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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No.: 2401-0172-95X-C10
RICHARD L. HUNT,)	
Employee)	
)	Date of Issuance: November 5, 2012
v.)	
)	
DISTRICT OF COLUMBIA GENERAL)	
HOSPITAL,)	
Agency)	
)	Eric Robinson, Esq.
)	Senior Administrative Judge
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Barbara B. Hutchinson, Esq., Employee Representative		
Frank McDougald, Esq., Agency Representative		

SECOND ADDENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL BACKGROUND

Richard Hunt (“Employee”) was separated from his employment with the District of Columbia General Hospital (“Agency”) on May 6, 1995, pursuant to a reduction-in-force (RIF).¹ On May 25, 1995, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) asserting that the RIF was conducted as a result of retaliation, and that his “bump” and “retreat” rights were inaccurately ascertained. An evidentiary hearing on this matter was held before this office on July 15, 2003, and August 26, 2003. Agency opposed Employee’s Petition for Appeal at the hearing and asserted that the RIF was properly conducted.

At the time of the RIF, Employee held a position as an Auditor, DS-12, with Agency.² Employee assumed this position with Agency on March 1, 1995, at a pay grade lower than his previous position as a Managed Care Program Coordinator as a DS-13.³ Subsequent to Agency’s RIF on May 6, 1995, Employee immediately sought employment that was commensurate with his background, knowledge, and experience. Employee submitted over 94

¹ See Agency’s Response to General Counsel’s Order on Compliance.

² See Employee’s Exhibit 4.

³ See Employee’s Exhibit 4.

applications during the course of his job search. In August 2000, Employee was able to secure a position with the D.C. Office of Inspector General.

In an Addendum Decision issued September 2, 2004, Administrative Judge (AJ) Hollis, held that Agency erred in determining Employee's retreat rights. Specifically, the AJ found that Employee should have been afforded the right to retreat to one of the two Accountants, DS-11 positions occupied at the time of the RIF. *See* September 2, 2004, Addendum Decision.

In the Addendum Decision, the AJ ordered Agency to determine the current status of the accountant positions. It was further ordered that if either position existed, then Agency must retroactively place Employee in the position to the date of his release with all back pay and benefits. However, if neither position existed, the AJ ordered Agency to determine the date on which the latter of the two positions ended and provide Employee with all back pay and benefits due to him from the date of his release until the date said position was terminated. Finally, Agency was ordered to file, within 60 days, documents showing compliance with the order. *See* General Counsel's Order on Compliance.

On October 7, 2004, Agency filed a Petition for Review of the AJ's Addendum Decision with the OEA Board ("Board"). Agency argued that the AJ's holding was not based on substantial evidence, but instead on "erroneous interpretation of the regulation."⁴ On December 21, 2006, after a review of record, the Board concluded that the AJ properly adjudicated the case and upheld the decision.⁵ Agency subsequently appealed the Board's decision to the District of Columbia Superior Court. Thereafter, the Court affirmed the Board's decision. *See* General Counsel's Order on Compliance.

On March 19, 2009, in an effort to elicit Agency's compliance with the AJ's Order, Employee filed a Motion for Enforcement and Compliance. Despite Agency being duly served, there was no response to Employee's Motion. Due to AJ Hollis' retirement, this matter was reassigned to the undersigned and a status conference was held on October 20, 2009. At the status conference, Agency admitted it had not complied with the Order and further asserted it would need at least 30 days to make an estimate of back pay and benefits due to Employee. *See* General Counsel's Order on Compliance.

On October 22, 2009, the undersigned issued an Addendum Decision on Compliance. The undersigned found Agency's assertion that it needed at least 30 days to make an estimate of back pay and benefits to be unacceptable, given the already exorbitant amount of time that had lapsed, Agency's inaction, and its failure to respond to Employee's Motion. The undersigned certified the matter to the OEA General Counsel's office for enforcement of the final decision. *See* General Counsel's Order on Compliance.

Efforts to mediate the issues of back pay and benefits were unsuccessful. On August 6, 2010, Employee filed a Petition requesting a hearing and determination on back pay and benefits.⁶ The parties then reentered into protracted settlement talks that were ultimately

⁴ *Agency's Petition for Review*, p. 4 (October 7, 2004).

