence or record which would have revealed that Sgt. Antenucci had improper earnings during the asserted period of overpayment.(Pa54)

Indeed, Sgt. Antenucci has never provided with any pay stubs or bank records for any period covering this case. When he met with Lt. Yarson he was not presented with a single document evidencing an overpayment other than what Civil Service surmised what happened. Antenucci was expected to take upon trust, that an actual overpayment existed.(Pa54)

Lt. Yarson recommended an appeal to Civil Service for a waiver of the alleged overpayment. At this point in time neither Lt. Yarson nor Sgt. Antenucci contacted the union. The STNCOA remained completely in the dark about the issue. Sgt. Antenucci, relying completely upon the statements and directions of the

employer, took the advice of Lt Yarson and appealed to Civil Service for a waiver of the overpayment without the assistance of the union or the advice of counsel.

(Pa54-55)

The State Police payroll practices could, at best, be described as Byzantine and labyrinthian.(Pa55)

At various times the witnesses testified that payroll was controlled by TREADHOC, a “mainframe system” a “data warehouse” the PMIS system, “Business Objects” and “Passport”.(Pa55)

The Union demanded copies of any *banking records* that revealed an actual payment to Antenucci other than a spreadsheet which simply assumed an overpayment. The records ultimately produced by the employer were simply “spreadsheets” of dubious provenance.(Pa56) No banking transactions were ever provided or produced.

The union was provided with what would ordinarily be described as Excel spreadsheets.

The employer produced Ms. Stacey Monte as the witness with the most knowledge as to what occurred. She indicated that she did not start working until several years after the alleged source of the “glitch” in 2012 so that she could not say how or why the alleged anomaly was occurring in the spreadsheets. She

testified:

But at the time that this happened I was not the one that was getting those reports.

So, therefore, I cannot testify as to why or how it was missed.

So for whatever reason the system, here again, a glitch, put him at step 8, and it shouldn't have.

(T1 Transcript, Stacey Monte, Pg. 75-76)³

Ms. Monte also stated that the actual pay records themselves only go back 7 years - after that they are destroyed.

Q. So can we go back in the payroll files and go back in time to 2012 and - -

A. Unfortunately, no, because the payroll records **are only retained for seven years and then they're destroyed off that.**

(T1 Transcript, Stacey Monte, Pg. 61)

The records and evidence in this matter, as it concerns salary, which may have been **underpaid** or overpaid, was replete with uncertainty. Ms. Monte testified that for some periods of time Sgt. Antenucci was underpaid. (See Stacey

³ 1T = Transcript of July 6, 2023

Monte Transcript: 1T July 6, 2023)

“Q: So he [Antenucci] was underpaid during this period?

A: Correct

* * *

Q: The \$78,126 should have been \$81,140?

A: But – by this yeah, it should have been.
(T1 Tr. of Stacey Montey, P. 76, July 6, 2023)(emphasis supplied)

Mr. Monsey Farhat also testified. He had worked within the payroll system of the State Police for many years and was recognized by all of the witnesses as a knowledgeable person concerning state payroll issues. (Pa62)

He presented two (2) sets of documents which he represented came from the state payroll data base commonly referred to as PMIS. PMIS is run by Civil Service. In one document Trooper Antenucci’s salary was said to have been inconsistent with the salary guide contained within the Collective Bargaining Agreement. The PMIS Civil Service payroll documents produced by Mr. Farhat provided two distinct and different salaries for Sgt. Antenucci.(Pa63

The entries for Sgt. Antenussi’s salary on 8/11/12 has two different salary numbers - \$81,840.15 and \$87,913.02. Both are from the same Civil Service payroll system (PMIS system)

No explanation for the dual entries was ever supplied.

The process for State Trooper payroll was testified to be Ms. Stacey Monte. She testified that “batches” of salary figures were created. These batches were thereafter transmitted to Civil Service who would then “approve” those salary requests. (Pa66)

After Civil Service approved such requests the payroll department would then send those figures to the Department of Treasury who would also review and approve. (Pa66)

Before a banking transaction was processed for a State Trooper, three separate agencies approved the numbers, the State Police, Civil Service and the Department of Treasury. (Pa66)

Sgt. Antenucci testified that immediately upon being advised by the employer that he was allegedly overpaid \$29,000.00, he went in and tried to print his pay stubs and banking records from that time. (Pa72)

He testified that he was completely unable to track his salary or his payments and they were essentially undecipherable to him. As he indicated in his testimony:

Q. And you were trying to track to see what happened?

A: Yeah, around the anniversary, around August.

Q: And were you able to make heads or tails as to what happened?

A: No.

(T2⁴, dated October 26, 2023, Testimony of Trooper Antenucci, p. 30)

As he testified:

Q: Now were you able to deduce anything from that after looking at all these paychecks?

A: No.

(Tr., dated October 26, 2023, Testimony of Trooper Antenucci, p. 31)

Indeed ultimately Sgt. Antenucci said that he never received a breakdown of the alleged overpayments. As he indicated:

Q: And in all the exchanges, have you ever seen, like, a breakdown or an accountancy of any of these years in question 2012, '13, '14, '15, '16, '17, '18, '19 all these years, did they ever provide you with a breakdown in any of these documents that you saw which revealed an actual overpayment?

A: No.

(Tr., dated October 26, 2023, Testimony of Trooper Antenucci, p. 44)

Trooper Antenucci testified as to both his “pay stubs” which showed some of his direct deposit activity as well as his W-2’s. (Pa73) In every case, Sgt. Antenucci

⁴ 2T = Transcript of October 26, 2023

was completely unable to track or determine precisely what his salary was or to track precisely what he was paid. (Pa73) Indeed, there is no way to determine whether he was overpaid or *underpaid* (as Ms. Monte testified (Pa62) in any of the years in question. It appears that his pay fluctuated from year to year without any ability to track why that was actually occurring.(Pa73)

The arbitrator declined to address the issue as to whether an overpayment of cash money actually occurred (Pa30) holding that the issue had already been determined by Civil Service and the Appellate Division. He stated:

"While the Appellate Division noted this PERC arbitration, it affirmed the Civil Service Commission final agency decision on the issue the Association seeks to arbitrate".
(Pa30)

The issue "sought to be arbitrated" was whether an overpayment of actual money *in fact occurred*. Thus, the arbitrator declined to examine whether an actual overpayment in fact occurred finding that Civil Service had concluded otherwise.

