

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
DELORES JUNIOUS)	OEA Matter No. 1601-0057-01C07
Employee)	
)	
v.)	Date of Issuance: November 15, 2007
)	
D.C. CHILD AND FAMILY)	Muriel A. Aikens-Arnold
SERVICES)	Administrative Judge
Agency)	
)	

Robert E. Deso, Esq., Employee's Representative
Andrea G. Comentale, Esq., Assistant Attorney General for the District of Columbia

ADDENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL HISTORY

On June 22, 2001, Employee, a Social Worker, filed a Petition for Appeal from Agency's action to remove her effective April 20, 2001 based on employment-related conduct.¹ On October 25, 2004, an Order convening a Prehearing Conference was issued scheduling said conference on November 16, 2004. After two (2) postponements, based on requests by the parties, said meeting was held on February 1, 2005. On March 1, 2005, an evidentiary hearing was conducted, the parties submitted closing arguments, and the record was closed effective June 10, 2005.

On November 10, 2005, this Judge issued an Initial Decision (ID) in which it was concluded that Agency's action was not supported by a preponderance of the evidence. The removal action was reversed and Agency was ordered to reinstate Employee to her position of record with all back pay and benefits. Agency was further directed to file written verification with this Office regarding its compliance with said decision within thirty (30) days of the date on

¹ This Judge initially dismissed this matter on 10/07/03 based on Employee's failure to prosecute. However, upon further appeal to this Office, the Board issued an *Opinion and Order on Petition for Review* on 9/27/04, finding that, based on the evidence presented, remand for further proceedings was warranted. The specific charges are not repeated as the specifics are not pertinent to the outcome in this matter.

which the ID became final.. Agency did not file said notification. Nor did Agency appeal the ID to the Board or otherwise challenge this Judge's ruling in the District of Columbia Superior Court.

On August 3, 2006, Employee filed a Petition for Enforcement asserting that she had not been reinstated nor reimbursed back pay and benefits. On August 25, 2006, an Addendum Decision On Compliance was issued based on: 1) the fact that Employee had, indeed, returned to work effective July 24, 2006; and 2) the assurance of Agency Counsel that Employee's back pay and benefits were being processed at that time. However, on November 13, 2006, Employee filed a Second Petition for Enforcement (SPFE) stating that Agency had *not* fully complied with the ID and that she had *not* received back pay and benefits. Shortly thereafter, documents requested from Agency's Counsel and received by the Judge, reflected that Employee was issued a salary check for \$178,813.12 on November 24, 2006; and a Back Pay Worksheet showed various monetary deductions for, *inter alia*, retirement and taxes, as well as benefits paid.²

On December 22, 2006, Agency filed its response to the Petition for Enforcement, in which Agency asserted, *inter alia*, the following:

1) That since Employee had not been active for more than five (5) years, she was required to undergo training including, but not limited to, current applications, policies, practices, laws and regulations before fully resuming her duties. Such training was *only* provided during the day shift where she was initially assigned upon reappointment.³

2) That it takes about four (4) weeks from a reinstatement for the payroll cycle to complete its course, and due to Employee's absence from a pay status for over five (5) years, the necessary information was not in the payroll system at the time of Agency's request. Further, Employee failed to provide information regarding outside earnings.⁴

3) That Employee may only be reimbursed for pay and benefits permitted by law, Mayor's Order, regulation, or agency policy. Therefore, Employee is not entitled to overtime pay, training reimbursement, a bonus, promotion, or interest on the back pay.⁵

² See Agency's Response to Petition for Enforcement (hereinafter referred to as "ARPFE"), Exhibits 3 and 4 (which represent identical documents previously provided) filed on 12/22/06. In addition to regular hours, total payments for night differential, holidays, and Sunday premium were reflected.

³ This explanation was given, presumably, because Employee was assigned to the night shift, prior to her removal.

⁴ At this point, Agency incorrectly cited "Exhibit 8" of Employee's SPFE, which does not exist.

