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:)	
)	OEA Matter No.: 1601-0046-12C16
WILLIE PORTER,)	
Employee)	
)	Date of Issuance: February 15, 2019
v.)	
)	Arien P. Cannon, Esq.
D.C. DEPARTMENT OF BEHAVIORAL)	Administrative Judge
HEALTH[1],)	
Agency)	
)	

Robert B. Fitzpatrick, Esq., Employee Representative
Edward J. Smith, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative
Ryan Donaldson, Esq., Agency Representative

ADDENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL BACKGROUND

An Initial Decision ("ID") was issued in this matter by the undersigned on December 24, 2013, upholding the Department of Behavior Health's ("Agency" or "DBH") decision to remove Employee from his position as a Psychiatric Nurse. Employee filed a Petition for Review on February 4, 2014, with the Office of Employee Appeals' ("OEA") Board, asserting that new and material evidence became available. Agency filed its Opposition to Employee's Petition for Review on June 27, 2014. Employee filed a Response to Agency's Opposition on July 30, 2014.

On April 14, 2015, the OEA Board issued an Opinion and Order on Petition for Review, which remanded this matter to the undersigned to consider the case based on the merits of the new evidence presented by Employee.

[1] The Department of Behavior Health was formerly known as the Department of Health. This agency became known as the Department of Behavioral Health in FY 2014.

On September 8, 2015, based on the new evidence presented, the undersigned issued an Initial Decision on Remand ("IDR") reversing Agency's decision to terminate Employee from his position. On October 13, 2015, Employee filed with OEA a "Request for Review or C[l]arification of the Initial Decision."[2]

On October 20, 2015, Agency filed a Petition for Review in the District of Columbia Superior Court of the IDR. The D.C. Superior Court issued an Order on February 14, 2017, affirming the IDR.

On March 7, 2017, the OEA Board issued an Opinion and Order on Remand addressing Employee's October 13 filing. Following the OEA Board's issuance of this Opinion and Order on Remand, several cross-motions were made by both parties with OEA and the District of Columbia Superior Court.

On or around July 17, 2017, it was brought to the attention of the undersigned that Employee attempted to file what appeared to be a Motion for Compliance on October 13, 2015, regarding the IDR with this Office. In the interim, Agency filed a Petition for Review on October 20, 2015, of the IDR with the District of Columbia Superior Court which was ultimately upheld by the Honorable Judge Jennifer DiToro on February 14, 2017.

Thereafter, ensued several status conferences and briefs filed addressing the compliance issue. On April 10, 2018, Agency filed a Submission Regarding Compliance with Final Decision and Order Regarding Compliance. On May 23, 2018, Employee filed his Response/Objections to Agency's Submission Regarding Compliance. In this filing, Employee addressed: (1) projected overtime pay; (2) reimbursement for his out-of-pocket insurance payments; (3) tax neutralization; (4) request for an award of interest, both pre-judgment and post-judgment; and (5) the calculations of his interim earnings to offset his total backpay award. This Addendum Decision addresses each of Employee's five (5) arguments as to why he believes Agency has not fully complied with the IDR.

JURISDICTION

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

ANALYSIS AND CONCLUSION

A barrage of filings were made both before this Office and the District of Columbia Superior Court, after what should have been treated as a Motion for Compliance was actually treated as a Petition for Review by the OEA Board. The OEA Board subsequently issued an Opinion and Order on Remand ("O & O") on March 7, 2017, addressing Employee's October 13

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[2] The OEA Board initially treated Employee's October 13, 2015 ("October 13 filing") as a Petition for Review. Although the Board treated Employee's October 13 filing as a Petition for Review, it should have been treated as a Motion for Compliance or Enforcement and addressed by the undersigned. Once it was realized in July of 2017 that Employee's October 13 filing should have been treated as a Motion for Compliance, the undersigned intervened to address the compliance issue.

filing. This O & O "denied" Employee's petition.[3] Despite the OEA Board "denying" Employee's October 13 filing, it did not prevent the undersigned from enforcing the September 8, 2015 IDR, which was upheld by the D.C. Superior Court on February 14, 2017, in an Order issued by Judge DiToro.

In July of 2017, Employee's October 13, 2015 filing was brought to the undersigned's attention to be treated as a Motion for Compliance. Based on the filings made by both parties, the undersigned will address the compliance issues asserted by Employee.