⁵ *Opinion and Order*, p. 9-10 (September 21, 2006).

⁶ *Petition of Employee Richard Hunt for a Hearing and Determination on Back pay* (August 6, 2010).

unsuccessful. A hearing was held before the undersigned on July 10, 2012, which is the basis of this Second Addendum Decision on Compliance.

JURISDICTION

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

BURDEN OF PROOF

Pursuant to this Office's rules, Agency has the burden of proof in this appeal. *See* OEA Rule 628.2, 59 DCR 2129 (March 16, 2012). The standard of proof with regard to material issues of fact shall be by a preponderance of the evidence, which is defined by this Office's rules as follows:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean the degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012).

ISSUES

1. Whether Employee was required to mitigate his damages in the instant matter.
2. If so, whether Employee adequately mitigated his damages by seeking gainful employment during the pendency of this matter.

Agency's Case-in-Chief

Deborah Moreau

Deborah Moreau ("Moreau") testified in relevant part: that she owns and operates a vocational rehabilitation and medical case management company. Moreau has a *Bachelor of Arts Degree* in Psychology and a *Master of Science Degree* in Rehabilitation and Counseling, both from West Virginia University. *See* Resume/Curriculum Vitae. Moreau testified that she is a practicing vocational counselor and helps determine what a person's employment options are based on their education, work history, and transferable skills. *See* Transcript ("Tr.") at 20. Moreau has been in this field for 32 years.

Moreau also testified that a large focus of what her company does is work with people who have disabilities and match their disability with an appropriate job. *See* Tr. at 24. She has also worked in the field of vocational rehabilitation with individuals *without* a disability. *See* Tr. at 44. Moreau has qualified as an expert witness in the following jurisdictions: Virginia, Maryland, and District of Columbia. She has qualified as a vocational expert in worker compensation, divorce, and personal injury matters. *See* Tr. at 31-33.

Moreau has qualified as an expert before this Office on a previous occasion. *See* Tr. at 36-38. Namely, in the matter of *George Walker v. Office of Chief Technology Officer*, OEA Matter 1601-0046-97R09. *See* Tr. at 36. This matter required Moreau to conduct a labor market survey that assessed the employee's work potential in retrospect over a decade.

Based upon Moreau's knowledge, experience, training, and education, I certified her as an expert witness in this matter, over the objection of Employee. Moreau was certified as an expert in determining the adequacy of job search tactics for an unemployed individual who actively sought employment between May 1995 and August 2000. *See* Tr. at 68.

Moreau testified that her company performs labor market surveys to assess the types of jobs an individual is qualified for in a particular labor market. *See* Tr. at 46. These labor market surveys take into consideration an individual's skills, education, and work history. *See* Tr. at 46. Based on these surveys, Moreau is able to identify different types of positions that an individual may qualify for. *See* Tr. at 46. It was testified that Moreau and her company perform approximately 50 to 100 labor market surveys per year. *See* Tr. at 47. However, over the course of Moreau's career, she has only performed two or three surveys in retrospect, which is at issue in the instant matter. *See* Tr. at 52. More specifically, the surveys Moreau conducted in retrospect looked at an individual's job prospects, and what type of positions they may have qualified for approximately three to five years prior to the survey being conducted. Of these two to three surveys that were conducted in retrospect, only one of them looked back over a decade to assess an individual's job prospects. *See* Tr. at 49.

Here, Moreau conducted a labor market survey on Employee. This survey considered Employee's job descriptions with Agency as a Managed Care Coordinator and Budget Analyst, two versions of Employee's résumé, and information regarding his job search, such as letters sent to potential employers and copies of job vacancies that he applied for. *See* Tr. at 60, 70. These documents covered the period of May 1995 to 1998, and 2000. Documents for the year 1999 were submitted subsequent to the labor market survey report being completed and were not taken into consideration. However, this did not have an effect on the overall conclusion of the report. *See* Tr. at 60. Based on this information, Moreau was asked to evaluate whether Employee did an adequate job search and made a sincere effort to secure a job in order to mitigate his damages. *See* Tr. at 60.

