Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
HASSAN ABDULLAH,	)	
Employee	)	OEA Matter No. 1601-0126-13
	)	
v.	)	
	)	Date of Issuance: March 7, 2017
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Hassan Abdullah ("Employee") worked as a teacher with the D.C. Public Schools ("Agency"). On June 27, 2013, Agency issued a written notice to Employee informing him that he was being terminated after receiving a final rating of "Ineffective" under IMPACT during the 2012-2013 school year. IMPACT is Agency's assessment system for school-based personnel. The effective date of Employee's termination was August, 10, 2013.[1]

On July 30, 2013, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He explained that for three years prior to his removal, he received effective and highly effective ratings in many areas of his IMPACT evaluations. He argued that Agency

[1] *Petition for Appeal,* p.12 (July 30, 2013).

deliberately under-rated him. Therefore, Employee requested that he be reinstated.[2]

Agency filed its Answer to Employee's Petition for Appeal on September 9, 2013. It denied Employee's allegations. Agency explained that Employee was evaluated in four areas: teaching and learning framework, teacher-assessed student achievement data, commitment to the school community, and core professionalism. Agency provided that during the 2012-2013 school year, Employee was observed on five separate occasions. It argued that because Employee received a rating of "Ineffective" under IMPACT, he was properly terminated.[3]

On May 19, 2015, the OEA Administrative Judge ("AJ") ordered both parties to submit written briefs. Employee filed his brief on June 19, 2015. He explained that on January 6, 2014, Agency sent him a letter to discuss reinstatement and back pay. Employee provided that he e-mailed and subsequently met with Agency, along with his union representative, to discuss resolution of the matter. Thereafter, Employee filed a grievance seeking reinstatement. Employee maintained that he discussed the details of his return with Agency but never received a detailed offer of reinstatement and back pay. Furthermore, he engaged in retirement discussions with Agency in an effort to explore other alternatives. As a result, Employee requested a detailed offer from Agency which he could accept.[4]

Agency filed its brief on July 17, 2015. It acknowledged liability in the termination of Employee, but it reasoned that Employee did not accept Agency's "make whole" offer which included him returning to work with back pay and benefits. Agency provided that although it was ready to implement its offer, Employee never provided a response. It stated that during January of 2014, it received Employee's grievance that contested his termination. Agency explained that it offered the same relief requested in Employee's grievance as outlined in its

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[2] *Id.* at 1-6 (July 30, 2013).
[3] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal,* p.2-4 (September 9, 2013).
[4] *Employee's Brief in Response to Post Status Conference Order,* p. 3-7 (June 19, 2015).

January 3, 2014 letter. Therefore, Agency sought to have Employee's back pay and benefit relief cover only the period from the date of his termination until January 3, 2014.[5]

On September 23, 2015, the AJ issued her Initial Decision. She determined that because Agency acknowledged liability for Employee's termination and reinstated Employee in August of 2015, the only issue she had to address was Employee's back pay. The AJ found that the January 3, 2014 letter outlined that Agency offered Employee reinstatement with back pay. She held that Agency's offer letter provided the same remedies that Employee would have been entitled to had he won his case with OEA. Moreover, the AJ provided that Employee had enough information and a reasonable amount of time to seek advice to decide if he would accept Agency's offer. She reasoned that Agency extended its original offer deadline from January 13, 2014 until February 20, 2014. Further, she considered that the grievance Employee filed on January 27, 2014, to be a rejection of Agency's initial offer of reinstatement and concluded that the parties were no longer engaged in the negotiations of the initial offer. Therefore, the AJ held that by not accepting reinstatement, Employee failed to mitigate his damages. Hence, she ruled that Agency was liable for back pay from Employee's effective date of termination until February 20, 2014.[6]

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on October 28, 2015. He argues that the AJ's findings were not based on substantial evidence and that the Initial Decision was based on an erroneous interpretation of law. Employee also contends that because neither he nor Agency briefed the back pay issue, the AJ did not consider any arguments pertaining to the mitigation of damages. He asserts that although, the AJ alleged that the grievance he filed constituted a rejection of an offer of

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[5] *District of Columbia's Public Schools' Response to May 19, 2015 Post Status Conference Order,* p. 1-6 (July 17, 2015).

