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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)	
	)	
JOHN BARBUSIN, JR.,	)	
Employee	)	OEA Matter No. 1601-0090-18C21
	)	
v.	)	Date of Issuance: January 28, 2021
	)	
D.C. DEPARTMENT OF GENERAL	)	
SERVICES,	)	
Agency	)	MICHELLE R. HARRIS, ESQ.
	)	Administrative Judge
_____	)	

Ann Kathryn So, Esq., Employee Representative  
Harrison Richards, Esq. Employee Representative  
C. Vaughn Adams, Esq., Agency Representative

**ADDENDUM DECISION ON COMPLIANCE<sup>1</sup>**  
**INTRODUCTION AND PROCEDURAL HISTORY**

On September 14, 2018, John Barbusin, Jr. (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of General Services’ (“Agency” or “DGS”) decision to terminate him from service, effective September 7, 2018. Employee was a Supervisory Special Police Officer at the time of his termination. Following an Evidentiary Hearing and the submission of written closing arguments, on January 15, 2020, I issued an Initial Decision reversing Agency’s removal action. Agency did not file an appeal; thus the Initial Decision became final. On March 20, 2020, Employee, by and through his counsel, filed a Motion for Attorney Fees and Expenses. Accordingly, on March 25, 2020, I issued an Order requiring Agency to submit a response to Employee’s Motion on or before April 13, 2020. On April 1, 2020, Agency filed a Notice of Compliance with the Initial Decision.<sup>2</sup> Following a request for an extension of time to respond to Employee’s Motion for Attorney Fees, Agency submitted its response on April 14, 2020. Following the submission of supplemental briefs and a review of the record, on September 3, 2020, I issued an Addendum Decision on Attorney Fees granting the award of attorney fees and costs.

<sup>1</sup> This decision was issued during the District of Columbia’s Covid-19 State of Emergency.

<sup>2</sup> Agency indicated therein that as of March 19, 2020, Employee had been “reinstated to his position of Supervisory Police Officer, CS-0083-9/10 with the Department of General Services Protective Services Division.” Agency also noted that it, along with the DC Department of Human Resources (DCHR) were “currently processing his application for backpay and will provide payment as soon as practicable, given the current state of emergency.” Agency noted that most of its staff were working remotely.

On October 15, 2020, Employee, by and through his counsel, filed a Petition for Enforcement citing that Agency had failed to comply with orders of the Initial Decision and the Addendum Decision on Attorney Fees. As a result, on October 15, 2020, I issued an Order for Agency to respond to Employee's Petition on or before October 30, 2020. Employee filed an Amended Petition for Enforcement on October 16, 2020.

The following is representative of the procedural history regarding the compliance issues in this matter.

1. On October 15, 2020, Employee filed a Petition for Enforcement indicating that Agency had not complied with the Initial Decision or the Addendum Decision on Attorney Fees in these associated matters. Employee filed an Amended Petition for Enforcement, citing corrections to the previously filed Petition. Employee cited the following:
  - a. Employee asserted that he had been reinstated but was subject to desk duty and was not operating in his former capacity as a Special Police (SPO).
  - b. Specifically, Employee argues that he is being instructed to complete a medical examination in order for his SPO commission to be restored,(which expired on May 31, 2018, and was effectually being treated as a new hire, as opposed to being reinstated. Further, Employee asserts that he was required to submit additional information from his own primary care physician regarding an EKG.
  - c. Employee also asserts that he had not received backpay nor had he received full restoration of his benefits.
  - d. Additionally, Employee asserts that the attorney fees awarded in this matter had not been paid
2. On October 30, 2020, Agency submitted its Opposition to Employee's Petition for Enforcement, citing that Employee's Petition should be dismissed. Agency noted the following to support its contention that Employee's Petition should be dismissed:
  - a. Agency asserts that it has no control of the issuance of SPO commissions. Agency avers that the Department of Consumer and Regulatory Affairs (DCRA) along with the Security Officers Management Branch (SOMB) of the Metropolitan Police Department (MPD) control and manage the issuance of the commission. Agency argues that Employee is not unique in being required to complete a medical examination as a part of the restoration of a SPO commission.
  - b. Agency avers that backpay is not being withheld from Employee and is currently going through the processes of review and approval. Specifically Agency indicated the following timeline:
    - i. April 28, 2020- Agency HR received complete paperwork from Employee to process backpay.
    - ii. July 2, 2020 – Completed packet with memo signed by DGS Director and Agency Fiscal Officer from OCFO was sent to the Office of Pay and Retirement Services (OPRS).
    - iii. July 16, 2020 – Agency was informed by DCHR that Employee's date of discharge and re-employment had been corrected and was sent to DCHR Office of General Counsel for review.
    - iv. July 29, 2020 – Agency HR was told to ask Employee to submit a notarized statement of outside earnings. Employee returned the notarized statement

