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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
THE ESTATE OF	)	
DEBORAH HULL,	)	
Employee	)	OEA Matter No. 1601-0201-97-C-11
	)	
v.	)	Date of Issuance: May 14, 2012
	)	
D.C. DEPARTMENT OF HUMAN	)	
SERVICES,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge
_____	)	
Roosevelt Brown, III, Esq., & John Floyd, Esq., Employee Representatives		
Kevin Turner, Esq., Agency Representative		

**ADDENDUM DECISION ON COMPLIANCE**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

Deborah Hull (“Employee”) was employed as a Psychiatric Nursing Assistant in the Career Service at Agency’s Eunice Smith Center. The Eunice Smith Center is a geriatric-psychiatric facility, which is part of Agency’s Commission on Mental Health Services. Most of the patients at the Smith Center are elderly and suffer from mental illness as well as other medical conditions.

On Monday, May 27, 1996, a Ward Psychiatrist reported that she observed Employee abusing a patient. Agency investigated the allegation and, after it reviewed the findings, it determined that Employee engaged in misconduct warranting her removal. Thus, on August 1, 1996, Agency served Employee with a Notice of Proposal to Remove Employee from her position. At the conclusion of the pre-termination administrative process, Agency removed Employee from her position for “Discourteous treatment of the public . . . Inflicting bodily harm on another”. The effective date of Employee’s removal from service was January 21, 1997.

On February 11, 1997, Employee filed a timely petition for appeal to the Office of Employee Appeals (“OEA” or ‘the Office”). The Administrative Judge (“AJ”) convened an evidentiary hearing on September 13, 2000. The AJ issued an Initial Decision (“ID”) on March

6, 2001. The ID reversed the Department's removal decision. Thereafter, the Agency filed a Petition for Review with the OEA Board. On April 10, 2003, the OEA issued an Opinion and Order affirming the ID. The Agency filed a further appeal in the Superior Court of the District of Columbia.

Whether Employee was able to perform the essential functions of her position became a question after Employee appeared at the evidentiary hearing in a wheelchair. Thus, the Office of the Attorney General conducted an investigation to determine whether Employee was incapacitated from duty. The investigation revealed that at least as of November 10, 2003, Employee was a double amputee and was undergoing dialysis three times per week. On January 20, 2004, the Superior Court of the District of Columbia issued an *Order Affirming Respondent's April 10, 2003, Opinion and Order* (CA 2003 000003 P (MPA)). The Agency did not file a further appeal of the Superior Court decision, therefore, the ID became final on February 19, 2004. Employee died on October 19, 2004.

According to the Agency, at that time, Employee's former attorney of record, Sheila T. Mayers, Esq., informally contacted opposing counsel to inquire about Agency's intentions regarding compliance with the ID. *See* Agency's Motion to Dismiss the Motion to Enforce Judgment at 3. As of the date of the instant Addendum Decision on Compliance, the Agency has not submitted any documentation evidencing compliance with the Final Decision.

#### JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

#### ISSUE

Whether this matter should be certified to the OEA General Counsel for enforcement.

#### ANALYSIS AND CONCLUSION

This matter is before the undersigned in order to determine whether the Agency still owes Employee back-pay due to the timeliness of Employee's (or her Estate) filing a claim against the Agency for court awarded back-pay and benefits. If so, what amount is owed to the Estate of Deborah Hull due to her becoming physically incapacitated while this matter was pending before various tribunals.

It is undisputed that Employee prevailed when this matter went before the District of Columbia Superior Court. As a result of that victory and the Agency opting not to contest this matter any further, the Initial Decision became the Final Decision in the instant matter. Further, it is plainly evident to the Undersigned that the Agency was on notice from the point that it opted not to contest the District of Columbia Superior Court decision in this matter that it owed Employee back-pay and benefits commensurate with the various decisions that were decided in Employee's favor. The only tangible point of contention was the amount of back-pay owed to Employee since her health took a turn for the worst during the pendency of this matter.

According to the following argument, cited in pertinent part from its Motion to Dismiss the Motion to Enforce Judgment, Agency argues that its responsibility to pay the monies and benefits accorded by the Final Decision should be nullified because it argues that disputes regarding the amount and payment of back-pay due to court award are grievances and outside of the OEA's jurisdiction. I disagree. Moreover, I find that Agency's jaundiced reasoning of the applicability of the cited section of the District Personnel Manual ("DPM") unpersuasive. According to the Agency, cited below, in pertinent part, is the section of the DPM that is most applicable to the instant matter:

1149.1 In this section, the following terms have the meaning ascribed:

**Appropriate authority**-an entity having authority to correct or direct the correction of an unjustified or unwarranted personnel action, including but not limited to the following:

- (a) A court having jurisdiction;
- (b) The Office of the Corporation Counsel;
- (c) The head of the employing agency or an agency official to whom corrective action authority is delegated;
- (d) The pay authority;
- (e) The Office of Employee Appeals;**
- (f) The Public Employee Relations Board;
- (g) The Office of Human Rights;
- (h) The Equal Employment Opportunity Commission;
- (i) An arbitrator in a binding arbitration case; and
- (j) Any other federal agency authorized to order remedial actions under any program providing federal financial assistance.

**Benefits**-monetary and employment benefits to which an employee is entitled by law or regulation, including but not limited to health and life insurance, and excluding pay as defined in this section.

**Nondiscretionary provision**-any provision of law, Mayor's Order, regulation, personnel policy issued by the pay authority, or collective bargaining agreement that requires a personnel authority to take a prescribed action under stated conditions or criteria.

