THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE	OEA Matter No. 1601-0215-11C21
	Date of Issuance: September 29, 2021
v.	
	JOSEPH E. LIM, ESQ.
D.C. PUBLIC SCHOOLS,	Senior Administrative Judge
Agency	

Lynette Collins, Esq., Agency Representative
Employee *Pro se*

ADDENDUM DECISION ON COMPLIANCE

PROCEDURAL HISTORY

On September 9, 2011, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public School's ("DCPS" or "Agency") final decision to remove him from his position as a School Psychologist due to two (2) consecutive years of a "Minimally Effective" IMPACT rating.[1] Employee's termination was effective August 12, 2011. On May 20, 2014, I issued an Initial Decision ("ID") dismissing the matter for lack of jurisdiction due to Employee's retirement.

Employee subsequently filed a Petition for Review with OEA's Board on June 26, 2014. On February 16, 2016, the OEA's Board issued an Opinion and Order on Petition for Review denying Employee's petition. It held that OEA had no jurisdiction over his appeal because the evidence supports a finding that Employee's decision to retire was of his own volition and was not a result of incorrect or misleading information on Agency's part.

Thereafter, Employee appealed to the Superior Court of the District of Columbia ("Superior Court"). On February 21, 2017, the Superior Court affirmed OEA's decision and denied Employee's appeal.[2] Employee's Motion for Reconsideration was denied on April 11, 2017. Employee then appealed to the District of Columbia Court of Appeals ("CA"). On August 9, 2018,

[1] IMPACT is the effectiveness assessment system Agency uses to rate the performance of school-based personnel.
[2] *Johnson v. District of Columbia Public Schools, et al*., Case No. 2016 CA 001551 (D.C. Super. Ct. February 21, 2017).

the CA vacated the ID on the issue of jurisdiction and remanded the case to the Superior Court for further remand to OEA. The Superior Court then remanded the matter back to OEA on February 8, 2019, with instructions to proceed with the matter. On June 14, 2019, I issued an Initial Decision on Remand ("IDR") upholding Agency's termination of Employee's employment due to his two consecutive years of 'Minimally Effective' IMPACT ratings.[3]

Employee appealed the IDR and on May 19, 2020, the OEA Board upheld the legality of the IMPACT but remanded the matter to the undersigned for the purpose of conducting an evidentiary hearing.[4] Specifically, the Board determined that a hearing was needed to address Employee's allegations of procedural errors in Agency's removal of Employee as it pertained to his IMPACT scores. After an Evidentiary Hearing on July 23, 2020,[5] I issued a Second Initial Decision on Remand ("Second IDR") on October 15, 2020, whereby I reversed Agency's action of separating Employee for receiving a "Minimally Effective" IMPACT rating for two consecutive school years but upheld his "Minimally effective" IMPACT score for school year 2010-2011. Consequently, I ordered Agency to reinstate Employee to his last position of record and reimburse Employee all back-pay and benefits lost as a result of the separation less any retirement benefits, he has received. Agency appealed, and on February 4, 2021, the OEA Board held that Agency failed to prove just cause in terminating Employee and denied Agency's Petition for Review.[6]

Employee accepted Agency's job offer on or about December 21, 2020, and his position as a School Psychologist took effect on January 4, 2021. On February 19, 2021, Agency requested a hearing on the issue of the amount of backpay. Based on the parties' request, an Evidentiary Hearing was held on June 23, 2021, with the parties submitting their written closing arguments by August 4, 2021. The record is closed.[7]

JURISDICTION

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

ISSUES

1. Whether Agency met its burden of proof in proving that Employee failed to make reasonable efforts to mitigate his backpay damages following his removal.

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[3] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18, *Initial Decision on Remand* (June 14, 2019).
[4] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18, *Opinion and Order on Remand* (May 19, 2020).
[5] Due to the District of Columbia's Covid-19 State of Emergency, the Evidentiary Hearing was held virtually via WebEx.
[6] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20, *Opinion and Order on Remand* (February 4, 2021).
[7] Throughout this appeal, Employee sent numerous, often duplicative, and irrelevant motions. For instance, he would ask for discovery on topics not germane to the issues, and when his motions were denied, he would resend them. This I.D. dismisses these motions in toto.