on July 31, 2020 and Agency immediately forwarded it to DCHR for further processing.

- c. Agency asserts that on October 30, 2020, funds were identified to pay the attorney fees and cost and that it contacted Hannon Law Group to provide its Tax Identification. Agency could not provide a date certain for when funds would be sent, but indicated it was being processed.
3. Following the review of the submissions of the parties, I issued an Order on November 2, 2020, scheduling a Status Conference for November 16, 2020, to discuss the issues raised.
  4. On November 16, 2020, Employee filed a Motion for Leave to File a Reply to Agency's Opposition and included its supporting brief and documentation therein. Employee raised issues regarding Agency's assertions regarding the SPO commissions and cited to D.C. Superior Court and PERB decisions in support of his arguments regarding the commission. Employee asserts that based on the DC Superior Court and PERB decisions that the DGS SPOs are not bound by the governance of commissions in DCMR 6A 1101.7(d).
  5. During the Status Conference held on November 16, 2020, Employee asserted that backpay had still not been received and indicated that his health benefits had recently been restored, but retirement benefits had not. Additionally, Employee's counsel noted the firm's preference for the attorney fee award to be sent its IOLTA account. Parties were to exchange information to facilitate this transaction.
  6. Following the Status Conference, I issued an Order requiring Agency to report by specific deadlines regarding the issues raised/discussed during the conference. Agency adhered to those deadlines and provided the following information:
    - a. November 17, 2020: Attorney Fees – Agency indicated that it had identified funds for payment of the fee award and a direct voucher memorandum requesting payment was submitted to Agency Fiscal Officer Antoinette Hudson-Beckham. A W-9 was sent to the Hannon Law Group to complete processing and Agency noted that they hoped payment could be complete by Monday November 23, 2020.
    - b. November 18, 2020 – Agency provided follow up information regarding the status of the processing of Employee's backpay.<sup>3</sup> Agency also explained that in addition

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<sup>3</sup> The following is representative of what Agency sent regarding its processing of backpay. They also included the memos pertaining to Employee's back pay being processed. "DGS Human Resource Specialist Kala Sharp on the progress of DGS's payment of Sgt. Barbusin's backpay in this matter (the "Shawn" referenced is Shawn Winslow, DGS' HR Director): "Here is a timeline of Barbusin back-pay package, from most recent to past. Shawn is working with DCHR to get all of Mr. Barbusin benefits back in place, he currently has health/dental/vision. I attached his backpay packet version 1, as many of the documents had to be revised per DCHR request. The separate backpay estimate and memo are the most recent.

1. **Health Insurance reactivated as of 11/08/2020**, DGS HR Administrator working with DCHR Benefits to reactivate life insurance ( Dental/vision were automatically restored as of 3/28/2020)
2. **10/30/2020**: Revised documents sent back to DCHR to be forwarded to DCHR GC
3. **10/29/2020**: Received communication from DCHR requesting correction of documents (Point of contact is Ashley Jacobs: HR Specialist (DCHR)) Direct: 202.442.9668 Ashley.Jacobs@dc.gov
4. **10/27/2020**: DGS HR Specialist reached out to DCHR GC to obtain update/status on Barbusin packet

to the timeline provided that the “package is currently with the HR specialist in DCHR. After it is approved by DCHR’s General Counsel, the package will be forwarded to the Office of Pay and Retirement Services, which will determine what offsets will be applied to the gross backpay calculation to determine the final amount owed to Sgt. Barbusin and then will authorize payment.” Agency also noted that Employee had been enrolled in retirement since his reinstatement.