The arbitrator directed that the parties "negotiate a reasonable, and, if necessary, lenient repayment schedule".(Pa32)

Following the arbitrator's decision the STNCOA made an additional waiver petition to Civil Service on June 7, 2024.

Civil service denied the waiver and declined to address the issue of whether an overpayment actually occurred stating that "the Commission declines to address anew

the underlying issue as to whether the Appellant was erroneously overpaid in the first place". (See Civil Service Decision, Pa4)

Petitioners filed the instant appeal.

POINT I

FUNDAMENTAL FAIRNESS REQUIRES THAT A REQUEST FOR A WAIVER CONSIDER WHETHER OR NOT AN ACTUAL OVERPAYMENT OCCURRED (Pa4, Pa103)

In the Decision under appeal in this matter, Civil Service blithely sidestepped the issue as to proof of overpayment:

“the Commission declines to address anew the underlying issue as to whether the Appellant was erroneously overpaid in the first place”. (See Civil Service Decision, pg. 4)

At every step in this case the Union demanded the documents which purportedly showed an overpayment of *actual money* to Sgt. Antenucci. At every stage in this process the only documents presented were spreadsheets and charts of compensation schemes which purportedly revealed a record of the salary progression of Sgt. Antenucci over the years. Antenucci objected to any reliance upon these hearsay documents.

The spreadsheets revealed what *might* have occurred. What they did not reveal is whether he was overpaid with actual money.

An actual banking record which revealed that Antenucci was indeed overpaid was never presented. Sgt. Antenucci testified unequivocally that he went over his banking records with scrutiny and that it was impossible for him to determine what he was paid in the years at issue. This was because the Employer commingled a variety of payments and compensation such as salary, overtime, maintenance, etc., into a single paycheck.

As no time was Sgt. Antenucci ever noticed what his actual salary was (correct or incorrect) in any given year.

The regulation in question N.J.A.C. 4A:3-4.21 (Salary overpayments: State service) indicates:

(a) The Civil Service Commission may waive, in whole or in part, the repayment of an erroneous salary overpayment, or may adjust the repayment schedule based on consideration of the following factors:

1. The circumstances and amount of the overpayment were such that an employee could reasonably have been unaware of the error;
2. The overpayment resulted from a specific administrative error, and was not due to mere delay in processing a change in pay status;
3. The terms of the repayment schedule would result in economic hardship to the employee.

(b) An employee or appointing authority may request a waiver of repayment in accordance with the procedure for written record appeals. See N.J.A.C. 4A:2-1.

This is the only regulation that arguably contemplates a dispute or an issue surrounding an alleged overpayment. What the regulation does not specifically contemplate is whether an overpayment actually occurred in the first place. The regulation contemplates that an accusation of overpayment is correct in the first instance.

Petitioner submits that subsumed within this regulation must be a factor or element which considers whether an actual overpayment of actual money indeed occurred. Absent that element an employer could simply claim “overpayment” and then effectively evade the core issues as to whether an overpayment was actually made in the first place - as is occurring in this matter. By limiting an employee to the criteria in the regulation an employer avoids that question entirely. That is exactly what is occurring in this case. Fundamental fairness requires that an employee accused of receiving an overpayment be supplied with the proofs underlying such a claim - particularly where the agency charged with such a review is the one responsible for the issue in the first place.

The doctrine of fundamental fairness has been described in this manner:

The doctrine "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against government procedures that tend to operate arbitrarily." The "one common denominator" in our fundamental fairness jurisprudence is "that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked." The fundamental fairness doctrine "promotes the values of 'fairness and fulfillment of reasonable expectations in the light of the constitutional and common law goals.'" (Citations omitted)

State v. Njango, 247 N.J. 533, 548-49 (2021)

Under the Doctrine of Fundamental Fairness, an employee must be granted a fair chance of either having an agency confirm with competent proof an overpayment or extend the employee challenging it. Here Sgt. Antenucci requested proof or competent and primary source evidence so that he could evaluate it and either agree with an overpayment or challenge the allegation that he was indeed overpaid. He has a reasonable expectation of fairness in this regard. Civil Service has not relied upon any records which can be considered competent evidence of an overpayment - it simply relies on unproven assertions - not facts or records.

Unfortunately the regulation does not contemplate or consider the issue as to whether or not an overpayment actually occurred with competent proof. Fundamental

fairness requires that such an element be read *pari materia* into the regulation or presumed as a factor so as to avoid potentially unfair treatment.

The employer supplied a series of hearsay spreadsheets and various computer print outs. No banking records were disclosed. Ultimately some type of check or some type of electronic deposit must have occurred concerning Sgt. Antenucci's pay. The Petitioner requested such documents and none were ever provided.

This is a particularly problematic question because Civil Service is one of the three agencies who determines whether or not a proper salary payment was actually administered in the first place. In other words it is charged with investigating its own mistakes which once again invokes fundamental fairness.

The record revealed that there are several administrative checkpoints for the payment of State Troopers. The State Police payroll system requests a payment and that payment is *then checked and approved by Civil Service* and then ultimately the Department of Treasury issues either a check or an electronic payment. Those banking records were never produced.

The records of what occurred in 2012, 2013, 2014, etc., were never supplied to Sgt. Antenucci or the Union in this case. While the spreadsheets have indicated what Sgt. Antenucci should have or might have been paid we simply do not know what was actually transmitted to his bank account.

It is impossible for him to determine what part of his compensation was attributed solely to salary or to other items such as overtime, or maintenance payments.

This court has applied the doctrine of fundamental fairness to Civil Service cases. See *Jones v. Dep't of Civil Serv.*, 118 N.J. Super. 323, 325-26 (App. Div. 1972) “a determination that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked.”

In this case Civil Service suggests that the arbitrator found that Antenucci “did not dispute his employment history, history of promotions, salary history, and overpayment as set forth in the Compensation Compendium, CNA and Personnel Management Information System”. (Pa3)

This statement sidesteps the issue at stake. The spreadsheets and Compensation Compendium provide a history of what should have or might have occurred on paper - they do not address the issue of an actual payment of cash.

The employers charts and spreadsheets and excel sheets are precisely what they purport to show - supposition documents. They do not reveal what was actually paid to Antenucci *in his pocket or bank account*. Fundamental fairness requires something more than a spreadsheet before dunning an employee tens of thousands of dollars.

A review of the quantum and quality of the evidence was never conducted by Civil Service. The agency did not review the evidence to determine whether sufficient, competent evidence supported a finding of an overpayment. Whether or not an actual (as opposed to a hypothetical) overpayment occurred is an ultimate fact essential to any adjudication of this matter. Spreadsheets are hearsay documents. Our Supreme Court has explained that "a fact finding or a legal determination cannot

be based on hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony" but it cannot serve to satisfy an ultimate fact. *Weston v. State*, 60 N.J. 36.