Moreau primarily used job vacancy announcements from *The Washington Post* between May 1995 and August 2000 in evaluating Employee in her Labor Market Research Report. *See* A2.⁷ Due to the volume of employment classified ads for the years used in the report, Moreau primarily used the bi-annual Mega Employment sections of *The Washington Post* for review. *See* A2. The Mega Posting section was used for "time's sake." *See* Tr. at 122. Moreau noted that *The Washington Post* has advertised new job announcements weekly, beginning every Sunday, at least since 1979, when she began her career in the vocational rehabilitation field. *See* Tr. at 74. *The Washington Post* puts out the Mega Employment section, a comprehensive listing of current jobs in the area, twice a year. *See* Tr. at 74.

⁷ "A__" refers to Agency's exhibit number

Based on the bi-annual Mega Postings from May 1995 through August 2000, Moreau identified approximately 800 positions that Employee qualified for. *See Tr. at 80.* The time period that Moreau's labor market survey covers is over a course of 277 weeks. *See Tr. at 80.* Moreau picked ten of those weeks using the Mega Posting Section, which provided job listings where she was able to identify approximately 800 jobs that were relevant to Employee. With respect to the remaining 267 weeks in which the Mega Employment section did not cover, Moreau testified that a conservative estimate of what her company would have been able to identify if the search was done on a week by week basis, is approximately five (5) prospective positions a week. *See Tr. at 80.* This amounts to five prospective jobs for 267 weeks, equaling approximately 1335 employment opportunities that would have been available to Employee to pursue.

Moreau also testified that she did not believe all of the jobs Employee applied for were comparable in terms of pay, education, and experience to the position Employee held prior to leaving Employer's employ. *See Tr. at 82.* Specifically, Moreau states that Employee was applying for jobs on a pay scale of DS-15, although at the time of Employee's termination he was at a DS-12 pay scale.

A summary of Moreau's findings show that Employee submitted approximately 94 applications in various ways, such as applying directly to an advertised position or sending potential employers blind solicitation of his services. *See Tr. at 103.* Moreau opines that the number of job applications Employee submitted fall short of what a reasonable job search would produce and result in being hired for a position. *See Tr. at 103.*

During cross-examination, Moreau testified that she did not consider salary in any of the potential job prospects in her report. *See Tr. at 116.* When asked whether any of the 800 jobs identified in the Mega Posting Section could have ranged in salary from \$15,000 to \$75,000, Moreau indicated that she did not have that information. *See Tr. at 119.*

Employee's Case-in-Chief

Richard Hunt

Richard Hunt ("Employee") testified in relevant part: that he was separated from his employment in May of 1995 by the District of Columbia (D.C.) General Hospital. Subsequent to Agency's RIF, Employee used necessary measures to secure another job that was commensurate with his background, knowledge, experience, and within the range of his Grade 12, step 7, \$42,556.00 salary. *See Tr. at 179-180.* However, Employee was not successful in finding employment again until August 2000. *See Tr. at 164-165.* In the interim, Employee applied to several D.C. government agencies in-person where he would have a representative of the agency sign documentation to indicate that the application was received. *See Tr. at 147.*

When Employee was subjected to a RIF by Agency in May of 1995, his pay schedule was a grade 12, step 7. *See Tr. at 151, 179-180.* Although Employee was a DS-12 at the time he was separated from Agency, he saw fit to apply for positions that were a DS-15 level. *See Tr. at 152.* Despite Employee's DS-12 position at the time of separation, he was able to

secure an interview with the D.C. Commission on Health Care Finance for a Medicaid Policy Officer position as a DS-15. *See* Tr. at 152.

Although Agency's Exhibits 3-8 provide documentation for *some* of the positions that Employee applied for while unemployed, they do not account for *all* of the positions Employee applied for. *See* Tr. at 154, 163. Employee testified that he did not keep record of all of the positions he applied for. *See* Tr. at 162-163. However, it was testified that Employee kept a folder that contained some, not all, of the job announcements that he applied for. *See* Tr. at 163. Among the undocumented job vacancies that Employee applied for was the job that Employee secured in August of 2000 with the D.C. Office of Inspector General. *See* Tr. at 164. The documents provided in Agency's exhibits 3-8 are only the job announcements that Employee actually kept track of to document his job search. *See* Tr. at 154. Employee testified that he used the newspaper as part of his search and found positions that required him to fax a cover letter and resume. *See* Tr. at 157. Many of the ads in the newspaper did not have announcements; rather they contained "a blurb about what the position was about." *See* Tr. at 157. Agency's exhibits also include several letters of confirmation by prospective employers in response to Employee's inquiry confirming that they had received his application. *See* Tr. at 156-160.