- c. November 20, 2020 – Agency provided a follow up and supporting documentation reiterating that DCRA and SOMB are the responsible parties for the issuance of a SPO commission and that they can require a medical/physical examination.
7. On November 20, 2020, Employee provided a statement based on his assessment of what he believed the calculations should be for back pay.
  8. On November 27, 2020, Employee, by and through his counsel submitted a response to Agency’s updates. Employee reiterated the SPO commission should not require him to obtain a physical/medication examination.
  9. Following a review of the information submitted by the parties, I issued an Order for Status Conference to be held on December 14, 2020. In response to this scheduling notice, Agency’s representative noted that as of December 4, 2020, Employee’s backpay package was at OPRS for final approval. Agency’s representative did not have the final calculations but advised that he would update the parties as soon as he was made aware.
  10. During the status conference held on December 14, 2020, Agency noted that the backpay processing from OPRS/OCFO should be completed within a day or so. Further, Agency indicated that the Attorney Fees payment would be sent via postal service due to challenges with deposits to Hannon Law Group’s IOLTA account. Employee noted during this conference that his SPO commission expired as of May 31, 2018. I asked why the commission had not been previously renewed given Employee’s termination was not until September 2018. Employee advised that DGS did not provide him with the typical paperwork required for the renewal process at DCRA. Further, it was noted by both Employee and Agency that all SPO commissions expire annually on May 31 of each year. Agency representative noted that it was likely that DGS did not provide Employee with the renewal paperwork because he was pending termination from Agency. Employee also maintained that he would not submit to the medical examination scheduled for January 2021 because he believes he should not be subject to a medical exam to renew his SPO.

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5. **10/21/2020:** DGS HR was made aware that employee benefits were not updated/restored
  6. **8/31/2020:** DG HR sent notarized benefits restoration for Barbusin
  7. **8/13/2020:** DCHR (Ashely Jacobs) sent communication that outside earnings for Harvey/Barbusin needed to be notarized. DGS HR Specialist sent request to both Harvey/Barbusin
  8. **7/28/2020:** DGS HR sent revised backpay statements back to DCHR
  9. **7/21/2020:** DCHR sent request to have backpay statement revised
  10. **7/16/2020:** DCHR requested a missing document from the packet
  11. **7/2/2020:** Completed backpay packet to include signed Memo approval from Dir Anderson and Budget to move forward with packet submission to DCHR
  12. **5/19/2020:** DGS Received Official IRS 2018/2019 accepted tax forms from Barbusin lawyer.
  13. **4/28/2020:** DGS Received completed benefits restoration/outside earnings from Barbusin lawyer.
  14. **3/28/2020:** Barbusin reinstated as an active employee”

Agency argued that it had no measure to control whether DCRA required a medical exam and maintained that it had no power to otherwise give Employee a commission. Following this conference, I advised both parties that based on what was discussed during the conference that they could submit any supplemental information by December 18, 2020. At that time both parties indicated that they had stated their positions. However, Employee did submit supplemental brief on December 18, 2020.

11. Following the December 14<sup>th</sup> Status Conference, there was a lot of correspondence via email and phone from December 15, 2020 through December 18, 2020, regarding the following:
  - a. On December 15, 2020, a representative from OCFO, Diane Gidderon, provided the final backpay calculations for Employee. The award amount was \$37,990.61. Following a review of the calculations, Employee had questions regarding why the 457(b) Deferred Plan deductions were not included and had questions about the deductions made for outside earnings. Ms. Gidderon explained that 457(b) Deferred deductions are not typically included in backpay awards and that Employee would have to contact DCHR Benefits representatives to address that matter. Ms. Gidderon also explained the calculations for outside earnings. The backpay settlement check was dated and prepared for delivery for December 18, 2020. However, Employee elected to cancel this check in order to further address the 457(b) Deferred plan deductions.
  - b. On December 17, 2020, the attorney fee check was delivered via FedEx to Hannon Law Group. Attorney Ann-Kathryn So confirmed receipt of the attorney fee check.
  - c. Between December 17, 2020 and December 18, 2020, Employee discussed the 457(b) Deferred deductions with DGS Human Capital Administrator, Shawn Winslow. Winslow indicated that the 457(b) deductions could be made in the backpay award but advised that it would require an order from the undersigned indicating this directive.
  - d. As a result of this correspondence, I advised the parties that a formal motion should be filed in order to appropriately address this matter in the record. Parties were advised that they could submit a joint filing since both parties were in agreement regarding the 457(b) deductions. I issued an Order on December 18, 2020 requiring briefs be submitted on or before December 30, 2020. On December 30, 2020, Employee's counsel submitted a joint brief on behalf of both parties.