The Civil Service decision in this case is not reliant upon "a residuum of legal and competent evidence in the record to support it." Ibid. The "residuum" rule requires that any ultimate finding or findings of material fact must be based on a residuum of legally competent evidence.

As the Appellate Division explained in *Chou v. Rutgers*, 283 N.J. Super. 524, 539 (App.Div.1995), certif. denied, 145 N.J. 374 (1996), "our review of an agency's decision is not simply a pro forma exercise in which we rubber stamp findings that are not reasonably supported by the evidence. . . ."

The appellate application of this standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record. *Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs of Dep't of Law & Pub. Safety*, 64 N.J. 85, 93 (1973)

In this case the Residuum Rule competent evidence standard was not applied to the ultimate fact in this matter. As such the agency decision must be rejected where no such finding was reasonably made. The Court in this matter should not defer to an agency decision that is manifestly mistaken and not based upon a residuum of competent evidence in the record.

POINT II

THE SQUARE CORNERS DOCTRINE REQUIRES THAT CIVIL SERVICE DISCLOSE COMPETENT EVIDENCE THAT AN OVERPAYMENT IN FACT OCCURRED (not raised below)

As one of three State agencies overseeing the payroll of State Troopers the Civil Service Commission has a special duty to conduct some rudimentary investigation in order to ensure that an employee facing an allegation of overpayment has actually been overpaid. Civil Service has declined to accept this obligation.

Sgt. Antenucci made repeated statements that he was unable to determine from his own banking records that he was indeed overpaid. He was not in a position to be able to either verify or refute the claims (and they are only claims) that he was indeed overpaid with cash money. Once his banking records were presented to the Employer, the Employer's only response was again to "double down" and rely upon spreadsheets and data sheets which it had prepared. In a word those documents are aspirational - they simply reflect the employers desire to document a presumed fact - even though no actual facts supply the background for the claims. No banking records or proof of overpayment of an actual electronic banking deposit was ever produced by the Employer in this case. Shifting the burden to an employee to recreate his financial records from a decade ago is unfair and outside the standards of compunction and integrity.

The "Square Corners Doctrine," mandates that the government must act scrupulously, correctly, efficiently, and honestly and will exercise its governmental responsibilities conscientiously, in good faith and without ulterior motives. *Seaboard v. Borough of Penns Grove*, 28 N.J. Tax 607, 622 (Tax Ct. 2015).

The Appellate Division within *New Concepts for Living, Inc. v. City of Hackensack*, 376 N.J. Super. 394, 401 (App. Div. 2005) explained the Doctrine of Square Corners in this way:

This requires that the government not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner. Its primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another.

As the New Jersey Supreme Court has stated in *W.V. Pangborne & Co. v. New Jersey Dep't of Transp.*, 116 N.J. 543 (N.J. 1989) government must adhere to strict standards of honesty and integrity.

[W]e have insisted that in the exercise of statutory responsibilities, government must 'turn square corners' rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens. '[The government's] primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another.' We have similarly insisted that government adhere to strict standards in its contractual dealings. Therefore....government must act fairly and 'with compunction and integrity.' (Citations omitted).

In this case the employer has not turned square corners and its has use the opaqueness of its own financial and payroll process to gain a litigational advantage over Sgt. Antenucci.

Many of the payroll records that were produced were contradictory. Some purported to show an overpayment and some purported to show the correct payment. These documents were presented and no explanation was ever provided. Indeed, the Employers' witnesses in this case indicated that the payroll records were usually destroyed after six (6) years. Therefore there was no banking records of the years in question, 2012, 2013, 2014 and succeeding years.

It is grossly unfair that Sgt. Antenucci is forced into a situation where he must prove that he was not overpaid where he has no reasonable ability to do so. Prior case law has indicated that any type of proof of injustice enrichment should be placed upon the Employer to prove that an overpayment was indeed made.

As our Supreme court has held:

"[o]ne who charges an unjust enrichment has the burden of proving it."

Kutzin v. Pirnie, 124 N.J. 500, 516 (1991)

New Jersey has a well recognized case history which maintains that the party who alleges an unjust enrichment has the burden of proof. See, *Oliver v. Lawson*, 92 N.J. Super. 331, 336 (App. Div. 1966) and cases therein.

Here the Employer has not provided such documents and yet it seeks to demand a payment of twenty-nine thousand (\$29,000.00) dollars from Sgt. Antenucci with no banking records that he ever was paid such amounts. The doctrine of square corners requires that the Employer reveal competent proof of overpayment before requiring that the Employee be subjected to such deductions from his current payroll.

When the Petitioner requested such documents, the Employer offered spreadsheets and computer generated records as to what the Employer believed occurred back in 2010 and thereafter. There is a marked difference between computer generated spreadsheets and an actual bank deposit. A bank deposit is a business record of what actually occurred. A spreadsheet on the other hand is simply a recreation of what was supposed to occur - but which may or may not have occurred. A history of bank transactions is the only way to prove with certainty what monies were actually extended and paid to Sgt. Antenucci. Fundamental Fairness requires substantial competent proof that an actual overpayment was made. Here the Employer has sought to capture or clawback an alleged overpayment. However there is no proof of overpayment.

As noted, Civil Service is an active agent in determining what is the correct salary for State Troopers. The Division of State Police "clears" its payroll with Civil Service before paychecks are issued. If there was a mistake - Civil Service was one of the responsible parties. Fundamental fairness and the doctrine of square corners mandates that Civil Service reveal competent proofs akin to banking records before

it compels employees to forfeit tens of thousands of dollars.

POINT III

**THE AGENCY DECISION WAS NOT REASONABLE
(not raised below)**

Civil Service has issued a decision in which it serves as the investigator and judge of its own actions taken over a decade ago. Civil service was one of three agencies that was responsible for whatever happened with Sgt. Antenucci's salary. An actual overpayment has never been substantiated, yet Antenucci is being denied a waiver based upon technicalities within the regulation rather than a review of the totality of the circumstances - particularly circumstances over which Civil Service had complete control.

Certainly the Commission should consider the equity of a waiver application where economic hardship is manifest and where the agency itself was part of, or perhaps the direct causal agent, of whatever confused payroll practices occurred over a decade ago. Fundamental fairness and Square corners should be a part of an waiver determination. Application of the Residuum Rule should also be consideration.