[6] *Initial Decision,* p. 5-9 (September 23, 2015).

employment, he maintains that he filed the grievance to preserve his rights in the event that the negotiations did not conclude favorably. He argues that the AJ made multiple legal errors; applied the wrong standard for mitigation factors; failed to analyze whether Agency made a "bona fide" offer of reinstatement; and wrongfully concluded that he rejected an offer of reinstatement by filing a grievance. Therefore, Employee requests that the Board reverse the AJ's decision on damages; order that he be "made whole" through August 20, 2015; and remand the matter to the AJ for further proceedings and clarification of her order.[7]

Agency filed a Response to Employee's Petition for Review on December 2, 2015. It provides many of the same arguments previously stated in its brief. Accordingly, it requests that the Board dismiss Employee's Petition for Review.[8]

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. Therefore, if there is substantial evidence to support the AJ's decision for the period used to award back pay, then this Board must accept it. As will be discussed below, this Board does not agree with the AJ's back pay determination.

Agency's Offer for Reinstatement

First, this Board does not agree with the AJ's assessment that Agency's January 3, 2014 letter was an offer for reinstatement to be accepted by January 13, 2014. The notice states that

[7] *Petition for Review of Initial Decision,* p. 8-15 (October 28, 2015).
[8] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 6-10 (December 2, 2015).

"in light of the . . . adjustment to your IMPACT rating, I am writing to offer you reinstatement with back pay to your position as a Teacher with DCPS. If you are *interested in discussing reinstatement* or the implications of this rating change, please contact Erin K. Pitts . . . by Monday, January 13, 2014 . . . . (emphasis added)." According to the plain language of the notice, Employee was not required to accept Agency's offer by January 13th; the letter requested that he merely start discussions by that date. [9]

Moreover, this Board is unclear on how the AJ concluded that February 20, 2014, was the date upon which Employee had to accept the offer. Agency provided in an email exchange with Employee that because he was taking so much time to consider its offer of reinstatement, any time beyond February 20, 2014, would not be counted in any back pay award.[10] However, there is no official documentation that specifically notes February 20th as Agency's acceptance deadline. Furthermore, there was no notice providing that February 20th was the effective date of reinstatement.

This Board believes that Agency does not provide a clear offer for reinstatement with an effective date until August 18, 2015. The August notice from Agency to Employee provides that "this letter serves to offer you a placement as a Teacher, Elementary at Ludlow Taylor Elementary School. The effective date of this assignment is Thursday, August 20, 2015."[11] The August 18, 2015 notice is an offer with a specific position (Elementary Teacher), at a specific

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[9] This Board believes that it is unreasonable for the AJ to have equated the language that Agency used in this unique circumstance, where it was attempting to correct its wrongful termination, to the standard language used in an OEA order. It is obvious from the factual disputes regarding back pay that the terms of the reinstatement were reasonably important in this matter. This Board believes that the AJ oversimplified the complicated circumstances of this case by reaching the conclusion that Employee received the same remedy from Agency's January 13th letter as he would have received from an OEA order. This case had several complex issues that should have reasonably been addressed before Employee accepted Agency's offer. Contrary to most matters appealed to OEA, Agency admitted to wrongfully removing Employee. Additionally, Employee retired as a result of the wrongful removal action. Therefore, it is unreasonable for the AJ to have assumed that a one-sentence offer for reinstatement was warranted or acceptable in this matter.
[10] *Employee's Brief in Response to Post Status Conference Order,* p. 27 (June 19, 2015).
[11] *Petition for Review of Initial Decision,* p. 119 (October 28, 2015).

location (Ludlow Taylor Elementary), and with a specified start date (August 20, 2015). We believe that this represents a true offer with specific terms that could be accepted or rejected by Employee.