#### JURISDICTION

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

#### ISSUE

Whether Agency has complied with the Orders in the January 15, 2020 Initial Decision and September 3, 2020 Addendum Decision on Attorney Fees.

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

OEA Rule 635<sup>4</sup> addresses compliance and enforcement of Orders issued by this office. OEA Rule 635.1 provides that 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. Further, OEA Rule 635.9 states that if an 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 § 1-606.02.

In the instant matter, an Initial Decision was issued on January 15, 2020, which reversed Agency's decision to remove Employee and ordered that Employee be reinstated. Agency was also ordered to reimburse Employee all backpay and benefits lost as a result of the removal. Agency did not file a Petition for Review with OEA's Board or with the District of Columbia Superior Court of the January 15, 2020 Initial Decision. As a result, the Initial Decision became the final decision of this Office. Accordingly, Agency had until March 20, 2020, to comply with the Initial Decision pursuant to OEA Rule 635.1. As previously noted, on April 14, 2020, Agency filed a Notice of Compliance and indicated therein that as of March 19, 2020, Employee had been reinstated and that Agency, along with DCHR were working to process Employee's backpay. Agency noted that it would do so as soon as possible given the State of Emergency operational status. On October 15, 2020, Employee, by and through his counsel, indicated that Agency had not complied with the January 15, 2020 Initial Decision or the September 3, 2020 Addendum Decision for Attorney Fees and Costs.

### **Attorney Fees and Costs**

As of December 17, 2020, Hannon Law Group has received the attorney fee award amount. This was confirmed by Attorney Ann-Kathryn So. Accordingly, I find that Agency has complied with the September 3, 2020 Addendum Decision for Attorney Fees and Costs. As a result, Employee's October 15, 2020 Petition for Enforcement regarding Attorney Fees is dismissed as resolved.

On January 8, 2021, Employee's representative filed a Motion for Leave to File for Supplemental Attorney Fees. On January 14, 2021, Agency filed its Opposition to Employee's Motion. Upon consideration of the motions, it is hereby **ORDERED** that Employee's motion to file for supplemental attorney fees is **GRANTED**. It should be noted that this is not representative of an award of fees, but that a supplemental brief may be filed and will be reviewed by the undersigned to determine whether an award of additional attorney fees is warranted. Additionally, because this would be representative of an attorney fee matter, the undersigned will issue a separate order pertaining to deadlines for submissions from the parties.

### **Backpay/457(b) Deferred Account**

Prior to the December 14, 2020 Status Conference held in this matter, Employee's backpay had not been processed. Based on the submissions of the parties, Agency had all the necessary paperwork from Employee as of August 31, 2020, to begin processing the backpay check. As previously noted in this decision, following the December 14<sup>th</sup> Status Conference, a representative from OCFO/OPRS submitted the final calculations for Employee's backpay award. A check in the

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<sup>4</sup> 59 DCR 2129 (March 16, 2012).

amount of \$37, 990.61 was prepared and would have been available for pickup on December 18, 2020; however, Employee canceled receipt in order to address the 457(b) Deferred Plan deduction that he maintained should be deducted from the backpay award. Following a conversation with the DGS HR Specialist, it was determined that the 457(b) deduction could be made but would require an order from the undersigned to do so. Additionally, on December 30, 2020, the parties submitted a joint brief regarding the 457(b) and indicated therein that "...[t]he parties hereby request that the Initial Decision in this matter be amended to reflect that Petitioner's 457(b) Deferred Compensation plan be made whole with contributions in the amount of \$12,600, which is the amount that he would have contributed to the plan had he not been terminated. As such, \$12,600 should be deducted from Petitioner's backpay award and contributed on a pre-tax basis to his 457(b) Deferred Compensation account at the same time that any back pay is awarded to the employee."<sup>5</sup>