Civil service declined to find economic hardship because Sgt. Antenucci was granted an ability to negotiate a repayment plan. Every employee has a right to negotiate a repayment plan.

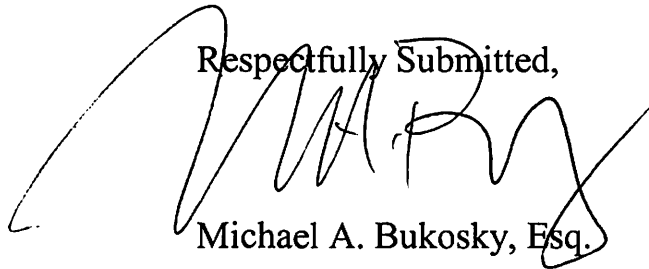
If this was the standard no employee would ever be eligible for a waiver. As

such the Commission's decision was arbitrary and capricious.

CONCLUSION

For all of the above reasons including the Doctrine of Fundamental Fairness and the Doctrine of Square Corners, the decision in this matter should be reversed and Sgt. Antenucci should be extended a waiver in this case where the sums at issue have never been proven to have been made to him.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'M. Bukosky', is written over the text 'Respectfully Submitted,' and 'Michael A. Bukosky, Esq.'.

Michael A. Bukosky, Esq.

January 30, 2025



State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

MATTHEW J. PLATKIN
Attorney General

MICHAEL C. WALTERS
Acting Director

June 2, 2025

Via eCourts Appellate

Marie C. Hanley
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: In the Matter of Vincent Antenucci, Division of State Police,
Department of Law and Public Safety
Docket No. A-4037-23

Civil Action: On Appeal from a Final Decision of the Civil
Service Commission

Letter Brief on Behalf of Respondent, Civil Service Commission,
on the Merits of the Appeal

Dear Ms. Hanley:

Please accept this letter brief on behalf of Respondent, the Civil Service
Commission, on the merits of this appeal.

TABLE OF CONTENTS

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS2
ARGUMENT4
CONCLUSION10



PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

In May 2019, the New Jersey State Police advised Appellant, Vincent Antenucci, that, following a 2012 administrative error, he had been overpaid by a cumulative amount of \$29,000. (Pa36).¹ Antenucci applied to the Commission for a repayment waiver under N.J.A.C. 4A:3-4.21, which the Commission denied on December 23, 2019. (Pa36-37). The Commission explained, in relevant part, that it could not grant Antenucci's waiver because the State Police had not yet set a repayment schedule and Antenucci therefore could not show repayment would cause him economic hardship. (Pa38). Antenucci appealed the Commission's decision to the Appellate Division. (Pa36).

Separately, on January 3, 2020, the State Trooper's Non-Commissioned Officers Association of New Jersey ("Association") also filed a grievance on Antenucci's behalf with the Public Employment Relations Commission ("PERC"). (Pa13). Antenucci's grievance sought "proof of overpayment" from the State Police and a finding that "any payment plan [must] be collectively negotiated." Ibid. On March 16, 2021, the Association requested arbitration before PERC. Ibid.

On October 27, 2021, the Appellate Division affirmed the Commission's decision. (Pa35-36). The court found Antenucci "failed to satisfy his burden of

¹ "Pa" refers to Petitioner's Appendix. "Pb" refers to Petitioner's brief.

showing an inability to repay his salary overpayment” because “no repayment schedule had been established.” (Pa42). The court added:

Antenucci’s remaining arguments are presently pending a scheduled hearing before a PERC arbitrator. Our affirmance of the Commission’s December 23, 2019 decision is based on the record before the agency on that date. Nothing precludes Antenucci’s filing of a new waiver application after the PERC arbitrator renders a decision on the Association’s grievance claims.

[(Pa42-43).]

On May 21, 2024, the PERC arbitrator issued a written award finding the Association failed to meet “its burden to prove that Antenucci was not mistakenly overpaid.” (Pa30; Pa32). The arbitrator further found the State Police violated its collective bargaining agreement “by failing to negotiate over the repayment plan for the overpaid salary.” (Pa31). The arbitrator therefore directed the parties to “negotiate a reasonable and, if necessary, lenient repayment schedule as ordered by the [Commission] and affirmed by the Appellate Division.” (Pa32) (internal quotation marks omitted).

Following the arbitrator’s decision, Antenucci again applied to the Commission for a repayment waiver, arguing (1) “the documentary and evidentiary trail concerning the alleged overpayments . . . was ‘foggy’ at best and insufficient to support a claim of an actual overpayment,” and (2) his obligation to repay the overpaid amount in full “r[esults] to the level of a facially apparent hardship” under the unpublished opinion In re Stumpf, Docket No. A-

0053-15 (App. Div. July 17, 2017). (Pa3-4; Pa7-10) (internal quotation marks omitted).

The Commission denied Antenucci's second waiver application on July 24, 2024. (Pa5). The Commission first noted it lacked "the ability to set aside the decision and award of a PERC-appointed arbitrator" regarding the existence of an overpayment. Ibid. It further concluded Antenucci could not prove the economic hardship prong of N.J.A.C. 4A:3-4.21 because, among other reasons, "the parties still ha[d] not set any repayment schedule." Ibid. This appeal follows.

ARGUMENT

THE COMMISSION'S DENIAL OF ANTENUCCI'S REQUEST FOR A WAIVER OF REPAYMENT OF SALARY OVERPAYMENT IS REASONABLE AND BASED ON SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

The Commission's July 24, 2024 decision should be affirmed because it is supported by the facts and consistent with the requirements and policies of the Civil Service Act, N.J.S.A. 11A:10-1 to -12-6, and applicable regulations.

The Commission's final agency decision is entitled to "substantial deference." In re Herrmann, 192 N.J. 19, 28 (2007). Appellate courts maintain a limited role in reviewing the decisions of an administrative agency and will reverse a decision only if it is "arbitrary, capricious or unreasonable or . . . not supported by substantial credible evidence in the record as a whole." In re

Adoption of Amendments to N.E., Upper Raritan, Sussex & Upper Delaware Water Quality Mgmt. Plans, 435 N.J. Super. 571, 582 (App. Div. 2014). “The burden of demonstrating that the agency’s action was arbitrary, capricious, or unreasonable rests upon the person challenging the administrative action.” In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006).