**Pay**-the rate of basic pay or basic compensation as defined under the applicable pay system; pay increases; within-grade increases; premium pay (including holiday, Sunday, night, administrative closing, and local environment pay); on-call pay; retained rates; and pay adjustments for District Service supervisors. For the purpose of this section, pay also means annual, sick, court, and military leave.

**Unjustified or unwarranted personnel action-an act of commission (that is, an action taken under authority granted to an authorized official) or of omission (that is, non-exercise of proper authority by an authorized official) that is subsequently determined to have violated or improperly applied the requirements of a nondiscretionary provision, as defined herein, and thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay or benefits, as used herein, otherwise due an employee. The words "personnel action" include personnel actions and pay actions, alone or in combination.**

**1149.2 An employee who, on the basis of a timely appeal of an administrative determination is found, by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have undergone an unjustified or unwarranted personnel action resulting in the withdrawal or reduction of all or part of an employee's pay or benefits, shall be entitled, on correction of the personnel action, to back pay under this section.**

**1149.3 This section applies to the computation, payment, and restoration of pay and benefits for the purpose of making an employee financially whole, when the employee, on the basis of an administrative determination, a timely appeal, grievance, or claim against the District government, is found to have undergone an unjustified or unwarranted personnel action.**

**1149.4 An unjustified or unwarranted personnel action shall only be corrected if it is found by appropriate authority that the withdrawal, reduction, or denial of all or part of the pay or benefits due an employee was the clear and direct result of and would not have occurred but for the unjustified or unwarranted personnel action.**

**1149.5 The requirement for an administrative determination shall be met when an appropriate authority finds that an agency has taken a personnel action it was prohibited from taking, has taken a personnel action not authorized by law or regulation, or has not taken a personnel action it was required to take. (Emphasis Added).**

#### 1152 Pay Claims

1152.1 A claim for the payment of compensation under this chapter must be filed in writing with the pay authority within three (3) years from the date it first accrued or the claim shall be forever barred.

1152.2 The date of accrual of a claim under § 1152.1 shall be the first day the services were performed or the date other compensation under this chapter was due.

1152.3 Upon receipt of a claim, the pay authority shall investigate the claim, and shall respond in writing to the claimant within ninety (90) days of receipt of the claim.

I find that the Agency has not complied with the terms of the ID that is the subject of this matter. I also find that the Agency knew that it was required to comply with the terms of the ID when it had exhausted all of its legal remedies. At every tribunal, Agency was met with a rebuke of its wrongful termination action in this matter. Accordingly, I find that the Agency was provided its written notice that it was required to recompense Employee all back-pay and benefits due her when the Superior Court issued its *Order Affirming Respondent's April 10, 2003 Opinion and Order*. I further find that neither Employee nor her Estate were required to file any other paperwork in order to initiate compliance with the ID in this matter. That is not to say that Employee was not required to attempt to mitigate her damages but rather Agency, at the point of the issuance of the *Order Affirming Respondent's April 10, 2003 Opinion and Order*, was duly notified that it now had a legal responsibility to recompense Employee (or her Estate) for the wrongful termination action that it undertook against her.

The undersigned is also of the opinion that the Agency has skirted its responsibility to recompense the Employee and her Estate for over a decade. Normally, in a compliance matter where an employee died prior to reinstatement, I would require the Agency to recompense said deceased employee's estate through the moment of her termination until the moment of her death. However, the undersigned must take into account that both sides agree that Employee was physically incapable of handling the physical rigors of her last position of record (Psychiatric Nursing Assistant) prior to her death because of her double amputation. Given the instant circumstances, I find that the Agency is required to reimburse Employee's Estate for all back-pay and benefits due Employee from the moment of her termination - January 21, 1997, through the moment of her double amputation - November 10, 2003.

I find that the following excerpt from the Office of Employee Appeals Rule § 635 *et al*, 59 DCR 2129 (March 16, 2012), is pertinent to this matter.

Enforcement

- 635.1 Unless the Office's final decision is appealed to the Superior Court of the District of Columbia, the District agency shall comply with the Office's final decision within thirty (30) calendar days from the date the decision becomes final.
- 635.7 The Administrative Judge shall take all necessary action to determine whether the final decision is being complied with and shall issue a written opinion on the matter.
- 635.8 The Administrative Judge may, for good cause shown, allow the agency additional time to submit proof of compliance with the initial decision.

- 635.9 If the Administrative Judge determines that the agency has not complied with the final decision, the Administrative Judge shall certify the matter to the General Counsel. The General Counsel shall order the agency to comply with the Office's final decision in accordance with D.C. Official Code § 1-606.02 (2006 Repl.).
- 635.10 No additional filings are permitted once the General Counsel certifies the final decision.
- 635.11 If the agency fails to comply with the order, the General Counsel may take such actions as are necessary to secure compliance with the order.

In a compliance matter, the Administrative Judge's role is to determine whether or not the Agency has complied with the OEA's Final Decision. It is plainly evident to the undersigned that the Agency has not complied with the Final Decision of this Office. Consequently, pursuant to OEA Rule 635.9, *supra*, this matter is hereby certified to the Office of Employee Appeals General Counsel for appropriate compliance action.

ORDER

It is hereby ORDERED that this matter be certified to the General Counsel.

FOR THE OFFICE:

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ERIC T. ROBINSON, Esq.  
Senior Administrative Judge