OEA has held the following as it relates to the benefits that are reimbursable to an employee upon an administrative ruling that a personnel action was unjustified:

"Pursuant to 6-B DCMR 1149.2, "[a]n employee who, on the basis of a timely appeal of an administrative determination is found, by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have undergone an unjustified or unwarranted personnel action resulting in the withdrawal or reduction of all or part of an employee's pay or benefits, shall be entitled, on correction of the personnel action, to back pay under this section." Further, E-DPM Instruction No. 11B-80 (II)(a) (October 4, 2011), highlights that, upon authorization from the appropriate authority to correct the personnel action, an agency shall determine the employee's back pay entitlement by recomputing the period covered by the action. The affected employee's pay and benefits (as prescribed by law and regulation) shall be recomputed as if the unjustified or unwarranted personnel action had not occurred (emphasis added). E-DPM Instruction No. 11B-80 (II)(b)(2)(i) additionally provides that, when an employee is entitled to receive back pay, the agency shall offset and deduct from the gross back-pay award, "authorized deductions that would have been made from the employee's pay ... subject to any applicable law or regulation, including, but not limited to, the following types of deductions as applicable: mandatory retirement contributions ... (emphasis added)."<sup>6</sup>

In the instant matter, the January 20, 2020 Initial Decision reversed Agency's personnel decision and ordered Agency to reimburse Employee all back-pay and benefits lost as a result of the separation. OEA has also held that pursuant to 6-B DCMR 1149 that "benefits" are defined as "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."<sup>7</sup> Before he was removed from service, Employee was entitled to, and contributed to his 457(b) account. Accordingly, based on the aforementioned regulatory provisions and the parties' agreement, the undersigned finds that Employee's 457(b) plan contributions are benefits that can be adjusted for in the award for backpay. Further, it is **ORDERED** that \$12,600 should be deducted from Employee's backpay award and contributed on a pre-tax basis to his 457(b) Deferred Compensation account at the same time that any back pay is awarded to the Employee.

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<sup>5</sup> Joint Supplemental Brief (December 30, 2020).

<sup>6</sup> *Laura Jackson v. DC Department of Health*, OEA Matter No. 2401-0020-10R17C19 (September 23, 2018).

<sup>7</sup> *Id.*

### **Special Police Officer Commission Renewal**

Employee also avers that he has not been appropriately reinstated to his position of record because he does not have a Special Police Officer (SPO) commission. Employee further contends that Agency is requiring him to undergo a medical examination to renew his commission and asserts that he should not be subjected to such an examination in order to have his commission renewed. Employee argues that a medical examination is a requirement for new commissions. Agency asserts that its SPOs are required to have commissions and that those are issued by the D.C. Department of Consumer and Regulatory Affairs (DCRA) in conjunction with the Security Officers Management Branch (SOMB) of the Metropolitan Police Department (MPD). Agency avers that it does not regulate the process for which SPO commissions are issued or renewed. Agency argues that it has no control over what is required by DCRA or SOMB to renew commissions and that DGS has no other power by which it could provide a commission to Employee. Employee avers that Agency, by and through DCRA/SOMB does have the authority to grant him a commission without a medical examination. Further, Employee avers that DCRA does not always require exams to renew commissions. Employee notes that during the recent District Government Covid-19 State of Emergency that commissions were renewed as a part of that response.<sup>8</sup>

Specifically, Employee cites that "...DCRA has the authority to "waive" any SPO's expired commission and extend the SPO's commission beyond the expiration date."<sup>9</sup> Further, Employee avers that "in his previous filings, each and every one of the SPO's at DGS (who are not Campus Security) have an expired commission as a result of the current public health emergency."<sup>10</sup> Employee also asserts that "[t]hose commissions all expired on May 31, 2020, however, DCRA issued a stay on renewal and extended the commissions beyond their expiration date."<sup>11</sup> Employee avers that Agency's representative acknowledged these extended commissions and as a result acknowledges a waiver of other requirements. Thus, Employee insists that subjecting him to medical exam to renew his commission following a wrongful termination is without justification. Employee also argues that a D.C. Superior Court decision<sup>12</sup> indicated that DGS' SPOs commissions are not governed under 6A

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<sup>8</sup> Employee's Brief (December 18, 2020).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Employee's Brief (December 18, 2020).