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 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). Unless the Commission’s determination is “patently incompatible with the language and spirit of the law,” the judiciary will not interfere in the Department’s exercise of authority. In re Hudson Cnty. Probation Dep’t., 178 N.J. Super. 362, 371 (App. Div. 1981) (quoting Walsh v. Dep’t of Civil Serv., 32 N.J. Super. 39, 44 (App. Div. 1954)); see also Hargrove v. Sleepy’s, L.L.C., 220 N.J. 289, 301 (2015) (noting the “deference that should be afforded to the interpretation of the agency charged with applying and enforcing a statutory scheme.”).

Although Antenucci, by the terms of his collective bargaining agreement, must repay his overpaid salary, N.J.A.C. 4A:3-4.21 allows the Commission to waive some or all of that obligation upon a showing of the relevant factors.

Here, the Commission correctly applied the uniform regulatory criteria to determine that Antenucci was ineligible to receive a waiver.

N.J.S.A. 11A:3-7 authorizes the Commission to administer the State employee compensation plan. “When an employee has erroneously received a salary overpayment, the commission may waive repayment based on a review of the case.” N.J.S.A. 11A:3-7. N.J.A.C. 4A:3-4.21 sets forth the standards that govern a waiver. It requires the applicant to show: (1) the circumstances and amount of the overpayment were such that an employee could reasonably have been unaware of the error; (2) the overpayment resulted from a specific administrative error, and was not due to mere delay in processing a change in pay status; and (3) the terms of the repayment schedule would result in economic hardship to the employee. N.J.A.C. 4A:3-4.21.

The Commission properly and thoroughly reviewed Antenucci’s request for a waiver of his salary overpayment obligation under N.J.A.C. 4A:3-4.21. However, as the Commission observed below, “all of the factors outlined in N.J.A.C. 4A:3-4.21 must be satisfied to successfully obtain a waiver of the repayment obligation.” (Pa4) (emphasis added). To obtain a waiver, Antenucci must therefore demonstrate that the terms of his repayment schedule would cause him economic hardship. N.J.A.C. 4A:3-4.21(a)(3).

Yet as the Commission, the arbitrator, and the Appellate Division have already observed, Antenucci has failed to negotiate a repayment schedule with

the State Police. (Pa5; Pa31; Pa42).² Until Antenucci does so, the Commission cannot grant the waiver he seeks. The Commission therefore did not act arbitrarily, capriciously, or unreasonably in denying Antenucci's second waiver application.

Antenucci further contends the Commission, in denying his second waiver application, wrongfully "declined to address anew the underlying issue as to whether [he] was erroneously overpaid in the first place." (Pb13) (quoting Pa4). Antenucci argues that, because N.J.A.C. 4A:3-4.21, as written, does not contemplate "whether an overpayment actually occurred," and instead "contemplates that an accusation of overpayment is correct in the first instance," "such an element [should] be read . . . into the regulation or presumed as a factor so as to avoid potentially unfair treatment." (Pb15-17). The court should reject this argument.

N.J.A.C. 4A:3-4.21 governs the Commission's ability to waive an erroneous salary overpayment. However, it does not create a right to dispute whether an overpayment occurred before the Commission. Such a dispute

² As the arbitrator observed: "The Civil Service Commission first issued its waiver denial decision on December 23, 2019. Since then[,] the [State Police] has attempted to set a repayment plan that would not impose financial hardship upon Antenucci. [The State Police] actively attempted on multiple occasions to seek a reasonable recoupment schedule that would be acceptable to Antenucci. The Association and Antenucci did not respond to the [State Police,] as he was pursuing his waiver appeal and [the] arbitration." (Pa31).

would be governed by the State Police's negotiated agreement with the Association, not the Commission's regulations.

N.J.S.A. 34:13A-5.3 requires public employers to “negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions . . . affecting them.” That statute further states that “[g]rievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.” Ibid. (emphasis added). “Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes.” Ibid.³

Here, Antenucci has already filed such a grievance disputing the existence of an overpayment. Antenucci's January 3, 2020 grievance, which the State Police and Antenucci submitted to binding arbitration pursuant to the Association's agreement with the State Police, sought “proof of overpayment,”

³ The State Police and its employees may not use binding arbitration to adjudicate disputes regarding the discipline of State Police employees, because such authority is vested in the Superintendent of the State Police. See N.J.S.A. 34:13A-5.3; N.J.S.A. 53:1-10 (providing that “[t]he superintendent shall, with the approval of the governor, make all rules and regulations for the discipline and control of the state police”). However, this exception does not apply in Antenucci's case, which does not involve employee discipline.

and argued “the unilateral declaration of a salary overpayment and adjustment in [Antenucci’s] compensation without negotiation [was] a violation” of that agreement. (Pa13). Nevertheless, the arbitrator ultimately found the Association failed to meet “its burden to prove that Antenucci was not mistakenly overpaid” or that “the [State Police] violated the Agreement in . . . seeking recoupment of that salary overpayment,” and denied the grievance “in [that] respect.” (Pa30-31).

As the Commission explained in its decision denying Antenucci’s second waiver application, the Commission “does not have the ability to set aside the decision and award of a PERC-appointed arbitrator.” (Pa5). Instead, under N.J.S.A. 2A:23B-23 and -24, a party seeking to vacate, modify, or correct an arbitration award must file a summary action with the New Jersey Superior Court. N.J.S.A. 2A:23B-1, -23(a), -24. That party must file its summary action within 120 days of receiving notice of the award. N.J.S.A. 2A:23B-23(b), -24(a).

Here, the arbitrator issued his award on May 21, 2024. (Pa12). Antenucci therefore had until September 18, 2024 to file a summary action with the New Jersey Superior Court seeking to vacate, modify, or correct that award. He failed to do so. The Commission was therefore required to accept the arbitrator’s finding that an erroneous overpayment occurred, and that the State Police were entitled to recoup that overpayment.

June 2, 2025

Page 10

CONCLUSION

The Commission's decision should be affirmed.