2. If so, what is the proper amount of backpay damages to be awarded to Employee following his removal.

POSITIONS OF THE PARTIES

Agency asserts that Employee has a duty to mitigate his damages but failed to make reasonable efforts to do so, and thus should not be awarded any back pay. Employee counters that he had made reasonable efforts to mitigate his damages after August 12, 2011. Therefore, he is entitled to all his back pay.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Debbie Moreau ("Moreau") June 23, 2021 Transcript ("TR") Pgs. 10-80.

Since 1990, Moreau owned a vocational rehabilitation company, in which she worked as a Vocation Rehabilitation Counselor and was certified as a Maryland and Virginia rehabilitation counselor, disability management specialist, and medical case manager, and held certifications with the Department of Labor's ("DOL") Office of Workers' Compensation Program.[8] She explained that the company provided vocational rehabilitation to individuals, helping them to get re-employed. Additionally, the company provided home modifications for catastrophic injuries. Moreau further testified that prior to COVID-19, she met with individuals to evaluate their employment prospects and assist them in returning to the workforce. When conducting assessments, she considered a person's education, work history, transferable skills, hobbies, and anything relevant to help enter the job market.

Moreau has also testified as an expert witness before both Federal and State tribunals on workers compensation cases, disability rehabilitation, and vocational evaluation matters. In her work, she applies her expertise in assessing what is an appropriate job search. She was certified as an expert witness for the narrow purpose of giving testimony concerning what is an adequate job search for an unemployed individual who is actively seeking employment.

Moreau stated that Employee had two different time periods of retirement. The first retirement was in May of 2012. The second, was shortly after Employee was reinstated in January of 2021. Moreau testified that Employee's retirement had no impact on the report she created, as it would not have changed his work history, credentials, licensing, or mitigation.

Moreau stated that Employee reported his 2011 annual salary at $90,000, which is consistent with the 75th percentile of the field of clinical, counseling, and school psychologists in the D.C., Virginia, and Maryland area. Employee has a degree in Psychology, and a Masters of Clinical Community Psychology. Thus, judging from Employee's qualifications and work experience, Ms. Moreau determined that Employee qualified for positions in both public and private schools, mental health agencies, Veterans Administration medical centers, and non-profit organizations. In her report,

[8] Agency Exhibit No. 2. Moreau C.V.

Moreau obtained median wages for Employee's occupation from the U.S. Bureau of Labor Statistics and listed the 75th percentile wage for school psychologists and clinical counselors at $90,690 for 2011, $90,020 for 2012, $95,040 for 2013, $94,780 for 2014, $105, 260 for 2015, $109,150 for 2016, $113,890 for 2017, $113,890 for 2018, $105,120 for 2018, $114,150 for 2019, $115,060 for 2020.[9]

In doing a labor market analysis for the field of school psychologists, Moreau used the U.S. Bureau of Labor Statistics ("BLS") to show that in the Washington. D.C. Metropolitan area alone, careers in Clinical Counseling and School Psychologist would grow by 11% on a nation-wide basis for the period of 2008 through 2018.[10] The Washington D.C. metropolitan area has some of the largest public school systems in the nation that employ hundreds of School Psychologists. This area also has approximately 62 private schools as well as numerous mental and behavioral health services and treatment facilities.

Moreau stated that she was guided by the Department of Labor Office of Workers' Compensation Programs and the Maryland Workers' Compensation Commission. Under their guidance, she was asked to develop vocational rehabilitation plans outlining what was considered a reasonable job search for a client. Moreau explained that a sufficient work search was when a prospective employee contacted ten to twenty prospective employers between four to six hours per day, five days a week. Additionally, a minimum of three to ten applications should be submitted each week. Prospective employees were counseled and encouraged to utilize all resource available. She stated that the seventeen applications submitted would not be considered a reasonable job search.

Moreau explained that searching for a job is a full-time job in itself, requiring job applicants to devote at least four to six hours per day, five days a week, and submit a minimum of three to ten applications per week. The Maryland Department of Labor requires applicants to network with family, friends, business associates, professional organizations, and job banks in one's job search. Moreau saw none of that in Employee's record. If Employee submitted two applications per week, that would have equaled eight applications per month, which would have been ninety-six applications per year. She reiterated that the minimum requirement was three applications per week, and if Employee submitted at least two applications over the course of the nine-year period, Employee would have submitted eight hundred sixty-four applications for work search. However, Employee only submitted seventeen in that time period.