Employee testified that from the time he was separated from Agency until he was employed by the Office of Inspector General, that he constantly sought employment by all means necessary. *See* Tr. at 164. Although Employee was able to submit several of his documented job applications to Agency for use in its' Labor Market Report, there were also several job applications Employee was unable to submit due to lack of documentation. *See* Tr. at 163-165. Of particular importance is the fact that Employee's application submitted to the Office of Inspector General, where Employee became employed in August of 2000, is not included in Agency's Exhibit 8--Employee's job search for the year 2000. *See* Tr. at 164.

Employee ultimately got a job as an Auditor with the D.C. Inspector General's Office in August of 2000 and worked on matters including Medicaid fraud and healthcare audits. *See* Tr. at 186-187.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSION

The following findings of fact, analysis, and conclusion are based on the testimonial and documentary evidence presented by the parties during the course of the Employee's appeal process with this office.

The amended D.C. Government Comprehensive Merit Personnel Act (CMPA) continues the applicability of the [Federal] Back Pay Act... to the District Government. *See District of Columbia v. Brown*, 739 A.2d. 832 (D.C. 1999). The Court has held that the District must provide its pre-1980 employees, such as Employee in the instant case, with concrete entitlements "at least equal to...previously applicable entitlements" available to them when they were part of the federal system. *See Brown, supra*. It has also been held that "the plain language of the Home Rule Act expresses the intent of Congress that amendments to the Federal Back Pay Act shall apply to pre-1980 employees of the District of Columbia. *Brown, supra*. Accordingly, the language of the Federal Back Pay Act below is applicable in the instant matter.

The Federal Back Pay Act, 5 U.S.C. § 5596 (b)(1)(a)(I), provides that an employee who has been affected by an unjustified or unwarranted personnel action,

...is entitled...to receive...an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period...

Here, Employee was hired by Agency in April 1978 and continued to work there until he was subjected to a RIF in May of 1995. At the time Employee left Agency, his salary schedule was a grade 12, step 7, \$42, 556.00 annually. Employee would have been entitled to all of his annual earnings if he was not subjected to the RIF conducted in May of 1995 by Agency.

The court has also held that statutory entitlements of the Federal Backpay Act must be applied to the back pay for employees, hired prior to January 1, 1980. *District of Columbia v. Hunt*, 520 A.2d 300 (D.C. 1987).

The D.C. Court of Appeals has held that an employee who has been improperly discharged must exercise “reasonable diligence in seeking alternative employment.” See *Wisconsin Avenue Nursing Home v. D.C. Commission on Human Rights*, 527 A.2d 282. (D.C. 1987).

Here, Moreau, Agency’s expert witness, testified that she did not believe that Employee exercised reasonable diligence in seeking employment after being terminated by Agency. Moreau conducted a Labor Market Research Report which considered several factors in reaching her conclusion. Among those factors included: Employee’s job descriptions with Agency as a Managed Care Coordinator and Budget Analyst, two versions of Employee’s résumé, and information regarding his job search, such as letters sent to potential employers and copies of job vacancies that he applied for.

In order to evaluate Employee, Moreau primarily used job vacancy announcements from *The Washington Post* between May 1995 and August 2000 to compare them to Employee’s education, work history, and transferable skills. Moreau did not believe all of the jobs Employee applied for were comparable in terms of pay, education, and experience to the position Employee held prior to being RIFed. Specifically, Moreau states that Employee was applying for jobs on a pay scale of DS-15, although at the time of Employee’s termination he was at a DS-12 pay scale. Despite the difference in what Employee’s pay grade was prior to being terminated, and the pay grade of job vacancies in which he applied for, I do not find that the pursuit of such varied pay grades was unreasonable. It should be noted that one’s pay grade does not necessarily translate into a higher salary. For instance, someone at a pay grade of DS-12 may have a higher salary than someone with a DS-13, depending on the step an individual has within his or her pay grade.