Respectfully submitted,
MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW
JERSEY

By: /s/Gordon C. Estes
Gordon C. Estes (427252023)
Deputy Attorney General
Gordon.Estes@law.njoag.gov

Sookie Bae-Park
Assistant Attorney General
Of Counsel

cc: Michael Bukosky, Esq. (via regular and certified mail)
Loccke Correia & Bukosky
235 Main St
Ste 203
Hackensack, NJ 07401
Counsel for Appellant

Michael A. Bukosky, Esq. -NJ Attorney ID # 015891992
9 Yeomans Lane
Allendale, NJ 07401
(201) 906-6083
mbukosky@northeastlaborlaw.com
Attorney for Appellant

IN THE MATTER OF	:	SUPERIOR COURT OF
VINCENT ANTENUCCI, DIVISION	:	NEW JERSEY:
OF STATE POLICE, DEPARTMENT	:	APPELLATE DIVISION
OF LAW AND PUBLIC SAFETY	:	
	:	DOCKET NO.: A-004037-23
	:	
	:	APPEAL FROM THE CIVIL
	:	SERVICE COMMISSION
	:	CSC DOCKET NO.: 2024-
	:	2589
	:	July 24, 2024
	:	
	:	
	:	

**APPELLANT STATE TROOPERS NCO ASSOCIATION’S (VINCENT
ANTENUCCI) REPLY BRIEF IN SUPPORT OF APPEAL**

Of Counsel and On the Brief:
MICHAEL A. BUKOSKY, ESQ.
Attorney ID#: 015891992

TABLE OF CONTENTS

TABLE OF AUTHORITIES-ii

POINT I

**THE AGENCY DID NOT CONDUCT A
“REVIEW OF THE CASE” AS
STATUTORILY REQUIRED1**

POINT II

**WHERE THE AGENCY HAS A SELF
INTEREST OR A CONFLICT OF INTEREST
NO DEFERENCE SHOULD BE EXTENDED4**

POINT III

**THE ISSUE OF OVERPAYMENT HAS
NEVER BEEN ADJUDICATED WHICH
HAS DENIED SGT. ANTENUCCI
FUNDAMENTAL DUE PROCESS..... 7**

POINT IV

**THE RESIDUUM RULE REQUIRES THAT
THE AGENCY DECISION BE VACATED11**

POINT V

**CIVIL SERVICE CREATED UNLAWFUL
IMPEDIMENTS WITHIN ITS DECISION12**

CONCLUSION.....14

APPENDIX TABLE OF CONTENTS

Final Administrative Action of the Civil Commission, Request for Waiver of Repayment of Salary Overpayment, CSC Docket No.: 2024-2589, Issued: July 24, 2024.....Pa1

Correspondence to Director Nicholas F. Angiulo regarding Request for Waiver Pursuant to *N.J.A.C.* 4A:3-4.21, Docket No.:2019-3633, Dated June 7, 2024.....Pa7

EXHIBIT “A” Decision and Award received from the Public Employment Relations Commission before Arbitrator Brian W. Kronick Docket No.: AR-2021-424, Issued May 21, 2024.....Pa11

EXHIBIT “B” Opinion and Award received from the Superior Court of New Jersey, Appellate Division, Docket No.: A-2165-19, Argued October 12, 2021 - Decided October 27, 2021, Before Judges Rothstadt and Mayer, On appeal from the New Jersey Civil Service Commission, Docket No.: 2019-3633.....Pa34

EXHIBIT “C” Post Hearing Brief on behalf of State Troopers NCO Association and Grievant Sgt. Antenucci, OER No.: 14950, Docket No.: AR-2021-424, Before Arbitrator Brian W. Kronick, Dated March 6, 2024.....Pa45

EXHIBIT “D” Reference Case In re Stumpf, Superior Court of New Jersey, Appellate Division, June 1, 2017.....Pa115

TABLE OF AUTHORITIES

<i>Burlington Cnty. Evergreen Park Mental Hosp. v. Cooper</i> , 56 N.J. 579, 600 (1970)	3
<i>Chevron Deference and Agency Self-Interest</i> , 13 Cornell J. L. & Pub. Pol'y 203 (2004)	5
<i>DiProspero v. Penn</i> , 183 N.J. 477, 492 (2005)	2
<i>F.G. v. MacDonell</i> , 150 N.J. 550, 563-64 (1997)	2
<i>Handlon v. Town of Belleville</i> , 4 N.J. 99, 106 (1950)	3
<i>In the Matter of Sean McManus</i> , 2022 N.J. CSC LEXIS 2, CSC Docket No. 2022-1342	2
<i>N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n</i> , 82 N.J. 57, 82 (1980)	3
<i>Pace v. Kuchinsky</i> , 347 N.J. Super. 202, 215 (App. Div. 2002).....	9
<i>Scenic Am., Inc. v. DOT</i> , 583 U.S. 936, 938 (2017)	5
<i>State v. Schenkolewski</i> , 301 N.J. Super. 115, 145 (App. Div. 1997).....	6
Statutes and Regulations	
N.J.S.A. 11A:3-7	1
Blacks Law Dictionary (1983, 5th ed.).....	2

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Civil Service Decision.....	Pa1
------------------------------------	------------

POINT I

**THE AGENCY DID NOT CONDUCT A “REVIEW OF
THE CASE” AS STATUTORILY REQUIRED**

As Civil Service notes in its response brief at page six, "N.J.S.A. 11A:3-7 authorizes the Commission to administer the State employee compensation plan" and that "[w]hen an employee has erroneously received a salary overpayment, the commission may waive repayment based on a review of the case." (Rb-6)

The authorizing statute provides in relevant part:

a. The commission **shall administer an equitable¹ State employee compensation plan** which shall include pay schedules and standards and procedures for salary adjustments other than as provided for in the State compensation plan for the career, senior executive and unclassified services.

* * *

c. When an employee has erroneously received a salary overpayment, the commission may waive repayment **based on a review of the case.** (Emphasis supplied)

N.J.S.A. § 11A:3-7

¹ Civil Service has recognized that “equitable” requires something more than ministerial administration. *In the Matter of Sean McManus*, 2022 N.J. CSC LEXIS 2, CSC Docket No. 2022-1342

The Commission was legislatively obligated to “administer” the Compensation plan “equitably” and to conduct a “review of the case” in circumstances involving an “erroneously” received salary. (“We ascribe to the statutory words their ordinary meaning and significance”) *DiProspero v. Penn*, 183 N.J. 477, 492 (2005) “Equitable” generally means “fair and impartial”. A “review of the case” means a form of appeal for consideration of either findings of fact, or of law, or of both. *Blacks Law Dictionary* (1983, 5th ed.) Findings of fact require evidence which a reasonable mind might accept as adequate to support a conclusion after taking into consideration opposing evidence.