⁵ See Employee's SPFE, Exhibit 4 and ARPFE at pp. 3-5, where both parties cited various regulations from CDCR 6-1149, Back Pay, to support their respective positions. Employee included, among other things, reimbursement for outside training, payment for overtime, and out-of-pocket medical, dental and

4) That promotions are not automatic; certain requirements under the District Personnel Manual (DPM), Chapter 8, Section 837 must be fulfilled; and it is speculative that Employee would have been promoted at any time during the five year period following her removal .⁶

On January 12, 2007, Employee filed a Reply to Agency's Response (ERAR), including an affidavit from Employee, to the SPFE stating, *inter alia*, that “ . . . Agency has not implemented a 'make whole' remedy which restores Employee, as nearly as possible, to the *status quo ante* . . .”⁷ Employee lists the following outstanding issues:

- a) That Employee is entitled to overtime pay for the period of the erroneous separation during which Employee would have worked hours outside her regular midnight shift, eg., court appearances and other employment-related activities;
- b) That the Union plan will not pay for dental benefits during the period that she was wrongfully terminated;
- c) That Agency failed to promote Employee to Grade DS 0185-12 as required by its policy (Exhibits 3 and 4);
- d) That Agency failed to properly compute Employee's retirement benefits to include compounded earnings over the five-year period of her wrongful termination;
- e) That Agency failed to pay Employee a \$2000.00 cash bonus; failed to assign Employee to the midnight shift where she previously earned more income; failed to reimburse Employee for outside training she attended during the period of wrongful termination; and
- f) That Employee should be paid 6% interest per annum for the delay in issuing back pay for more than a year.⁸

optical expenses. Agency contends that Employee declined health insurance reimbursement and is, therefore, not entitled to reimbursement for those expenses.

⁶ See ARPFE at p. 4.

⁷ See ERAR at pp. 5-6.

⁸ See ERAR at pp. 7-10.

On June 20, 2007, this Judge held a teleconference with the parties to further clarify issues various issues raised by Employee. For example: 1) how does Employee know whether her retirement was incorrectly computed; did Agency representatives explain how they arrived at the numbers used for deductions taken and the retirement computations; 2) verify the source and explain how the promotion policy works (see Exhibit 3); and 4) Employee must provide a rule, regulation, law, or legal opinion regarding this Office's authority to mandate a "make whole" remedy which addresses, *inter alia*, payment for overtime Employee would have worked during the time of her removal; and overriding DPM back pay regulations cited by Agency.⁹

On July 6, 2007, Employee filed a response to the teleconference discussion which included the following: 1) a formula to determine compounded retirement earnings; 2) a Board decision which supports Employee's "make whole" remedy argument; 3) self-authentication of the promotion policy Fact Sheet included as Exhibit 3 filed with her January 12, 2007 affidavit; and 4) Agency notification regarding Continuing Education units for Social Workers.

On July 16, 2007, Agency filed its response to the teleconference discussion by providing DPM, Chapter 8 regulations for career ladder promotions.¹⁰ On July 19, 2007, Employee submitted a further response arguing that Employee met the basic criteria for promotion to DS-12, ie., served 1 year at the lower grade, had no unsatisfactory performance evaluations; and obtained her LICSW license in March 2004.

On August 23, 2007, an Order for Agency to Clarify Back Pay Issues was sent out, to which Agency responded. The record is closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code, Section 1-606.03 (2001).

ISSUE

Whether this compliance matter may now be dismissed.

⁹ During the teleconference, Employee's Counsel represented that Agency was notified regarding Employee's license as an Independent Clinical Social Worker (which is required for promotion from Grade 11 to Grade 12) prior to her reinstatement.

¹⁰ See Agency Submission in Response to June 20, 2007 Conference Call (hereafter referred to as "ASRCC"), Exhibit 1, Section 837, Merit Promotion Requirements; Section 838, Time In-Grade Requirements; Exhibit 2, Memorandum dated 10/18/05 on CFSA's Career Ladder Promotion Practice.

ANALYSIS AND CONCLUSIONS

OEA Rule 636.7, 46 D.C. Reg. at 9322, states that in a compliance matter, 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.” If the Administrative Judge determines that the agency has not complied with the final decision, the matter shall be certified to the General Counsel for further action to ensure compliance.¹¹

Compliance with the final decision for an unjustified personnel action, in this Judge’s view, includes the payment of wages lost and restoration of employment benefits to which an employee is entitled. In this instance, where a District of Columbia agency is involved, the Back Pay Act (the Act) as outlined in the DPM, is applicable. Nevertheless, this Judge will also address collateral issues raised by Employee.

Pursuant to the Back Pay Act, Title 6, Government Personnel, Chapter 11, Classification and Compensation, the correction of an unjustified or unwarranted personnel action and entitlement to back pay includes, in pertinent part:

(a) The following terms and meanings ascribed in Section 1149.1:

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.

(b) Section 1149.10 - When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel

¹¹ See OEA Rule 636.8.

action, the agency shall determine the employee's back pay entitlement by recomputing for the period covered by the corrective action the pay and benefits of the employee as if the unjustified or unwarranted personnel action had not occurred, but in no case shall the employee be granted more pay or benefits than he or she would have been entitled by law, Mayor's Order, regulation, or agency policy.

