



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
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Wednesday, December 13, 2023

Hon. Michael Bageris
935 Gravier Street, Suite 2110
New Orleans, LA 70112

Re: **Brejean Balancier VS.
Sewerage & Water Board
Docket Number: 9102**

Dear Mr. Bagneris:

Attached is the action of the Civil Service Commission at the Commission's meeting on Monday, 11/13/2023.

Yours very truly,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Ghassan Korban
Ashley Ian Smith
Brejean Balancier
file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**BREJEAN BALANCIER,
Appellant**

Docket No. 9102

v.

**SEWERAGE & WATER BOARD,
Appointing Authority**

ORDER

Ms. Balancier moved for a determination of the correct calculation of backpay and emoluments of employment ordered by the Commission on September 13, 2021, in addition to a request for attorney's fees under Civil Service Rule II, § 11.1. The Commission heard oral argument at its regular meeting on November 13, 2023,¹ and considered the memoranda of the parties submitted in advance of the argument. The Commission also accepted a post-hearing memorandum from Ms. Balancier.

Factual Background

The Commission granted Ms. Balancier's appeal of her termination, ordering backpay from October 25, 2019, to September 13, 2021. The Sewerage & Water Board filed a motion for rehearing, and the Commission denied this motion on January 24, 2022. The Sewerage & Water Board appealed the Commission's decision to the Fourth Circuit Court of Appeal, and the Fourth Circuit affirmed the Commission's decision on October 19, 2022. The parties disagree about the calculation of her back pay award.

¹ A quorum of three Commissioners was present. La. Const. art. X, § 4; Civil Service Rule II, § 1.1. Commissioner Mark Surprenant recused himself, but the findings of a majority of the quorum controls. Civil Service Rule II, § 1.1.

Legal Analysis

The Sewerage & Water Board calculated Ms. Balancier's backpay amount for the time period October 25, 2019, to January 24, 2022. Following receipt of documentation of earnings of Ms. Balancier from other employment and discussions with Ms. Balancier's counsel about the calculation, the Sewerage & Water Board paid Ms. Balancier on August 31, 2023, by checks dated August 10, 2023, and August 15, 2023. Ms. Balancier asserts she is entitled to backpay from October 25, 2019, to October 2022, when the Sewerage & Water Board offered to return her to work following the Fourth Circuit decision. However, the Sewerage & Water Board offered to reinstate Ms. Balancier while the Fourth Circuit appeal was pending. The Sewerage & Water Board requested return dates from Ms. Balancier's counsel by letter dated January 31, 2022, and by a follow-up email on February 16, 2022. Ms. Balancier declined the Sewerage & Water Board's offer to return to work by failing to respond to the offer of January 24, 2022, so she is not entitled to backpay beyond that date.

Ms. Balancier argues that sums earned as an independent contractor should not be offset from the backpay award. "[A]n illegally discharged city employee is entitled to back pay, minus a credit for all monies received by the employee from other employment during his separation from the City." *Carroll v. New Orleans Police Dep't*, 2004-0122 (La. App. 4 Cir. 9/29/04), 885 So. 2d 636, 639. Civil Service Rule II, § 11.1 authorizes an offset for "wages earned during the period for which back pay was restored." Louisiana Revised Statute 49:113 provides that "all wages and salaries earned by the employee in private employment in the period of separation" shall be offset from the calculation of backpay. This statute applies to "[e]mployees in the state or city civil service." *Id.* In 2019, Ms. Balancier earned \$2,529.05 as an independent contractor, and the Sewerage & Water Board offset this amount from its calculation of backpay. Applying La. R.S.

49:113, the Fourth Circuit Court of Appeal held that unemployment compensation should not be offset from the calculation of backpay:

This Court has found that this statute should be strictly construed. *Alongi v. Dept. of Police*, 480 So.2d 1001, 1002–03 (La.App. 4 Cir.1985); *see also Serpas v. Dept. of Police*, 529 So.2d 138 (La.App. 4 Cir.1988). In *Alongi*, this Court held that “[a]lthough it can be argued that the legislative purpose of the statute is to make an employee whole, we interpret it to mean what it says, that is ‘earned from private employment.’ ” 480 So.2d 1001, 1002–03.

Adams v. Dep't of Police, 2016-0146 (La. App. 4 Cir. 8/10/16), 198 So. 3d 257, 259, *writ denied*, 2016-1692 (La. 11/29/16), 210 So. 3d 805. Strictly construing La. R.S. 49:113, monies earned as an independent contractor are not wages or salaries from private employment. *See* 26 U.S.C. § 3401 and La. R.S. 47:111 (defining “wages” as “services performed by an employee for his employer”). Therefore, the Sewerage & Water Board shall recalculate the backpay due to Ms. Balancier excluding \$2,529.05 earned as an independent contractor from the total offset.

During oral argument, counsel for the Sewerage & Water Board noted that it never received documentation of other earnings from January of 2022. Therefore, Ms. Balancier shall supply documentation of wages earned from private employment in January of 2022 to the Sewerage & Water Board.

Ms. Balancier also claims the Sewerage & Water Board failed to include longevity increases to which she would have been entitled in the absence of her termination. The Sewerage & Water Board shall make Ms. Balancier whole for the time period October 25, 2019, to January 24, 2022, including any longevity increases to which she would have been entitled.

Ms. Balancier seeks reimbursement for private health insurance premiums. Ms. Balancier is entitled to reimbursement of premiums for private health insurance if these premiums were less expensive than COBRA or if COBRA was not available to her:

We have readily concluded that “restoration of all emoluments” includes restoration of health insurance coverage on the same basis that it would have been available had their employment not been interrupted. If appellants procured private insurance because COBRA insurance was unavailable or because it was more costly than private insurance, they are entitled to reimbursement for the private health insurance premiums they paid. If COBRA insurance was cheaper than private insurance, they are entitled only to the cost of COBRA insurance. If they procured no insurance at all, they are not entitled to any reimbursement.

Noya v. Dep't of Fire, City of New Orleans, 611 So. 2d 746, 748 (La. App. 4 Cir. 1992). If Ms. Balancier provides the Sewerage & Water Board with documentation of private health insurance premiums from October 25, 2019, to January 25, 2022, within 10 days of this order, and these premiums were less expensive than any COBRA available to Ms. Balancier through the Sewerage & Water Board, then the Sewerage & Water Board shall reimburse Ms. Balancier for the health insurance premiums.

Ms. Balancier has also requested attorney’s fees under Civil Service Rule II, § 11.1. The Commission denies this request, as the Sewerage & Water Board has attempted to comply with the Commission’s September 13, 2021, order in good faith.

Therefore, Ms. Balancier shall supply documentation of earnings during January of 2022 and documentation of private insurance premiums from October 25, 2019, to January 24, 2022, within 10 days of this order. After it receives the documentation, the Sewerage & Water Board shall recalculate the backpay award, including any longevity increases; reimbursing Ms. Balancier for any private insurance premiums (if less expensive than COBRA or if COBRA was not available to her); excluding earnings from work as an independent contractor; and including interim earnings in January of 2022 from the setoff calculation.

DATE:

December 13, 2023

J H Korn

[J H Korn \(Dec 12, 2023 15:00 CST\)](#)

JOHN KORN, VICE-CHAIRPERSON

Andrew Monteverde

[Andrew Monteverde \(Dec 12, 2023 17:04 CST\)](#)

ANDREW MONTEVERDE, COMMISSIONER