In this case the Agency has declined to conduct a case review, or make findings of fact, as to whether there was an “overpayment in the first place” or to conduct an equitable review of the case based upon substantial evidence in the record. Indeed Civil Service takes the position that the enabling statute “does not create a right to dispute whether an overpayment occurred before the Commission” and therefore rejects all of petitioner’s assertions as irrelevant. (Db6)

This is shockingly untenable. Civil Service is the agency that is responsible for “administer[ing] an equitable State employee compensation plan”. It appears to take the position that it is unaccountable for any mistakes it may make and may simply “claw back” money as it deems fit without any due process considerations

whatsoever. The Commission's position that a state employee “does not have a right to dispute” an alleged overpayment and that it will not consider whether an overpayment occurred in the first place is an abdication of its statutory obligations to administer an “equitable compensation scheme”, rendering its decision in this matter arbitrary and capricious. The statutory duty to “equitably administer” the compensation plan surely places Civil Service under some aspect of a fiduciary duty. *F.G. v. MacDonell*, 150 N.J. 550, 563-64 (1997) (“The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position”) The Commission should have treated this matter as an application for reconsideration as this Court directed it to do. That authority includes “the inherent power to reopen or to modify and to rehear orders that have been entered.” *Burlington Cnty. Evergreen Park Mental Hosp. v. Cooper*, 56 N.J. 579, 600 (1970); In this case Civil Service was bound to honor the Legislative policy which requires a meaningful “case review” of an erroneous salary calculation. The Agency is not free to “alter the terms of a legislative enactment or frustrate the policy embodied in the statute.” *N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n*, 82 N.J. 57, 82 (1980)

The matter should therefore be remanded with instructions that the agency conduct the mandatory “case review” which requires findings of fact based upon substantial evidence.

POINT II

WHERE THE AGENCY HAS A SELF INTEREST OR A CONFLICT OF INTEREST NO DEFERENCE SHOULD BE EXTENDED

It is very likely that if there were any erroneous "mistakes" in salary it was made by Civil Service itself. Civil Service is the primary agent for checking and signing off on salary changes. Civil Service therefore has a self interest in not comprehensively exploring who was responsible or seeking an explanation as to what actually occurred.

When this matter was litigated before the Arbitrator what finally came to light was that Civil Service reviews and approves the type of salary action which Sgt. Antenucci had experienced.

In this respect Civil Service has taken it upon itself to investigate it's own "mistake" and has taken it upon itself to unilaterally declare that its own assessment (bare of any competent proof) is sufficient to assess an employee \$29,000. It then self proclaims its own actions reasonable and asks that this Court extend it deference.

Most courts conducting a review of such matters do not extend deference to similar agency determinations. A cogent synopsis of the law explaining why agency action which advances an agency's self-interest should be viewed skeptically was

provided by a Cornell Law Review Article which explained:

[C]ourts have refused to defer to an agency's legal interpretation because the agency itself benefited in some direct way from the interpretation it adopted—in other words, because the agency's interpretation implicated the agency's self-interest. When called upon to review an agency's self-interested legal interpretation, some courts, apparently suspicious of possible agency self-aggrandizement, have hesitated to defer and have instead subjected the agency's interpretation of law to noticeably more thorough scrutiny than is typical in *Chevron* cases.

See, Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell J. L. & Pub. Pol'y 203 (2004) and cases cited therein. (Cited by the Supreme Court within *Scenic Am., Inc. v. DOT*, 583 U.S. 936, 938 (2017))

Chevron Deference and Agency Self-Interest concluded that extending deference in a case similar to the one at bar “effectively places the agency's thumb on the judicial scales, which should not be tolerated when the interpretation before the court advances the agency's own self-interest.” “*Chevron Deference*”, *Ibid*.

In this case the agency acted as a salary administrator, not a regulatory agency. We have no explanation as to what happened a decade ago. Indeed the most telling

answer was that the records had been destroyed and had to be "recreated". As a consequence the agency has simply concluded that the money is owed because it says it is owed. The Commission has flatly indicated that it refuses *any inquiry* as to "whether there was an overpayment in the first place."

It is of course possible that the same person responsible for the original error is now the same person, or serves within the same "team" of analysts who are charged with investigating and making recommendations as to the statutory waiver in this case. The record is entirely unclear if any person responsible for the mistake works within the same department or group that made the payroll decisions underlying Sgt. Antenucci's case. That person or persons would have a strong self interest in shifting responsibility for any error onto the employee and away from themselves.

Where the Agency intentionally determines to avoid such an inquiry its actions are potentially disqualifying. See, *State v. Schenkolewski*, 301 N.J. Super. 115, 145 (App. Div. 1997) ("A public official is disqualified from participating in quasi-judicial proceedings in which one has a conflicting interest that may interfere with the impartial performance of the duties as members of a public body")

The self interest and potential conflict of interest makes deference inappropriate in this case.

POINT III

**THE ISSUE OF OVERPAYMENT HAS NEVER
BEEN ADJUDICATED WHICH HAS DENIED SGT.
ANTENUCCI FUNDAMENTAL DUE PROCESS**

Civil Service was obligated to conduct a “review of the case” as it was required to do under the statute. If it did it would have considered these facts found by the Arbitrator:

[T]he evidence suggests that Antenucci could not determine what [his] precise annual salary was within any given paycheck because the increase was divided by the number of pay periods in the year and the Employer commingled such things as overtime, maintenance payments, and other items within any given bi-weekly paycheck. Antenucci credibly testified he was never informed as to the precise rate of salary which he was extended on a year to year basis, was never told what his precise salary was in terms of numerical calculation nor was he even informed as to what particular step he was on or what grade within the salary guide he had been placed upon. The evidence supports Antenucci's claim that he was unable to assure that his salary was correct or audit what was occurring on a monthly or annual basis going back so many years.

Arbitrator's Award, Pa30

Civil service ignored this evidence. This evidence revealed that Antennucci was unable to audit his own paycheck. This begs the question as to how Civil Service was able to conduct its own audit in the absence of any competent financial evidence enabling it to do so. It begs the question as to whether Civil Service conducted any audit whatsoever. The record shows no evidence of such an audit.

The Arbitrator was bound by Civil Service's and this Court's prior Orders but his award does not and cannot serve as collateral estoppel over the Commission's statutory "case review". Indeed the arbitrator stated that on the overpayment issue his hands were tied and that he was bound by the prior affirmance of the previous Civil Service's decision.

"While the Appellate Division noted this PERC arbitration, it affirmed the Civil Service Commission final agency action on the issue the Association seeks to arbitrate."

Arbitrator's Decision, (Pa30)

The arbitrator understood that he was bound to uphold the Appellate Division's prior decision "on the issue the Association seeks to arbitrate".

The Commission subsequently latched onto this finding as dispositive of

this matter which it contends excused it from any necessity of a fair and equitable "review of the case" or any type of fair and equitable audit.