(c) Section 1149.14 - An employee entitled to back pay under this section shall have included in the back pay computation any pay or benefit that the employee would have received, except that overtime pay shall not be included in the back pay award.

The right to return to status quo ante is not unconditional and does not require perfect consistency between all aspects of the pre- and post-removal positions. Employee contends that when the DPM regulations conflict with the rules of this Office, these rules prevail. Specifically, Employee claims that this Office is authorized, under its rules, to provide "appropriate relief," which conflicts with the DPM rules and regulations to, for example, exclude overtime.¹² However, "appropriate relief", in this Judge's view, does not conflict with the Act (as outlined in the DPM), but encompasses the Act.

The Act contains, *inter alia*, express provisions for monetary relief and employment benefits, to which an employee is entitled by law or regulation. While Employee contends that it was reasonable to believe that she would have worked mandatory overtime, such pay is specifically excluded from a back pay award. Moreover, no statutory mandate was cited, which specifically requires the inclusion of overtime pay in a back pay award, much less unconditionally mandates payment of collateral employment benefits. Consequently, there is no conflict between the DPM regulations and the rules of this Office, in this instance.¹³

Employee also contends that she be given a \$2000.00 cash appreciation award that was given, in December 2001, to all employees who worked in her section prior to her wrongful termination. In its initial response thereto, Agency asserts that the Rewards and Recognition Program is evaluated annually based on employee eligibility and budget requirements. Bonuses are not automatically awarded to all employees every year and Employee cannot assume that she would have received such recognition had she not been terminated.¹⁴

¹² See OEA Rules 602.4 and 632.3(b).

¹³ Employee cites various provisions of the D.C. Code, which authorize this Office to, *inter alia*, reverse or modify agency decisions and enforce compliance thereof. Employee further cites Equal Employment Opportunity decisions in support of her "make whole remedy". Yet EEO case law is based on specific congressional legislation that is not applicable or comparable to the circumstances here.

¹⁴ See ARPFE at p. 4; See also Agency's Response to Clarify Back Pay Issues filed 10/2/07 (AR) at p.3

Employee further claims that, but for the erroneous removal action, she would have been promoted to grade DS-12 upon receipt of her LICSW in March 2004. An agency's decision to promote an employee is discretionary and this Office lacks the authority to order an agency to promote an employee absent a showing that the agency had a mandatory duty to promote him or her.¹⁵ As reflected in DPM, Chapter 8, Sections 837 and 838, career ladder promotions are not guaranteed and such decisions are within the discretion of the supervisor.¹⁶

Upon her reappointment and prior to fully resuming her duties, Employee was required to undergo training on current Agency applications, systems, policies, regulations, etc., given by the Office of Training Services. During the period of her wrongful termination, Employee completed a number of training classes to otherwise maintain and improve her skills as a Social Worker. She now seeks reimbursement for said training. Agency asserts that a review of her training certificates reflects that they are not comparable to Agency's required Pre-Service Training curriculum. Moreover, pre-approval must be obtained for reimbursement of elective training.

Relative to Employee's retirement benefits, Agency records reflect that the District currently pays 5% of the base salary towards Employee's Defined Contribution Pension Plan. Across-the-board increases, which include Within Grade Increases and cost-of-living adjustments, were factored into the calculation of monies owed to Employee from the time of her termination to her reinstatement.¹⁷ Any other retirement issues should be brought to the attention of Agency officials.

Lastly, the Back Pay provisions do not expressly or impliedly provide for payment of interest on a back pay award. Nor does this Office have jurisdiction over the Union's health insurance plan. Based on a review of the record, this Judge concludes that Agency is now in compliance with the final decision of this Office in the underlying matter. Therefore, this Judge concludes that this compliance matter may now be dismissed.

¹⁵ See *Whitt v. District of Columbia*, 413 A.2d 1301 (D.C. 1980); *Beckford v. Department of Human Services*, OEA Matter No. 1602-0023-88, *Opinion and Order on Petition for Review*, (May 22, 1992), __ D.C. Reg. __ ().

¹⁶ See AR at p. 2 for further explanation regarding Employee's failure to meet minimum promotion requirements and her absenteeism rate since her return to duty which resulted in her supervisor's inability to fairly evaluate her performance.

¹⁷ See AR at p.4.

ORDER

It is hereby ORDERED that the matter is dismissed.

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge