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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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)	
EMPLOYEE ¹)	OEA Matter No. 1601-0015-20C24
)	
v.)	
)	Date of Issuance: May 29, 2025
D.C. PUBLIC SCHOOLS,)	
Agency)	
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OPINION AND ORDER ON
MOTION FOR INTERLOCUTORY APPEAL

This matter was previously before the Office of Employee Appeals’ (“OEA”) Board. Employee was hired to work as a Teacher with D.C. Public Schools (“Agency”). According to Agency, Employee was separated in August of 2009 for performance issues. After conducting an evidentiary hearing, the AJ issued an Initial Decision on September 13, 2023, ordering that Agency reinstate Employee with back pay and benefits.² Agency filed a Petition for Review on October 13, 2023. The OEA Board issued its Opinion and Order on Petition for Review on January 4,

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² The AJ held that Employee complied with Agency’s request to provide a chest x-ray, as it related to the Tuberculosis (“TB”) testing requirement. As for Employee’s background check, the AJ opined that Agency prevented Employee from completing the fingerprinting and should have communicated with Employee how he could have accomplished securing his background check, even with its concerns related to Employee’s suspicion of TB. The AJ held that Agency failed to provide authorization for Employee to schedule a drug test, which prevented him from efficiently completing his drug testing requirement. Consequently, the AJ ordered that Agency’s termination action be reversed; that Agency reinstate Employee; and that Agency reimburse Employee all pay and benefits lost as a result of his removal. *Initial Decision*, p. 9-13 (September 13, 2023).

2024, upholding the Initial Decision.³ On March 4, 2024, the Administrative Judge (“AJ”) issued an Addendum Decision on Attorney’s Fees and found that Employee was the prevailing party, but dismissed the attorney’s fee motion without prejudice as premature, noting that Employee had not been reinstated or received back pay.⁴

Employee’s counsel filed a Petition for Review on April 1, 2024.⁵ Agency filed its response to Employee’s petition on May 1, 2024.⁶ On August 26, 2024, Employee’s counsel filed a notice withdrawing his representation of Employee in this matter.⁷ On September 12, 2024, the Board issued an Opinion and Order on Attorney’s Fees wherein it granted Employee’s Petition for Review and determined that the Motion for Attorney’s Fees was ripe for review by the AJ.⁸

On November 20, 2024, the AJ issued an Addendum Decision on Remand. He held that pursuant to the Joint Stipulation Regarding Attorneys’ Fees and Costs, Agency and Employee’s counsels agreed to a fee award of \$50,000.00. The AJ explained that the award satisfied Employee’s counsel’s claims for attorney’s fees and costs arising out his representation of Employee in this matter. As a result, he ordered that Agency pay Employee’s counsel \$50,000 within thirty calendar days from the date of issuance of the Addendum Decision for legal fees and

³ The Board found that although there was one requirement that Employee could have completed, Agency failed to offer a range of penalties to determine the reasonableness of its termination action. Furthermore, it ruled that Agency did not provide any evidence that it considered relevant factors before terminating Employee. Accordingly, Employee was to be reinstated with back pay and benefits, as outlined in the Initial Decision. *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0015-20, *Opinion and Order on Petition for Review* (January 4, 2024).

⁴ *Addendum Decision on Attorney’s Fees* (March 4, 2024).

⁵ Employee argued that he should not be denied attorney’s fees because Agency refused to implement OEA’s decision; therefore, he requested that the Addendum Decision on Attorney’s Fees be reversed.

⁶ Agency argued that Employee’s request for attorney’s fees was premature. It was Agency’s position that the AJ needed to resolve the issue of backpay and Employee’s duty to mitigate before considering the petition for attorney’s fees. *District of Columbia Public Schools’ Response to Employee’s Petition for Review* (May 1, 2024).

⁷ *Praecepte Withdrawing Representation by Counsel* (August 26, 2024).