Moreau testified that she was requested to conduct a vocational assessment on Employee. According to the information that Moreau reviewed, Employee left Agency in August of 2011. Moreau asserted that it was Employee's responsibility to provide Agency with all the records of his job efforts. Based on Employee's interrogatories, and positions he applied to, Moreau found that Employee only submitted seventeen applications to schools, health care agencies and mental health treatment facilities, in nine years. Her report indicated that Employee made one (1) job application in 2011, eight (8) in 2012, four (4) in 2013, and four (4) in 2014. All these job

[9] Based on Moreau's report, the median income for school psychologists and clinical counselors fluctuates yearly.
[10] Agency Exhibit 1, Vocational Assessment Report on Employee.

applications were made between September 2011 and April 2014. Employee submitted four applications when he resided in Colorado. Employee did not submit any job applications between 2014 and 2020. She opined that Employee failed to make a reasonable effort to secure employment from 2011 to 2020.

Employee Tr. p. 81-100.

Employee testified that he supported himself from the time he was separated with his approximately $2400 annuity per month from his 2011 retirement. Employee stated that he made efforts to find employment by looking online, including Indeed.com, and other organizations and companies. Employee asserted that if a job was advertised and open, he applied for the position if he qualified for it. However, he said he was not qualified for some positions because most school psychologist positions required a Philosophy Doctorate ("PhD"). He explained that he maintained his licenses for the past ten years and his licenses in the District were not expired. Employee argued that there was no other reason than gaining employment to maintain his licenses. Additionally, he claimed that he applied for at least three positions in Colorado. He explained that he took an exam by the Educational Testing Service, which he ultimately failed to pass. Thus, Employee did not qualify for any positions in Colorado.

According to Employee, he exhausted his job search efforts and ability to obtain employment after his termination from Agency. He believed that his lack of a PhD hindered his chances in gaining employment. Employee contested Moreau's report that he submitted four applications from 2012 to 2014. He denied making a statement indicating that he could not look for work because he was unable to sleep or eat because he had to focus on his litigation. Employee could not say how many job applications he made.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

BACK PAY AND MITIGATION

An award of back pay is governed by Chapter 11B of the District Personnel Manual (DPM) ("Compensation"). Chapter 11B, Part II, Subpart 8 ("Back Pay") provides in pertinent part as follows:

> 8.1 Legal Basis The regulations provide that whenever an employee of the District government, on the basis of an administrative determination . . . is found by appropriate authority under applicable law to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or any pay . . . he or she is:
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> > 1. entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or part of the pay . . . that the employee would have earned during that period if the personnel action had not occurred, *less any amounts earned through other employment (see section 8.11) during that period*.

. . . .

> 8.11 Mitigation of Damages 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 [outside] earnings and the pay he or she would have received had it not been for the separation*.
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> (Emphasis Added).

DPM Chapter 11B, Part II, Subpart 8, § 8.11, sets forth the basic requirement that, as part of a back pay calculation, an employee "who has been separated from his . . . position by an unwarranted or unjustified personnel action" must attempt to mitigate his damages by seeking other employment. Section 8.11(4) provides that the mitigation attempt must be "sufficient". Further, the D.C. Court of Appeals has held that an employee who has been improperly discharged must exercise "reasonable diligence in seeking alternative employment."[11] Additionally, the Court also held that "minimal efforts to seek employment . . . [are] not reasonably diligent."[12] In *EEOC v. Service News Co.,* 898 F.2d 958, 963 (4th Cir.1990), the Court held that "[l]ooking through want ads for an unskilled position, without more, is insufficient to show mitigation, and the back pay award should accordingly be reduced."

The U.S. Court of Appeals ("CA") held in *Ellis v. Ringgold School Dist.,*[13] that plaintiff was responsible for mitigating her damages by seeking other employment. That obligation compels a plaintiff to seek "amounts earnable with reasonable diligence."[14] The duty of mitigation may require that a plaintiff accept a lower paying position if one equivalent to that from which she was barred is unavailable.[15]

The D.C. Municipal Regulations on backpay regulate the manner and the computation of the amount of backpay due the aggrieved employee.[16] Section 1149.12 of 6B DCMR 1149 states: In computing the amount of back pay under this section, the agency shall deduct both of the following:

(a) Any amounts earned by the employee from other employment during the period covered by the personnel action being corrected; and

(b) Any erroneous payment received from the District or Federal Government as a result of the unjustified or unwarranted personnel action, which, in the

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[11] *Wisconsin Avenue Nursing Home v. D.C. Commission on Human Rights*, 527 A.2d 282 (D.C. 1987). *Wisconsin Avenue Nursing Home* involved a discriminatory discharge. Nonetheless, the principles regarding mitigation set forth in the case are applicable here.

[12] 527 A.2d at 292 (citing *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 866 & n.2 868 (9th Cir. 1980)).

[13] 832 F.2d at 29.

[14] *Craig v. Y & Y Snacks,* 721 F.2d at 82.

[15] *Ford Motor Company v. EEOC,* 458 U.S. 219, 231 n. 16, 102 S.Ct. 3057, 3065 n. 16, 73 L.Ed.2d 721 (1982).

[16] 6B D.C.M.R. Sec. 1149

> case of erroneous payments received from the federal Civil Service Retirement System, Police and Fire Retirement System, and any District retirement system, shall be returned to the appropriate system.

Substantially Equivalent Employment

The duty of a successful Title VII claimant to mitigate damages is *not* met by using reasonable diligence to obtain *any* employment. Rather, the claimant must use reasonable diligence to obtain *substantially equivalent employment.*[17] "Substantially equivalent employment is that employment which affords virtually identical promotional opportunities, compensation, job responsibilities, and status as the position from which the Title VII claimant has been discriminatorily terminated."[18] Although the statutory duty to mitigate damages is placed on a Title VII claimant, the employer has the burden of proving a failure to mitigate.[19] To meet its burden, an employer must demonstrate that 1) substantially equivalent work was available, and 2) the Title VII claimant did not exercise reasonable diligence to obtain the employment. [20]

Once the employee establishes the amount of back pay he is entitled to receive, the burden shifts to the employer to prove what the employee could have earned by the exercise of reasonable diligence.[21] In *Wisconsin Avenue Nursing Home v. District of Columbia Com'n on Human Rights*,[22] the Court of Appeals noted that a back pay award should be equal to the salary a terminated employee would have received during the period of unemployment minus the "actual interim earnings *or the amounts she would have earned had she diligently sought other work"* (emphasis added).[23] In that regard, an employer has the burden of proof to establish the amount by which the salary that would have been earned during the period of unemployment from the employer should be reduced "to reflect the complainant's interim earnings *or to show her failure to take reasonable efforts to mitigate her damages by finding alternative employment"* (emphasis added).[24] The Court concluded that the finding by the Office was not supported by substantial evidence since the evidence only showed that the employee, during a year and a half period of unemployment, had interviewed for only two nurse assistant positions. *See also Sangster v. United Air Lines, Inc,* 633 F. 2d 864, 866, where a flight attendant's minimal efforts to seek employment over a period of eight years was not reasonably diligent.

Federal cases discussing precisely the same mitigation of damages defense have uniformly held that the proponent of the defense must prove with reasonable certainty, the amount that the

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[17] *Id.* See also *Anthony Anastasio v. Schering Corporation,* 838 F.2d 701 at 708.

[18] *Sellers v. Delgado College,* 902 F.2d 1189 at 1193; *see Mitchell v. Humana Hospital-Shoals,* 942 F.2d 1581, 1583 n. 2 (11th Cir.1991); *Ford,* 866 F.2d at 873.

[19] *See Robinson,* 982 F.2d at 897; *Anastasio v. Schering Corp.,* 838 F.2d 701, 707-08 (3d Cir.1988).

[20] *Supra Anastasio* at 708.

[21] *Remedio v. Revlon,* 528 F.Supp. 1380; *Kaplan v. International Alliance of Theatrical and Stage Emp. & Motion Picture Machine Operators, et al.* 525 F.2d 1354.

[22] 527 A.2d 282 at 292

[23] *Id.* at 291.

[24] *Id.*

employee would have earned had he or she exercised reasonable diligence in searching for employment. *See e.g*. *Jones v. Consolidated Rail Corp*., 800 F.2d 590, 594 (6th Cir. 1986) (The jury instructions "did not adequately inform the jury that the plaintiff was entitled to the difference between what he would have earned on the railroad and what he might have earned in another position. Because this may have affected the award of damages, it is also reversible error"); *Hadra v. Herman Blum consulting Engineers,* 632 F.2d 1242, 1245 (5th Cir. 1980) ("the defendant has the burden of proving the amount of money that a wrongfully discharged employee could have earned in mitigation of damages"); *Jackson v. Wheatley School Dist. No. 28 of St. Francis County,* 464 F.2d 411 (8th Cir. 1972) ("In determining the damages, the burden is on the [defendant] to show what the teachers, through *reasonable* efforts, could have earned to mitigate them"); *Hegler v. Board of Education of Bearden School District*, 447 F.2d 1078, 1081 (8th Cir. 1971) ("The overwhelming authority places the burden on the wrongdoer to produce evidence showing what the appellant could have earned to mitigate damages"); *John S. Doane Co. v. Martin*, 164 F.2d 537, 541 (1st Cir. 1947) ("In the matter of the mitigation of the damages, the burden is upon the respondent to produce evidence showing the amount of money the petitioner did earn, or with reasonable care and diligence could have earned, and since there is to be a new trial evidence to this effect should be presented").