Projected Overtime Pay

Employee contends that he should be compensated for overtime hours that he would have worked had he not been terminated by Agency on August 5, 2011. District of Columbia Municipal Regulations ("DCMR") 6-B § 1149.14, provides that, "[a]n employee entitled to back pay under this section shall have included in the back pay computation any pay or benefit that the employee would have received, *except that overtime pay shall not be included in the back pay award*." Employee contends that this regulation conflicts with the provisions of the Comprehensive Merit Personnel Act ("CMPA"). To support this argument, Employee cites to D.C. Code § 1-601.02(b)(2), which states that employees are to be provided with "equitable and adequate compensation." Additionally, Employee cites to DCMR 6-B § 631.2(b), which provides that an employee is entitled to "appropriate relief" if their petition for appeal is granted.

Employee's argument misses the mark with regard to overtime pay. The regulations make clear that overtime pay shall not be included in any award for back pay. Despite Employee's contention that the regulations conflict with the D.C. Code (CMPA), the language cited by Employee in the CMPA does not address overtime pay, thus, there is no direct contradiction between the regulations (DCMR) and the Code. Thus, I find that Employee is not entitled to any projected overtime pay as part of his backpay award.

Reimbursement for Out-of-Pocket Insurance Payments

Employee contends that he is entitled to reimbursement for his out-of-pocket insurance payments that he made for insurance coverage after being terminated by Agency, that he otherwise would have had at no expense to himself. Employee cites to several cases from other jurisdictions to support his argument that he is entitled to reimbursement for such out-of-pocket expenditures. Employee's assertion is incorrect. Employee ignores the fact that he would have still been responsible for paying health insurance premiums through payroll deductions if he elected coverage through one of the District-provided health insurance plans. Although Agency would have paid a portion of his health insurance benefits, Employee still would have had an obligation to pay his portion of the premiums to be covered under his selected health insurance plan.

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[3] It appears that confusion was created when the OEA Board "denied" Employee's October 13 filing. However, the OEA Board made clear that all of the relief sought by Employee was already provided for in the undersigned's IDR, issued on September 8, 2015.

Again, Employee's argument misses the mark with regard to being entitled to reimbursement for out-of-pocket insurance payments. As Agency explained during the June 22, 2018 Status Conference, in its July 9, 2018 Sur-Response Regarding Back Pay, and in its September 21, 2018 Brief in Opposition to Employee's Pleading Regarding Back Pay; Employee did not elect to retroactively reinstate medical coverage under his Benefits Restoration Agreement as part of his reinstatement package. Employee now seeks to have the District government pay for his outside insurance. Had Employee elected to reinstate his insurance coverage retroactively, he could have submitted his out-of-pocket expenses to his insurance company for reimbursement.[4] However, because Employee elected to receive his full back pay amount without having his health insurance retroactively reinstated, which was also not deducted from his total back pay amount, I find Employee is not entitled to be compensated for his out-of-pocket insurance payments.[5]

Tax Neutralization/Tax gross-up

Employee maintains that a tax neutralization, or "gross up," should be awarded as part of his "make whole" relief. The concept of a tax "gross up" is the awarding of an increased amount of back pay to offset the adverse tax consequences of a lump sum award. This is certainly an issue of first impression before this Office. While Employee's assertion that he is entitled to a tax "gross-up" is a compelling concept, the undersigned is not persuaded that this Office has the authority to provide such relief.

In Employee's Memorandum of Points and Authorities Regarding Tax Neutralization, he cites to a number of citations to case law from other jurisdictions. In particular, Employee cites to a Merit System Protection Board ("MSPB") case, where an ALJ granted an award for tax neutralization, deferring to the U.S. Equal Employment Opportunity Commission's "(EEOC") interpretation of Title VII and granting "[c]ompensation for the adverse tax consequences of receiving a lump sum back pay award" as part of the compensatory damages awarded to compensate the employee "for the proximate injury caused by employment discrimination."[6] Employee acknowledges that this finding has not been adopted by the Merit System Protection Board, but rather an ALJ's Initial Decision. Although this Office often relies on guidance from the MSPB, the finding regarding tax neutralization by the MSPB ALJ does not carry the same weight as it would had it been adopted by the full Merit System Protection Board.