<sup>12</sup> See Employee's Reply to Agency's Opposition (November 27, 2020). Employee cited the following to support this contention:

"...Sgt. Barbusin, like all other SPOs, is not required to have a commission to carry a gun or have arrest authority. This issue has already been decided, in *D.C. Superior Court case 2012-CDC-913, District of Columbia vs. John Barbusin*, which Sgt. Barbusin cited and discussed in his Motion for Leave to Reply to Agency's Opposition. In that case, Judge Nash directly rejected the argument that certain regulations, which empower the Mayor or Chief of Police to appoint Special Police Officers to protect buildings in the District of Columbia, also require that officers at D.C. Protective Services Division ("PSD") be commissioned as Special Police Officers. In other words, Judge Nash concluded that 6A DCMR was inapplicable to PSD officers because they are not "special police officers" within the meaning of the 6A DCMRs. The same conclusion was reached in *D.C. Department of General Services vs. Fraternal Order of Police/Protective Services Police Labor Committee*, which was an Arbitration Review Request case before the D. C. Public Employee Relations Board ("PERB"). In that case, the Agency appealed an arbitration award, claiming the Arbitrator exceeded her authority by determining that the "Special Police Officers" of Protective Services are not the same as the "Special Police Officers" described in 6-A DCMR § 1100. *D.C. Department of General Services vs. Fraternal Order of Police/Protective Services Police Labor Committee PERB Case No. 15-A-11, Opinion No. 1586, at page 3, (June 14, 2016)*. The Arbitrator



DCMR 1101.7(d), and as a result, neither DCRA nor Agency is bound to those regulations.<sup>13</sup> Further, Employee asserts that Agency has “willfully” prevented him from renewing his commission. Employee avers that during the disciplinary process when he was on administrative leave that he was entitled to renew his commission, but Agency withheld the paperwork necessary for him to proceed with renewal at DCRA. During a status hearing held in this matter, Agency noted that at the timeframe in 2018 where it would have otherwise provided commission renewal paperwork that it likely did not since Employee was pending termination from Agency.

Upon consideration of the parties’ assertions regarding this issue, the undersigned can not determine any authority for which OEA can direct a licensing authority like DCRA in its procedures for issuing licenses, or in this instance, to grant a special police officer commission. The undersigned finds that DCRA is a regulatory body responsible for the issuance of licenses/commissions, and can require employees to meet the conditions it has determined are necessary for ensuring the issuance of these commissions meet appropriate regulatory and safety guidelines. Further, the undersigned finds that Employee’s argument that renewals were extended during the District Government’s State of Emergency to be a different circumstance and not similar in nature to Employee’s issue. District government agencies have response mechanisms for emergencies that are meant to address atypical situations, like the District and world are currently facing through the Covid-19 pandemic. Accordingly, I find that Employee’s situation cannot be appropriately attributed to what has happened with other special police officers during the District’s state of emergency. It should also be noted that those officers’ commissions were active at the time the extensions were granted.

That said, the undersigned finds that DGS failed to provide Employee with the paperwork necessary to renew his commission that expired in 2018. Accordingly, I find that Agency should provide Employee with the same paperwork he would have received in May 2018 if it had not wrongfully terminated him from service. Again, I find that OEA does not have the authority to otherwise require DCRA to forego a medical examination requirement if it deems it is otherwise warranted. Employee also argues that determinations by D.C. Superior Court indicate that his SPO status is not regulated by 6A DCMR 1101.7(d), and asserts that because of this, regulations are not applicable as it relates to the renewal of his commission.<sup>14</sup> The undersigned finds, that even if those particular code provisions were not applicable, there are regulations in the District Personnel Manual (DPM) that give agencies the authority to require employees to undergo medical evaluations. Specifically, Chapter 20 - Health of the DPM<sup>15</sup> provides that personnel agencies may establish physical

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in that case determined that Special Police Officers at Protective Services were different than § 4-114 Special Police Officers. While she noted Judge Nash’s decision, she conducted an independent analysis, and reached the conclusion that PDS officers are not “special police officers” as defined in Chapter 6-A of the DCMR. The PERB agreed.”