This holding was affirmed by the D.C. Court of Appeals in *Walker v. Office of the Chief Technology Officer*.[25] It found that Agency can satisfy its burden of proof by "show[ing] [the employee's] failure to take reasonable efforts to mitigate [his] damages by finding alternative employment."[26] The Court also held that "any deduction in the back pay awarded to [Mr. Walker] must rest… on clear and reasoned findings that are particularized as to the time period of the deduction and the reasonable course of mitigation that [Mr. Walker] failed to follow during that period. To the extent the ALJ determined that [Mr. Walker] was required to have taken one of those positions as a mitigation measure, he needed to make findings to that effect that identified the position and the date it was offered, explained why turning it down was unreasonable, explored whether taking it would have prejudiced [Mr. Walker]'s ongoing legal claims against the District, and addressed the earlier findings suggesting that the position was not comparable to the one from which [Mr. Walker] was terminated."[27] In *Walker*, the CA issued a decision in which it was explained that "any deduction in the back pay awarded to Mr. Walker must rest . . . [on] findings that are particularized as to the time period of the deduction and the reasonable course of mitigation that Mr. Walker failed to follow during that period."[28]

Findings of Fact on the Clinical Counseling and School Psychologist Job Market for Employee from 2011 to 2020

Moreau testified that Employee had educational skills and employability assets. Based on her research using official Federal government data, she testified that the job market in the D.C. area in

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[25] *Walker v. Office of the Chief Technology Officer*, 127 A.3d 524 (D.C. 2015).

[26] *Wis. Ave. Nursing Home v. District of Columbia Comm'n on Human Rights,* 527 A.2d 282, 291 (D.C. 1987).

[27] *Walker v. Office of the Chief Technology Officer*, 127 A.3d 524 (D.C. 2015) at 22.

[28] *Id.*

Employee's area of Clinical Counseling and School Psychologist from 2011 to 2020 had an average rate of growth of 11%.[29] Employee did not refute Moreau's characterization of the job market. Based on the testimonial and government data presented, I also find that the job market for Employee was robust for the Baltimore-Washington Metropolitan Area throughout the relevant time period.

Findings of Fact on Employee's Efforts to Mitigate His Damages from August 2011 to December 2020

Employee left Agency in August of 2011. Based on Employee's own discovery responses to questions regarding his job search efforts, I find that Agency has met its burden of proving that Employee only submitted seventeen applications to schools, health care agencies and mental health treatment facilities, in the nine (9) years he was unemployed. While Employee asserted that he made more job applications than that, he was evasive and could not substantiate his assertion or even provide a figure. The evidence shows that Employee made one (1) job application in 2011, eight (8) in 2012, four (4) in 2013, and four (4) in 2014. All these job applications were made between September 2011 and April 2014. Employee submitted four (4) applications when he resided in Colorado. Employee did not submit any job applications between 2014 and 2020.

Although Employee insisted that his job search efforts were adequate, Department of Labor standards requires job applicants to devote at least four to six hours per day, five days a week, and submit a minimum of three to ten applications per week.[30] The evidence shows that Employee's minimal efforts fall far short of that standard.[31] Instead, in his testimony, he focused mainly on his lack of a PhD to explain his lack of jobhunting success. None of Employee's explanations credibly explain his lack of effort towards job hunting.

Based on his courtroom demeanor, inconsistency of testimony, and corroboration with the documentary exhibits, I do not find Employee to be credible. In his testimony, Employee admits that he relied on his DCPS retirement annuity to support himself. One can reasonably infer this as an explanation as to why Employee was not more motivated in his job search efforts.