The Commission was not free to then simply rely upon the Arbitrator's decision as collateral estoppel for its own decision because the issue in this second matter was different. The issue in this matter, as advanced by petitioner, was whether "the employer violated the contract or equitable principles when it sought to recoup alleged overpayments of salary" (Pa17) Whether there was an overpayment in the first place had never been adjudicated by the Arbitrator or Civil Service before that. The arbitrator found no competent evidence which would support an overpayment (indeed he found evidence of the opposite). We note that Civil Service was not a party to the arbitration. Nor was the issue before the arbitrator the "identical to the issue" in the prior proceeding. Nor was the issue at stake (whether there was a proven overpayment) actually litigated in the prior proceeding. Reliance upon a collateral estoppel argument was therefore not available to the Commission.

Moreover, even if collateral estoppel was applicable the Commission is not free to pick and choose what facts it accepts and what facts it rejects as collateral. It is equally clear that collateral estoppel, "which has its roots in equity, will not be applied when it is unfair to do so." *Pace v. Kuchinsky*, 347 N.J. Super. 202, 215 (App. Div. 2002).

Civil Service has made it plain that it refuses to address the underlying issue as to whether the Antenucci was erroneously overpaid in the first place.

At each successive level of review Sgt. Antenucci was found to owe money without ever being extended an explanation that *actual monies* paid to him were in fact overpaid. But each successive review simply engaged in a tautological feedback loop of affirming the overpayment even though the issue was never explored and simply presumed.

Unfortunately due to the various procedural postures of this matter the issue as to whether an overpayment occurred in the first place was never considered - it was simply assumed without any competent evidence.

The Arbitrator declined to address the issue because he was bound by the Appellate Division ruling which had confirmed the earlier Civil Service Decision.

The prior Civil Service decision was upheld but it certainly did not address the "issue the Association seeks to arbitrate" - which was whether an overpayment actually occurred in the first place. That issue should have been subject to an equitable and fair "case review" by Civil Service.

At no time did Antenucci or the STNCO ever receive an adjudication as to whether an overpayment occurred in the first place or to challenge whether an overpayment was proven. That ability was only available to it in the instant case and Civil service refused to consider the issue.

POINT IV

THE RESIDUUM RULE REQUIRES THAT THE AGENCY DECISION BE VACATED

As petitioner noted within its prior brief there is no evidence in the record which establishes competent proof that an overpayment actually occurred. In the instant appeal Civil Service does not offer any. Civil Service does not contest this judicial policy except to argue that the Arbitrator's decision excused it, on collateral estoppel grounds, from the obligation of making any factual findings of it's own. There is a difference between a payroll list and actual money deposited in a bank. Not a single paycheck, pay stub or receipt of electronic payment was ever produced by the employer, or anyone, including Civil Service, which would prove an actual money overpayment.

The Civil Service decision in this case is not reliant upon "a residuum of legal and competent evidence in the record to support it" and should be vacated.

POINT V

**CIVIL SERVICE CREATED UNLAWFUL
IMPEDIMENTS WITHIN ITS DECISION**

The Commission has taken the position that it is legally unable to grant a waiver because Antenucci has not yet negotiated a repayment schedule.

The Commission states in its brief at pages 6-7.

“Yet as the Commission, the arbitrator, and the Appellate Division have already observed, Antenucci has failed to negotiate a repayment schedule with the State Police. (Pa5; Pa31; Pa42).² **Until Antenucci does so, the Commission cannot grant the waiver he seeks.** The Commission therefore did not act arbitrarily, capriciously, or unreasonably in denying Antenucci’s second waiver application.”

This self imposed legal restriction that Antenucci must negotiate a repayment plan before Civil Service reviews a waiver request is arbitrary and capricious and is not supported by the existing Regulations. Civil service is not entitled to write in an additional qualification to the statute or the regulation.

DiProspero v. Penn, 183 N.J. 477, 492 (2005) If a waiver is granted then, ipso facto, there would be no need for a negotiated repayment schedule. Moreover, the burden of negotiation is not placed upon Sgt. Antenucci, it is placed on the

employer *before* its seeks any repayment.

Denying a waiver because Antenucci has not yet agreed upon a payment schedule is unreasonable and improper and is an arbitrary and capricious restriction outside of its regulatory obligations. The waiver denial should therefore be reversed.

The Commission also stated that it was “required” to accept the arbitrator's finding that an erroneous overpayment occurred, and that the State Police were entitled to recoup that overpayment.” The arbitrator did not so find. But more to the point, Civil Service is not “required” to accept any conclusion made by the Arbitrator. An arbitrator is neither authorized nor entitled to rule upon civil service regulations. That being said Civil service “cherry picked” only those pieces of the Arbitrator’s award that were favorable to its self interest and ignored those that were not.

The Arbitrator never made a finding of overpayment. The Arbitrator simply stated that he did not have the power to reverse the previous finding of Civil Service that an overpayment occurred. An arbitral finding does not operate to prevent Civil service from conducting an equitable “review of the case”.

Neither the parties nor an arbitrator can circumvent or override Civil Service Regulations. Indeed the Arbitrator made it plain that he believed he was

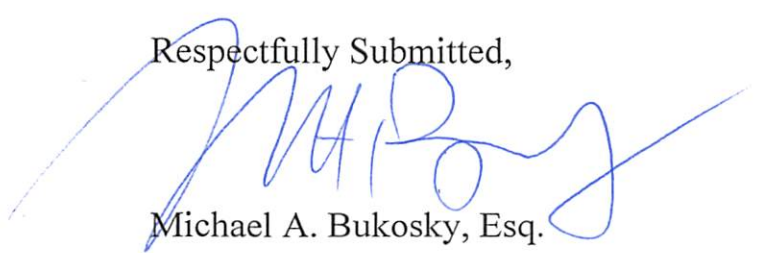
powerless to do so.

Civil Service cannot lawfully delegate its obligations to an arbitrator. Its sidestepping of its obligations in this case to reach an easier result (in its self interest) was arbitrary and capricious.

CONCLUSION

The record is bare as to any competent evidence or proof of overpayment. As the administrator of an “equitable compensation plan” Civil Service serves in a fiduciary capacity and is responsible for its actions. The Agency, as administrator, acted on a deficient record on an arbitrary and capricious basis. Its self interest should not afford it any deference. Where the Court cannot evaluate the challenged agency action on the basis of the record the proper course is to remand the matter to the agency for additional investigation and explanation.

Respectfully Submitted,



Michael A. Bukosky, Esq.

June 26, 2025