<sup>13</sup> *Id.*

<sup>14</sup> The undersigned will not otherwise analyze the D.C. Superior Court’s decision cited by Employee and the applicability of the SPO provisions under 6A DCMR.

<sup>15</sup> Pertinent DPM Chapter 20 :

**2000.1** The District of Columbia government is committed to providing a safe and secure workplace for its employees. To provide a safe and secure workplace, employees must be able to perform their duties in a safe, secure, productive, and effective manner.

**2000.2** Each individual selected for an appointment in the District of Columbia government must be able to perform the essential functions of his or her job, with or without reasonable accommodation(s).

**2000.3** Unless otherwise specified in this chapter, medical evaluations are to be made by physicians or practitioners, and determinations regarding essential functions of the job are to be made by supervisors and managers based on the employee’s practical day-to-day responsibilities and the

and mental requirements for job positions and may also require employees to undergo medical evaluations. *See*. DPM § 2004.1 and § 2004.2. Further, the undersigned finds that OEA does not otherwise have the authority to instruct an agency on its determinations for the need for medical evaluations for a job/position. The undersigned has noted that due to the wrongful termination, DGS failed to provide Employee with the documentation required for his renewal in 2018. As a result, it is hereby **ORDERED** that Agency provide Employee with the paperwork for renewal that would be representative of what he would have received in 2018 had he not been wrongfully terminated. As previously stated, the undersigned finds that OEA does not have the authority to control DCRA's subsequent requirements for Employee to submit to a medical examination to renew his commission.

### **ORDER**

The following is hereby **ORDERED**:

1. Employee's October 15, 2020 Petition for Enforcement regarding Attorney Fees and Costs is dismissed.
2. That \$12,600 should be deducted from Employee's backpay award and contributed on a pre-tax basis to his 457(b) Deferred Compensation account at the same time that any back pay is awarded to the Employee.
3. Agency shall provide Employee with the SPO commission renewal paperwork for that is representative of what he would have received in 2018 had he not been wrongfully terminated.

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employee's position description 2001.1 Unless otherwise provided by law, this chapter shall apply to all District government applicants, candidates, employees, and volunteers, except for:

- a. Uniformed members and applicants for uniformed positions in the Fire and Emergency Medical Services Department and the Metropolitan Police Department, who shall be covered by Chapter 8; and
- b. Employees covered by the public-sector workers' compensation provisions in D.C. Municipal Regulations, Title 7, Chapter 1.

**2004.1 Personnel authorities may establish physical and mental qualification requirements that are necessary to perform a specific job or class of jobs.** Any physical or mental qualification requirement established by a personnel authority shall:

- a. Be related to the essential job function(s) of the specific job or class of jobs, and is consistent with business necessity;
- b. Be designed to ensure consideration of individuals having the minimum ability necessary to perform the essential job functions efficiently without posing a significant risk of substantial harm to his or her health or safety, or the health or safety of others; and
- c. List disqualifying medical conditions only when specific physical or mental capabilities are required to safely and satisfactorily perform essential job functions and those functions cannot be safely or satisfactorily performed with the disqualifying medical condition.

**2004.2 The personnel authority may require an individual who has applied for or occupies a position with established physical or mental requirements, including requirements for selection or retention, or established occupational or environmental standards, to undergo a medical evaluation:**

- a. After an offer of employment has been made to a job applicant and prior to appointment (including reemployment based on full or partial recovery from a medical condition);
- b. On a regularly recurring, periodic basis; or
- c. Whenever there is an objectively reasonable concern about an employee's continued capacity to meet the established physical or mental requirements of the position.

Additionally, it is hereby further **ORDERED** that Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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Michelle R. Harris, Esq.  
Administrative Judge