⁸ The Board opined that because Employee terminated his counsel’s representation, there would be no additional attorney’s fees accrued after counsel’s August 26, 2024, withdrawal. Thus, although the AJ still needed to render a decision on compliance, that portion of the case would be handled by Employee in a *pro se* posture. As a result, this Board granted Employee’s Petition for Review to have the Administrative Judge render a decision on attorney’s fees. *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0015-20AF24, *Opinion and Order on Attorney’s Fees* (September 12, 2024).

costs.⁹

On December 16, 2024, Employee filed a Motion to Compel. He argued that Agency did not file an appeal of the Initial Decision; thus, he should be reinstated and awarded back pay. Employee asserted that Agency was not in compliance with the Opinion and Order on Petition for Review that became final on February 4, 2024. Additionally, Employee submitted that that due to health issues, he sought to retire rather than return to work.¹⁰

Agency filed its response to Employee's Motion to Compel on December 9, 2024. It argued that Employee was given several deadlines to complete the requirements for reinstatement. However, he failed to complete the mandated requirements, and in response, Agency issued a second Notice of Termination to Employee. Agency also filed a Motion on Mitigation. It explained that District of Columbia law requires mitigation.¹¹

There were several filings related to the Motion to Compel and Employee's back pay filed by both parties. On March 6, 2025, the AJ issued an order and found that the Motion for Compel would be deemed as a Petition for Enforcement. He found that an evidentiary hearing was warranted to determine whether Employee made an adequate attempt to mitigate his damages.¹² Subsequently, Employee filed a Request for Clarification of the AJ's Order. Employee contended that he objected to the hearing on mitigation as time barred and was inconsistent with the law and underlying case law in the matter.¹³ In response, Agency asserted that a hearing was warranted to determine back pay.¹⁴

⁹ *Addendum Decision on Remand*, p. 1-4 (November 20, 2024).

¹⁰ *Motion to Compel Enforcement of Final Petition and Initial OEA Order Regarding Reinstatement, Backpay, Benefits, and Other Appropriate Relief*, p. 2-4 (December 16, 2024).

¹¹ *District of Columbia Public Schools' Response to Employee's Motion to Compel*, p. 1-2 (December 19, 2024).

¹² *Order* (March 6, 2025).

¹³ *Request for Clarification of Order in [Employee] v. DCPS* (March 14, 2025).

¹⁴ *District of Columbia Public Schools' Response to Employee's Letter* (March 21, 2025).

On April 7, 2024, Employee filed what this Board considers a Motion for Interlocutory Appeal. He disagrees with allowing Agency an opportunity to conduct discovery and determine whether he mitigated his damages to seek other employment. Employee requests that no further evidence be submitted.¹⁵ According to Employee, there has been no OEA case where an AJ reopened a matter to allow testimony on mitigation of damages, without a request from a higher court. Subsequently, the AJ issued an Order granting Employee's Motion for Interlocutory Appeal, referring the matter to the OEA Board for consideration.¹⁶

Employee filed an Amended Interlocutory Appeal on April 22, 2025.¹⁷ He argues that the AJ cannot reopen a matter after the Initial Decision was issued. Employee contends that the AJ violated OEA Rule 632.2, which provide that once the record is closed, no additional evidence or argument shall be accepted into the record unless the Administrative Judge reopens the record pursuant to OEA Rule 633.1. Additionally, he argues that OEA lacks jurisdiction over the issue of mitigation. Therefore, Employee requests that he receive back pay and that he be allowed to retire in lieu of reinstatement, as a result of his declining health.¹⁸

On May 2, 2025, Agency filed its Response to Employee's Interlocutory Appeal. It asserts that OEA does have jurisdiction over mitigation. Agency maintains that Employee has not properly mitigated his damages as required under the District of Columbia Municipal Regulations ("DCMR"). As a result, it requests that the outstanding back pay issue be addressed, and the

¹⁵ *Employee's Amended Motion to Appeal to OEA Board Decision by Senior ALJ Robinson on March 6, 2025, to Reopen Case and Allow New Evidence of Failure to Argue Mitigation, Deny Mitigation and Order Enforcement of Award*, p. 2-6 (April 7, 2024).

¹⁶ *Order Regarding Employee's Motion for Certification of an Interlocutory Appeal and Motion for Stay* (April 14, 2025).

¹⁷ Prior to the Amended Interlocutory Appeal, Employee filed a Petition for Review. In his petition, Employee presents many of the same arguments made in his Amended Interlocutory Appeal. *Employee's Petition for Review*, p. 2-8 (April 11, 2025).

¹⁸ *Amended Addendum [Inter]locutory Appeal*, p. 5-9 (April 22, 2025).