Period for Back Pay

In *Walker v. Office of Chief Information Technology Officer*, 127 A.3d 524 (2015), the D.C. Court of Appeals held that District Personnel Manual ("DPM") § 8.11 provided that "when an employee has been separated from his or her position by an unjustified or unwarranted personnel action, he or she is entitled to an amount (when this action is corrected) equal to the difference between his or her earnings and the pay he or she would have received had it not been for the separation . . . ." A more recent version of the DPM provides that ". . . the period for which recomputation is required . . . shall be the period covered by the unjustified or unwarranted personnel action that is corrected."[12] Thus, as is consistent with the DPM, when a typical OEA order reinstates an employee to their position with back pay and benefits, it does so from the effective date of the removal action until the employee is actually reinstated to their position.

Accordingly, Employee would have been entitled to back pay from the time he was wrongfully removed on August 10, 2013 until he was reinstated on August 20, 2015. However, the AJ's decision limits Employee's period of back pay without a reasonable justification. In *Walker*, the court held that OEA improperly relied on a stipulation of the parties for the period of the back pay award. The court reasoned that OEA's decision to rely on the stipulated date was unsupported by substantial evidence in the record because there was no logical connection to the extent to the employee was working on the administrative challenges of his termination.[13]

[12] *See* DPM § 1149.9.
[13] *Walker v. Office of Chief Information Technology Officer*, 127 A.3d 524, 528 (2015).

Similarly, the AJ in the current matter offered no logical connection to the February 20, 2014 date. Like the AJ in *Walker*, it also appears that she did not consider that the Employee was still working on his administrative challenges to being wrongfully removed from his position. It was not until the May 6, 2015 Status Conference that it was revealed that the parties shifted from arguing the merits of the termination action to arguments regarding the offer or reinstatement and back pay.[14]

Moreover, the D.C. Court of Appeals ruled in *Walker* that "any deduction in the back pay awarded to [an employee] must rest not on vague and unexplored references to positions that he turned down, but on clear and reasoned findings that are particularized. . . ." The court reasoned that "to the extent the ALJ determined that [the employee] was required to have taken [a] . . . position[ ] as a mitigation measure, he needed to make findings to that effect that identified the position and the date it was offered[;] explain why turning it down was unreasonable[; and] explore whether taking it would have prejudiced [the employee's] ongoing legal claims against the District . . . ." The court opined that in the absence of such particularized findings, an employee could be entitled to back pay from the time they were wrongfully terminated until they are reinstated. The court concluded that "in making [a] determination, a court may consider among other things 'the terms of the offer and the reason for the former [employee's] refusal.'"[15]

In the current matter, the AJ relied on vague references of an offer to mitigate Employee's back pay award. This Board believes that the record does not provide a clear, particularized offer for Employee until August 18, 2015. Thus, as provided in the aforementioned analysis, this Board does not believe that the AJ's decision was based on substantial evidence. Accordingly, as is consistent with the ruling in *Walker*, if the AJ believed

[14] *Post Status Conference Order* (May 19, 2015).
[15] *Id.* at 536.

that Employee should have accepted the position sooner in an effort to mitigate, she is required to make additional findings. Thus, we must remand the matter to the AJ for her to consider the extent to which Employee was required to have taken the position prior to August 20, 2015, as a mitigation measure; to make findings that identified the position and the date upon which it was truly offered; to explain why Employee's non-acceptance of the position prior to August 20, 2015, was unreasonable; and to explore whether Employee taking the position prior to the August 20, 2015 offer would have prejudiced his ongoing legal claims against the District. Therefore, Employee's petition is granted, and the matter is remanded to the Administrative Judge for further findings.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**, and this matter is **REMANDED** to the Administrative Judge for further findings.

FOR THE BOARD:

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.