

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
VELERIE JONES-COE,	)	
Employee	)	OEA Matter No. 1601-0088-99-C09
	)	
v.	)	Date of Issuance: March 10, 2009
	)	
D.C. DEPARTMENT OF HUMAN	)	
SERVICES (CMHS),	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
_____	)	
Velerie Jones-Coe, Employee Pro-Se	)	
Andrea Comentale, Esq., Agency Representative	)	

**SECOND ADDENDUM DECISION ON COMPLIANCE**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On April 13, 1999, Velerie Jones-Coe (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the Department of Human Services (“Agency”) decision to remove her from service. Prior to her removal from service, Employee’s last position of record was Staff Assistant, DS-9 in the Career Service. This matter was originally assigned to the late Senior Administrative Judge Daryl J. Hollis. On June 17, 2002, Judge Hollis issued an Initial Decision, which, *inter alia*, reversed Agency’s action of removing Employee from service.

On October 10, 2002, Judge Hollis issued an Addendum Decision on Compliance (“ADC”) in this ongoing matter. In said ADC, Judge Hollis ruled against Employee’s motion on compliance primarily predicated on the following premises:

1. From the time that Employee was initially removed from service through the time that the ADC was issued, Employee was receiving disability payments. Given this finding, Employee was not due any back pay as D.C. Official Code § 1-623.16(a) [2001], generally precludes District government employees who are receiving disability compensation from also receiving their salary (or back-pay) except for a handful of instances which were deemed inapplicable to employee. *See*, ADC at 4 – 5.

2. Employee was physically unable to return to her duties. Furthermore, Employee had not, at the time of the ADC, submitted any medical documentation to Judge Hollis that would clear her to return to her duties. *See*, ADC at 5 -6.

Accordingly, Judge Hollis dismissed without prejudice Employee's motion for compliance on the grounds that it was premature. In so ordering, Judge Hollis provided that:

Because Agency cannot yet reinstate Employee and is at this time not responsible for back pay, I conclude that Employee's motion for compliance is premature and must be dismissed. The dismissal is without prejudice, because if and when Employee is cleared to return to work and submits the necessary documentation, then Agency is bound by my Order set forth in the June 17, 2002 ID. If it subsequently becomes necessary for Employee to file a new motion for compliance, she may do so at the appropriate time. ADC at 6.

On November 1, 2002, the D.C. Government Disability Compensation Program ("DCP") (another agency operating under the auspices of the District government) issued to Employee a Notice of Intent to Controvert Disability Compensation Payments ("Notice of Intent"). In short, the DCP decided that Employee no longer qualified for disability compensation. Further, according to this notice, Employee's last disability compensation check was to be issued on December 12, 2002. In making that determination, the Notice of Intent provided for the following:

Our claim examination process and review of your medical record has led us to conclude that you no longer meet the requirements of the D.C. Disability Compensation Act for continued biweekly compensation payments, and that you are capable of returning to the work force in your usual work capacity as Staff Assistant... It is the conclusion of the above noted physicians, (sic) indicate that you are able to return to the labor market on the basis of your work accident injury.

Employee appealed the Notice of Intent to DCP. On January 6, 2003, Employee received from DCP its D.C. Disability Compensation Program Reconsideration Final Order ("Reconsideration Final Order"). In said order, the DCP reviewed Employee's request that the denial of her disability benefits, as indicated in the Notice of Intent, be reconsidered. In a nutshell, DCP denied Employee's request for reconsideration. In doing so, DCP reaffirmed that Employee was "capable of returning to work in an administrative capacity from an orthopedic standpoint." Reconsideration Final Order.

According to a letter dated January 21, 2003, and signed by Linda Foxx, an official with the Agency, Employee reported for duty at the Agency on January 21, 2003.

When she reported for duty, Employee submitted to Agency another letter containing copies of the Notice of Intent and the Reconsideration Final Order. Agency denied Employee's attempt to return to duty. In the interim, Employee continued to press her disability compensation claims through various judicial and quasi-judicial forums.

On August 25, 2004, Administrative Law Judge Robert Middleton with the Office of Employment Services Hearings and Adjudication Section rendered his decision in *Velerie Jones-Coe v. D.C. Department of Mental Health*, 2004 DC Wrk. Comp. Lexis 199. In making the proceeding findings, ALJ Middleton primarily relied on the medical opinions of the independent medical examiners that were provided the opportunity to observe and diagnose Employee's alleged maladies in relation to her being able to return to duty. In his decision, ALJ Middleton sided with Agency and found "no persuasive medical evidence of a continuing disability arising out of the employment related injury." *Id.* at 11 – 12. He also found that Employee was "capable of returning to her regular employment duties for employer herein." *Id.* at 13. In doing so, ALJ Middleton upheld the Reconsideration Final Order.