Interlocutory Appeal be dismissed.¹⁹

The AJ issued an Amended Order Regarding Employee's Motion for Certification of an Interlocutory Appeal and Motion for Stay on May 13, 2025. He granted Employee's Interlocutory Appeal Motion and rescinded his original Order Regarding Employee's Motion for Certification of an Interlocutory Appeal and Motion for Stay with the instant Order. Accordingly, the matter was referred to the OEA Board for consideration of claims made in Employee's Interlocutory Appeal Motion.²⁰

OEA Rule 633 outlines that specific times when an Administrative Judge may re-open the record. OEA Rule 633.2 provides that "[t]he jurisdiction of an Administrative Judge terminates upon issuance of the Initial Decision; [p]rovided, that the Administrative Judge shall retain jurisdiction over the appeal to the limited extent necessary to . . . process any petition for enforcement." As it relates to compliance and enforcement, OEA Rule 640.8 provides that "[t]he Administrative Judge shall take all necessary action to determine whether the final decision is being complied with and shall issue a written opinion on the matter." Therefore, the AJ may re-open the record and take necessary actions to determine compliance matters.

Contrary to Employee's position, OEA Administrative Judges have held evidentiary hearings for the limited purpose of ruling on compliance matters related to back pay and benefits.²¹ Moreover, the Superior Court for the District of Columbia in *George Walker v. Office of the Chief Information Technology Officer*, 2021 CA 2406 P(MPA)(D.C. Super. Ct. January 3, 2022), held

¹⁹ *District of Columbia Public Schools' Response to Employee's Interlocutory Appeal*, p. 3-4 (May 2, 2025).

²⁰ *Amended Order Regarding Employee's Motion for Certification of an Interlocutory Appeal and Motion for Stay* (May 13, 2025).

²¹ *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20C21, *Opinion and Order on Petition for Review* (December 17, 2021); *Richard Hunt v. District of Columbia General Hospital*, OEA Matter No. 2401-0172-95X-C10 (November 5, 2012) and *Employee v. Office of the Chief Technology Officer*, OEA Matter No. 1601-0046-97R09R16, *OEA Hearing Transcripts* (July 27, 2011) and (July 29, 2011).

that there was no clear error of law by allowing the Administrative Judge to consider further evidence regarding a mitigation defense. Similarly, the Superior Court ruled in *Andrew Johnson v. D.C. Public Schools*, 2022 CA 000506 P(MPA)(D.C. Super. Ct. June 8, 2023), that OEA properly held an evidentiary hearing on back pay and the employee's mitigation efforts to properly determine the amount of back pay to which an employee is entitled.

OEA has historically relied on the holding by the D.C. Court of Appeals in *Wisconsin Avenue Nursing Home v. D.C. Commission on Human Rights*, 527 A.2d 282 (D.C. 1987), which ruled that an employee who was improperly discharged must exercise reasonable diligence in seeking alternative employment, also referred to as mitigating damages.²² The OEA Board noted in *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20C21, *Opinion and Order on Petition for Review* (December 17, 2021) that once an employee establishes the amount of back pay they are entitled to receive, the burden shifts to the employer to prove what the employee could have earned by the exercise of reasonable diligence. Moreover, the D.C. Court of Appeals in *George Walker v. Office of the Chief Technology Officer*, 127 A.3d 524 (D.C. 2015), held that Agency has the burden of proof as to whether Employee reasonably attempted to mitigate their damages. The D.C. Court of Appeals further reasoned in *Howard University v. Lacy*, 828 A.2d 733 (D.C. 2003), that an employer may satisfy this burden by showing the employee's failure to take reasonable efforts to mitigate damages by finding alternative employment. Thus, the AJ can conduct a hearing for the limited purpose of determining compliance related to back pay,

²² *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20C21, *Opinion and Order on Petition for Review* (December 17, 2021); *Employee v. Office of the Chief Technology Officer*, OEA Matter No. 1601-0046-97R09R16, *Third Opinion and Order on Petition for Review* (June 17, 2021); and *Richard Hunt v. District of Columbia General Hospital*, OEA Matter No. 2401-0172-95X-C10 (November 5, 2012).

including the mitigation of damages. As a result, Employee's Motion on Interlocutory Appeal is denied, and this matter is remanded to the AJ to determine Agency's compliance in this case.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Interlocutory Appeal is **DENIED**, and the matter is **REMANDED** to the Administrative Judge.

FOR THE BOARD:

Dionna Maria Lewis, Chair

Arrington L. Dixon

Lashon Adams

Jeanne Moorehead

Pia Winston

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.