Therefore, from the period Employee was unemployed from August 2011 to until his return to work in January 4, 2021, I find that that Employee did not exercise reasonable and sufficient diligence in attempting to find alternative employment after his termination. Thus, I find that for the period of August 2011 until the date Employee obtained a substantially equivalent position with Agency on January 4, 2021, Employee failed his affirmative duty to exercise reasonable and sufficient diligence in attempting to find alternative employment in his field from the time of his unwarranted separation in August 2011. The discussion now turns to Employee's entitlement, if any, to additional back pay for that period.

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[29] Agency Exhibit 1 extracting data from Bureau of Labor Statistics Occupational Outlook Handbook, 2010-11 Edition.
[30] Agency Exhibit 1, p. 8.
[31] *See Clark v. Marsh, 214 U.S. App.(D.C. 1981).*

As explained *supra,* back pay is designed to restore a victim of discrimination to the economic position he would have enjoyed absent the unlawful discrimination. The Supreme Court has instructed that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of [Title VII]."[32] It is the complainant's burden to present evidence demonstrating the amount of her damages, but once such evidence has been presented*, the burden shifts to the defendant to establish the amount by which those damages should be reduced* to reflect the complainant's interim earnings or to show her failure to take reasonable efforts to mitigate her damages by finding alternative employment. (Emphasis added).[33]

Again, in *District of Columbia v. Jones*, 442 A.2d 512 (D.C. 1982), the Court of Appeals stated this succinctly: "If the employee has obtained a substitute job, *or could obtain one by reasonable effort*, *he is chargeable with the income he* obtains *or reasonably could obtain in this fashion*, *but only if the employer sustains the burden of proving these facts*." *Id*. at 524 (emphasis added). In *Wisconsin Avenue Nursing Home*,[34] the Court of Appeals again made a similar pronouncement: "A back pay award should equal the salary the complainant would have received from the time of the violation until the date on which the Commission issued its final order, minus the complainant's actual interim earnings or *the amounts she would have earned had she diligently sought other work*."[35] (emphasis supplied). *See also Trustees of the University of the District of Columbia v. Vossoughi*, 963 A.2d 1162, 1178-79 (D.C. 2009) (holding that the Defendant, UDC, did not meet its burden to support a jury instruction on mitigation of damages where "[it] did not meet its burden of establishing what, if any, property [plaintiff] could have recovered from the dumpsters, piles of trash, and boxes he observed, let alone the value of that property").

In the instant matter, Agency has met its burden of proving that Employee failed to adequately mitigate his damages for 2011 to 2020. Agency also presented evidence as to what amounts Employee would have earned had he tried to find equivalent employment for that period. Thus, while Employee must be made whole by Agency for the entire period of his unemployment as he was subjected to an improper removal, I conclude that his backpay must also be reduced by any amounts already paid, any of his actual interim earnings, and the amounts he could have earned from August 2011 to the date he began working again for Agency.

ORDER

1. It is hereby **ORDERED** that, in accordance with all applicable D.C. laws and regulations, Agency reimburse Employee all backpay and benefits lost as a result of the improper removal action starting from August 2011 until January 3, 2021, less any annuity retirement benefits paid[36] and less any amounts he could have earned had he diligently sought other

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[32] *See Albemarle Paper Co.,* 422 U.S. at 421, 95 S.Ct. at 2373.

[33] *Rasimas v. Mich. Dep't of Mental Health,* 714 F.2d 614, 623 (6th Cir.1983), *cert. denied,* 466 U.S. 950, 104 S.Ct. 2151, 80 L.Ed.2d 537 (1984); *see Horn v. Duke Homes, Div. of Windsor Homes,* 755 F.2d 599, 606, 608 (7th Cir.1985).

[34] *Supra*, 527 A.2d 282 (D.C. 1987)

[35] *Id*. at 291.

[36] *See* 6B DCMR 1149.12(b).

work, prorated to the months Employee was unemployed. Specifically, Agency must recover all retirement annuities paid to Employee from 2011 to 2020. In addition, Agency must also reduce Employee's backpay by $90,690 for 2011, $90,020 for 2012, $95,040 for 2013, $94,780 for 2014, $105, 260 for 2015, $109,150 for 2016, $113,890 for 2017, $113,890 for 2018, $105,120 for 2018, $114,150 for 2019, and $115,060 for 2020.[37]

2. Agency must file with this Office, within 30 calendar days from the date on which this addendum decision becomes final, documents showing compliance with the terms of this Order.

FOR THE OFFICE: s/ *Joseph Lim*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

[37] It is entirely conceivable that after all the legislated deductions, Employee will not be entitled to any backpay.