On March 23, 2005 the District of Columbia Department of Employment Services Compensation Review Board reviewed the ALJ Middleton's aforementioned decision<sup>1</sup> and found that there existed substantial evidence supporting his ruling and therefore would leave same undisturbed. On November 8, 2007, in an unpublished opinion the District of Columbia Court of Appeals affirmed the previous aforementioned rulings denying Employee's disability compensation claims.<sup>2</sup>

On September 3, 2008, Employee filed a second motion for compliance. In said, motion, Employee wanted to recoup all back pay and benefits due her pursuant to the June 17, 2002, Initial Decision issued by Judge Hollis. Furthermore, she asserted that she stopped receiving disability compensation on January 6, 2003. Employee further asserted that Agency eventually allowed her to return to work in or around April 2008. Employee subsequently retired from service in or around October 2008. I was assigned this matter on October 7, 2008. In considering Employee's second motion for compliance, both Agency and Employee have, *inter alia*, submitted various motions outlining their positions in this matter. Further, the parties have also participated in settlement negotiations under the guidance of the OEA's Mediation and Conciliation Department. Ultimately, to no avail.

### JURISDICTION

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

### ISSUE

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<sup>1</sup> *Velerie Jones-Coe v. D.C. Department of Mental Health*, 2005 DC Wrk. Comp. Lexis 61 (March 23, 2005).

<sup>2</sup> *Jones-Coe v. DC DOES*, 936 A.2d 837 (November 8, 2007).

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

### ANALYSIS AND CONCLUSION

For the proper resolution of this matter, it is incumbent on the undersigned to determine to what extent Agency has failed to comply with the directives of Judge Hollis's June 17, 2002, Initial Decision ("ID"). Pursuant to the ID, Agency was ordered, in relevant part, to do the following:

1. Agency's action removing Employee from her position is REVERSED; and
2. Agency reinstate Employee to her position of record with all back-pay and benefits due her...

When Judge Hollis reversed Agency's action and placed Employee back in her position of record, it was with the implied caveat that Employee be physically ready and able to work. Such was not the case in the instant matter. According to the ADC, which quotes the Agency's September 20, 2002, response to Employee's first compliance motion, it states:

Before Employee was terminated from her position due to her protracted status as AWOL, Employee filed a claim for disability benefits with the [DCP]. Employee alleged that she suffered from work-related aggravation of previous back, left arm and left hand injuries. Employee's claim for disability benefits was initially accepted for the period from December 7, 1996 through December 12, 1997. ADC at 3.

Initially, Employee's disability compensation payments were terminated on or around December 11, 1997. However, Employee continued to press her disability compensation claims through the DCP and eventually the Director of the Department of Employment Services ordered that Employee's disability compensation payments be restored from the date that they had been terminated.

At the time the ADC was issued, Agency argued that Employee was then physically unable to work pursuant to the determination of her then treating physician. Agency also asserted that since Employee had been receiving disability compensation that she was ineligible to receive back-pay pursuant to D.C. Official Code § 1-623.16(a) which provides in relevant part that:

#### **§ 1-623.16. Limitation of right to receive compensation.**

- (a) While an employee is receiving compensation under this subchapter or if he or she has been paid a lump sum in

commutation of installment payments until the expiration of the period during which the installment payments would have continued, he or she may not receive salary, pay, or remuneration of any type from the District of Columbia, except:

- (1) In return for service actually performed;
- (2) Pension for service in the Army, Navy, or Air Force;
- (3) Other benefits administered by the Veterans Administration unless such benefits are payable for the same injury or the same death; and
- (4) Retired pay, retirement pay, retainer pay, or equivalent pay for service in the armed forces or other uniformed services, subject to the reduction of such pay in accordance with [§ 5532 of Title 5 of the United States Code](#). Eligibility for or receipt of benefits under subchapter III of Chapter 83 of Title 5 of the United States Code or another retirement or disability system for employees of the government does not impair the right of the employee to compensation for scheduled disabilities specified by [subsection \(c\) of § 1-623.07](#).