Moreau’s Labor Market Survey Report covers a 277 weeks span, from May 1995 to August 2000. In her research, Moreau identified approximately 800 jobs that Employee qualified for based on the bi-annual Mega Postings from May 1995 through August 2000. Based on the ten weeks of Mega Posting job vacancy announcements, Moreau reached her conclusion that Employee qualified for approximately 800 jobs during the course of his unemployment. It

was also testified that if a job search was done in *The Washington Post* on a week-by-week basis, opposed to the bi-annual Mega Postings, then Employee would have qualified for a conservative estimate of five (5) prospective jobs weekly. However, a job search was not done on a week-by-week basis for “time sake.”

The Labor Market Report conducted by Moreau did not take the salary of the job listings into consideration. Employee was earning \$42,556.00 annually at the time he was RIFed by Agency. Although some of the job listings that Moreau was able to identify may have been comparable to Employee’s salary, there may have been several job listings with salaries that were substantially lower than Employee’s ending salary. Moreau testified that she was not specifically looking for salary in any of the job listings in her report, thereby failing to do a holistic assessment of what jobs Employee was suited for. It was not unreasonable for Employee to take into consideration whether he was going to be “underemployed.” As such, I do not find it unreasonable for Employee to abstain from applying to job listings that had significantly lower salaries than his pay grade at the time he was separated from Agency. Employee’s decision to apply for positions at a DS-15 level, although he was a DS-12 when he separated from Agency, is further justified by the fact that he was able to secure an interview with the D.C. Commission on Health Care Finance as a DS-15. It was apparent that the Commission felt that Employee was qualified enough for an interview.

Based on the documented records in Moreau’s Report, Employee submitted approximately 94 jobs application. However, Employee testified that he was unable to provide documentation of all of the jobs which he applied for. Interestingly, the application and job announcement for Employee’s present job was not provided to Agency to be considered in the Labor Market Report because Employee did not have this documentation. On average, Employee submitted approximately three applications per weeks over the course of his unemployment, notwithstanding those applications which were not documented.

The burden is on the Agency to establish that Employee failed to mitigate his damages and use diligence in seeking employment after being separated from Agency. *See* 628.2, 59 DCR 2129 (March 16, 2012). It is well documented in Agency’s exhibits that Employee sought employment from May 1995 to August 2000. Although Employee’s efforts were unsuccessful until August of 2000, when he was able to secure a position with the D.C. Office of Inspector General, they were reasonable. I find that the thoroughness and reliability of Moreau’s report is lacking and does not allow Agency to meet its burden of proof to demonstrate that Employee’s job search was inadequate or unreasonable. As such, I find that Employee used reasonable diligence and was adequate in his efforts to mitigate his damages during his job search while unemployed pursuant to the RIF conducted by Agency. Accordingly, I find that Agency shall comply with the previous order in which Agency was to provide Employee with all back pay and benefits.

Enforcement

OEA Rule § 635.1, 59 DCR 2129 (March 16, 2012), reads as follows:

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.

OEA Rule § 635.7, *id.*, states:

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.

OEA Rule 635.9, *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. Official Code § 1-606.02 (2006 Repl.).

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. Based on the evidence adduced during the Evidentiary Hearing held on July 10, 2012, I find that the Agency has not complied with the Final Decision of Judge Hollis. Consequently, pursuant to OEA Rule 635.9, *supra*, this matter is hereby certified to the Office of Employee Appeals General Counsel for appropriate action consistent with the findings in this second Addendum Decision on Compliance.

ORDER

Based on the foregoing, it is hereby ORDERED that;

1. Agency shall **REIMBURSE** Employee with all back-pay and benefits from the date of the RIF, May 6, 1995, to the date he was able to secure employment, August 26, 2000; and
2. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order; and
3. This matter is hereby certified to the Office of Employee Appeals General Counsel for enforcement of this Second Addendum Decision on Compliance

FOR THE OFFICE:

Eric T. Robinson, Esq.
Senior Administrative Judge