Furthermore, the U.S. Court of Appeals for the District of Columbia has flatly rejected the concept of a "gross-up." In *Fogg v. Gonzales*, 492 F.3d 447 (D.C. Cir. 2007), the Court held that "absent an arrangement by voluntary settlement of the parties, the general rule that victims of discrimination should be made whole does not support 'gross-ups' of backpay to cover tax liability. We know of no authority for such relief." While the instant case is not one of discrimination, I find that the holding in *Fogg* regarding tax gross-ups is the most appropriate

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[4] *See* Agency's Reply Brief in Opposition to Employee's Pleadings Regarding Back Pay Calculations, Exhibit 2, DPM Instruction No. 11B-80, II(b)(2)(i)(3).

[5] *See* Agency's Submission Regarding Compliance with Final Decision and Order Regarding Compliance, Attachment 2 (April 10, 2018).

[6] *See Smith v. Department of Transportation*, No. AT-0752-05-0901-P-2 (M.S.P.B. June 13, 2017).

and closely aligned binding authority of this Office. As such, I find that this Office does not have the authority to grant a "tax gross-up."

Pre-Judgment and Post-Judgment Interest

Employee contends that he also is entitled to interest on the amount of his back pay. In support of this position, he cites two District of Columbia Court of Appeals decisions: *D.C. Office of Human Rights v. D.C. Department of Corrections*, 40 A.3d 917 (D.C. 2012) and *D.C. Public Schools v. D.C. Department of Employment Services*, 123 A.3d 947 (D.C. 2015). Additionally, Employee cites to several cases from other jurisdictions which are not binding on this Office.

Employee argues that the "appropriate authorities for the OEA to consider" regarding the award of interest is: (1) a D.C. Human Rights Act case regarding the allegations of sexual and racial discrimination[7]; and (2) a D.C. Workers' Compensation case.[8] However, there is no precedent by the OEA Board that has adopted a finding that an award of interest shall be included in any backpay amount ordered as a result of a wrongful adverse action under D.C. Code § 1-606.01, *et seq.*

In *OHR v. DOC*, 40 A.3d 917 (D.C. 2012), the Court of Appeals awarded interest to the claimant, finding that the claimant had "endured a particularly long and procedurally complicated ordeal…"[9] Additionally, the Court specifically held that it did not mean to suggest that an interest award be required in every case before OHR in which there is a back pay award.[10] The facts in the instant case are distinguishable from those in *OHR v. DOC,* 40 A.3d 917 (D.C. 2012). Here, the decision to reverse Agency's action of removing Employee from his position was made only after "new and material evidence" was presented to the OEA Board on Employee's Petition for Review, filed on February 4, 2014. The new and material evidence presented to the OEA Board did not exist at the time Agency terminated Employee, nor at the time the undersigned issued the Initial Decision. The facts of this case are not particularly complicated, and the reversal of Employee's termination can be attributed, at best, to an oversight by a third-party entity and beyond the control of Agency. Thus, I do not find an award of interest appropriate in the instant case.

In *D.C. Public Schools v. DOES*, 123 A.3d 947 (D.C. 2015), the Court gave deference to the Department of Employment Services' Compensation Review Board's interpretation that the CMPA (D.C. Code § 1-623.01, *et. seq.*) authorized interest to be paid on workers' compensation benefits awarded to a District government employee and held that an award of interest was reasonable and consistent with the statute's language and purpose.[11] However, as previously stated, the OEA Board has not made such an interpretation under this Office's governing statutory authority, D.C. Code § 1-606.01, *et. seq*. As such, I find that the instant case is

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[7] *See D.C. Office of Human Rights v. D.C. Department of Corrections*, 40 A.3d 917 (D.C. 2012).
[8] *See D.C. Public Schools v. D.C. Department of Employment Services*, 123 A.3d 947 (D.C. 2015).
[9] *OHR v. DOC*, 40 A.3d 917, 929 (D.C. 2012),
[10] *Id*.
[11] *D.C. Public Schools v. D.C. Department of Employment Services*, 123 A.3d 947 (D.C. 2015).

distinguishable from *D.C. Public Schools v. DOES,* and does not require a finding that Employee is entitled to an interest award.

Calculations of Interim Earnings

Employee asserts that Agency incorrectly used the income from his "second job" with Medical Staffing Network to compute outside earnings that were offset against the backpay owed to him under his reinstatement. Employee argues that had he continued in Agency's employ, he would have still received earnings from Medical Staffing Network as a "second job" and thus, the income from Medical Staffing Network should not have been used to offset the backpay amount.