Judge Hollis agreed with Agency's interpretation of the relevant facts and law and, as was stated previously, dismissed Employee's first motion for compliance for being premature. I agree. However, Judge Hollis likewise stated that said "dismissal is without prejudice, because if and when Employee is cleared to return to work and submits the necessary documentation, then Agency is bound by my Order set forth in the June 17, 2002 ID." ADC at 6. Employee's second motion for compliance, which is at the heart of what the undersigned must address here, adopts this reasoning and in so doing finds that the Employee's motion is now ripe for adjudication. Furthermore, I find that Employee is not, as part of this Second Addendum Decision on Compliance ("2<sup>nd</sup> AD"), due any back pay for any period time in which she was receiving disability compensation through the DCP or when she was physically unable to work.

Since the ADC was issued, Employee disability compensation payments were subsequently terminated on January 6, 2003. On January 21, 2003, Employee reported for duty with the Agency. When she presented herself to the Agency, Employee provided Agency with copies of the Notice of Intent and the Reconsideration Final Order. As was stated *supra*, the Notice of Intent and the Reconsideration Final Order both determined that Employee was fit to return to work. This determination was made in consultation with medical professionals that were assigned to review Employee's alleged ailments under the auspices of the District government. Furthermore, this determination was made in spite of Employee doctor's evaluation to the contrary, which the DCP considered and ultimately overruled. Agency argues that Employee should be precluded

from claiming back pay at this juncture because her doctor had not cleared her to return to work. I disagree. The substantive requirements of Judge Hollis's AD were met; Employee was medically cleared, by the Independent Medical Examiners to return to work; Employee had provided written documentation to support that she was medically cleared to return to work; Employee presented herself to the Agency ready and willing to resume her duties; and, Employee was no longer receiving disability compensation.

Agency's also argues that, since Employee and her doctor continued to claim that she was unable to work and continued to litigate said claim through other quasi-judicial and judicial venues, Agency action of not allowing Employee to return to work on January 21, 2003 was proper. Agency cites D.C. Official Code §1-623.16 and the related D.C. Personnel Regulations ("DPR") to support its argument. DPR § 1149.11, provides in pertinent part as follows:

§ 1149.11 In computing the amount of back pay under this section, the agency shall not include any of the following:

(a) Any period during which the employee was not ready and able to perform his or her job because of an incapacitating illness, except that the agency shall grant, upon the request of and documentation by the employee, any sick leave or annual leave to his or her credit to cover the period of incapacity by reason of illness

On May 26, 2005, Agency was presented with another return to work notice wherein Employee supplied a Release to Return to Work dated May 26, 2005, signed by Dr. Jacqueline C. Shepard-Lewis. It was not until October 14, 2007, over two years later, that Employee was returned to service in adherence to Judge Hollis' ID. Employee voluntarily retired from service on or around April 30, 2008.

Two salient facts lead me to disagree with Agency's arguments. First, on January 21, 2003, Employee reported for duty with the Agency ready, willing and medically cleared to return to duty. Employee presented Agency with documentation that evidenced that she was medically able to return to work. The fact that Agency did not allow her to return to work at that juncture was at its own financial peril. Lastly, Employee pressed her claims for disability compensation through multiple venues and ultimately lost.

Given the instant circumstances, I find that when Employee reported for duty on January 21, 2003, she was ready, willing, and medically cleared to proceed with her duties. I further find that this date is when Agency's obligation to reimburse Employee's back-pay and benefits, as mandated by Judge Hollis's ID, began. I further find that Agency's obligation to compensate Employee for back-pay and benefits ceased on October 14, 2007, when Employee was returned to her last position of record. To be clear, I conclude that given the instant circumstances as provided for in this second AD, Agency shall reimburse Employee for all back-pay and benefits lost as result of her

removal from January 6, 2003 through October 14, 2007.

Enforcement

OEA Rule § 636.1, 46 D.C. Reg. at 9321 (1999) reads as follows:

Unless the Office's final decision is appealed to the District of Columbia Superior Court, the District agency shall comply with the Office's final decision within thirty (30) calendar days from the date the decision becomes final.

OEA Rule 636.8, *id.*, provides in pertinent part as follows:

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. Code § 1-606.2.

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. According to the Employee's second Motion for Compliance, and has been held *supra*, the Agency has not complied with the Final Decision of Judge Hollis. Consequently, pursuant to OEA Rule 636.8, *supra*, this matter is hereby certified to the Office of Employee Appeals General Counsel for appropriate action consistent with the findings in this second AD.

ORDER

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

FOR THE OFFICE:

/s/

ERIC T. ROBINSON, Esq.

Administrative Judge