Employee earned the following amount of income from Medical Staffing Network during the relevant time periods[12]:

2011—$18,136.00
2012—$14,724.08
2013—$2,606.13
2014—$4,983.14

Employee earned a total amount of $40,449.35 from Medical Staffing Network between 2011 and 2014.[13] The total amount for each year listed above reflect income consistent with that of a part-time "second job" as described by Employee in his sworn Declaration filed on August 6, 2018. Employee declared that he worked for Medical Staffing Network for the entire period he worked with Agency up until his termination on August 5, 2011, to supplement his salary with DBH. After his termination, Employee continued to work for Medical Staffing Network and continued to supplement his income working part-time for Medical Staffing Network even after he secured full-time employment with Specialty Hospital in 2012.

E-DPM Instruction No. 11B-80 addresses back pay computations and restoration of pay and benefits for purposes of making an employee financially whole when the employee is found to have undergone an unjustified or unwarranted personnel action. Section II(b)(2)(ii) of this instruction provides that in computing back pay, an agency shall offset the gross back pay award by any amounts earned by the employee from other employment (outside earnings) during the period covered by the personnel action being corrected. This includes any employment

[12] *See* Employee's Memorandum of Points and Authorities Regarding Calculation of his Interim Earnings, Exhibit A (August 6, 2018); See also Agency's Submission Regarding Compliance with Final Decision and Order Regarding Compliance, Attachment 2 (April 10, 2018) (the total outside earnings for 2011 through 2014 reflected in the Reinstatement with Back Pay Worksheet include Employee's income from Medical Staffing Network, along with income from Specialty Hospital).
[13] In Exhibit A of Employee's Memorandum of Points and Authorities Regarding Calculation of his Interim Earnings, filed August 6, 2018, it lists an unexplained amount of income from the District of Columbia Government in 2012, totaling $67.97. This amount is not being used to calculate earning income from Employee's "second job" with the Medical Staffing Network, despite the $67.97 being included in the total amount incorrectly used as an offset against backpay

performed by the employee to *replace* the employment from which the employee was separated.[14]

This Addendum Decision on Compliance addresses the compliance issue regarding OEA's decision to reverse Agency's action of terminating Employee and ordering Agency to restore all back pay and benefits to Employee lost as a result of his termination. Employee contends that the amount of income offset by his earnings from Medical Staffing Network was erroneous. I agree.

An affidavit submitted by Employee declares that during his entire tenure with Agency prior to being terminated, he also worked for Medical Staffing Network as a "second job." DPM No. 11B-80, Section II(b)(2)(ii) provides that outside earnings from employment to *replace* the employment from which Employee was separated, be used to offset the backpay amount owed to Employee. Additionally, 6B DCMR § 1149.13 provides that Agency shall deduct "only that employment engaged in by the employee to *take the place of the employment* from which the employee was separated" (emphasis added).

Here, Employee's income with Medical Staffing Network from 2011 to 2014 was to *supplement* his employment income that he would have earned had he remained employed with Agency, not *replace*. This supplemental income was a result of Employee's "second job" that would have still been earned had Employee not been separated by Agency. The annual amounts earned from Medical Staffing Network between 2011 and 2014 are consistent with a "second job" earnings, rather than that of full-time earnings that would *replace* the salary Employee was earning with DBH before his separation. As such, I find that Agency improperly attributed **$40,449.35** of income earned by Employee from Medical Staffing Network between 2011 and 2014 to offset the backpay amount owed to Employee. Accordingly, Agency shall recalculate the amount deducted under "Less Outside Earnings" on the Reinstatement With Back Pay Worksheet to reflect the appropriate amount of outside earnings attributed to Employee.

ORDER

It is hereby **ORDERED** that Agency recalculate the amount of "outside earnings" that was deducted from the "Total Back Pay Due" to Employee. The **$40,449.35** earned by Employee from Medical Staffing Network and attributed to Employee's "outside earnings" on the Reinstatement with Back Pay Worksheet should not be reflected as "outside earnings" for purposes of awarding the backpay owed to Employee. The net amount due to Employee shall be consistent with the recalculations as set forth in this decision.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

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[14] E-DPM Instruction No. 11B-80 II(b(2))(ii).