THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0046-97R09R16
v.	)	
	)	Date of Issuance: June 17, 2021
OFFICE OF THE CHIEF TECHNOLOGY OFFICER,	)	
Agency	)	
	)	

THIRD OPINION AND ORDER
ON
PETITION FOR REVIEW

This matter was previously before the Board. Employee worked as a Supervisory Computer Specialist with the Office of the Chief Technology Officer ("Agency" or "OCTO").[2] Employee was removed for failure or refusal to comply with written instructions or direct orders by a supervisor. The effective date of his termination was November 1, 1996. On October 19, 1998, the Office of Employee Appeals ("OEA") Administrative Judge ("AJ") issued an Initial Decision in which he held that Agency failed to meet its burden of proof in terminating Employee. Therefore, Agency's termination action was reversed and Employee was ordered to be reinstated with back

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] In March of 1999, the Department of Administrative Services was absorbed by the Office of the Chief Technology Officer.

pay and benefits [3]

Agency then filed a Petition for Review with the OEA Board. On April 30, 1999, the Board affirmed the Initial Decision. Thereafter, Agency appealed to the Superior Court for the District of Columbia ("Superior Court"). The Court agreed with OEA's order to reinstate Employee to the same or an equivalent position and denied his request for pain and suffering damages. However, the matter was remanded to the AJ to determine if, and to what extent, Employee made efforts to mitigate his damages after the effective date of his termination.[4]

On remand, former AJ, Daryl J. Hollis, held an evidentiary hearing on January 30th and October 20th of 2003. Judge Hollis issued an Addendum Decision on December 16, 2004, ordering Agency to reinstate Employee as a Data Center Services Manager with OCTO. Agency was further ordered to reimburse Employee with back pay and benefits loss of a result of his termination only for the period of November 1, 1996 through March 26, 1999 because the AJ concluded that Employee failed to mitigate damages during the remaining years.[5]

Both parties appealed the AJ's decision to the OEA Board, and the Addendum Decision was affirmed on April 14, 2008. The parties subsequently filed appeals with Superior Court, presenting evidence that the positions the AJ considered akin to Employee's pre-termination position were not comparable to the Center Services Manager and Telecommunications Manager positions that were offered by Agency. Therefore, the matter was again remanded to OEA to identify a comparable position to which Employee could be reinstated. Further, the Court vacated the AJ's holding on back pay and ordered this Office to consider whether the Federal Back Pay Act governed whether Employee had a duty to mitigate his damages and, if so, whether he satisfied

[3] *Initial Decision* (October 19, 1998).
[4] *Dep't of Admin. Svcs. v. Employee*, Case No. 99-MPA-10 (D.C. Super. Ct. October 30, 2000). Both Agency and Employee filed a Motion for Consideration of the Court's order. The motions were denied on October 30, 2000.
[5] *Addendum Decision* (December 16, 2004).

his duty.

On remand, the matter was reassigned to the current AJ in July of 2009. While Agency reinstated Employee to a Career Service Telecommunications Specialist, Step 14, Grade 6, position, the issue of back pay remained outstanding. After reviewing the parties' briefs related to the applicability of the Federal Back Pay Act, and holding an evidentiary hearing in 2011, the AJ issued an Addendum Decision on Remand. He held that Employee failed to exercise reasonable diligence in attempting to find alternative employment after his termination. As a result, he concluded that Employee did not meet his burden of proof that he attempted to mitigate his damages. Therefore, the AJ denied Employee's request for back pay.[6]

Thereafter, Employee appealed the ruling to Superior Court. On July 2, 2015, the Court issued its Memorandum Opinion and Order, finding that Employee was subject to the District Personnel Manual ("DPM") and the Federal Back Pay Act, which required him to mitigate his damages post-termination by seeking alternative employment with reasonable diligence.[7] Employee disagreed and appealed to the District of Columbia Court of Appeals. On November 25, 2015, the Court ordered OEA to re-adjudicate Employee's back pay claim. Further, Agency was ordered to restore Employee's annual leave pursuant to the Back Pay Act. As it related to the back pay issue, the Court noted that Agency had the burden of proof as to whether Employee reasonably attempted to mitigate his damages. Additionally, the Court instructed OEA to make a period-by-period determination regarding Employee's efforts to mitigate his damages.[8]

The AJ held a status conference on November 25, 2019 to ascertain the status of

[6] *Addendum Decision on Remand* (November 7, 2011).
[7] Case No. 2011 CA 00494 P (MPA) (D.C. Super. Ct. July 2, 2012).
[8] *Employee v. Office of the Chief Technology Officer*, 127 A.3d 524 (D.C. 2015). Employee retired from Agency on December 31, 2016. On October 16, 2019, Employee filed a Petition for Writ of Mandamus requesting the Court of Appeals to order OEA to implement its remand order. OEA was not served with the 2015 remand order; this Office was not apprised of the Court's order until October of 2019.

Employee's leave. Thereafter, the AJ held a virtual hearing on June 20th and June 21st of 2020 wherein the parties agreed that Employee was entitled to a $139,603.49 repayment for his annual leave hours. The AJ issued a Second Initial Decision on Remand on February 25, 2021. The issues addressed were whether Agency met its burden of proof in establishing that Employee failed to make reasonable efforts to mitigate his damages, and if so, what was the proper amount of back pay owed to Employee following his removal. [9]

In his Second Initial Decision on Remand, the AJ held that Employee submitted three to four job applications each week and posted his resume on four job search websites in 1998 and 1999. He noted that Employee also worked in Pre-paid Legal Services from 1999-2003 and started a business called the African American Business Directory. Between 2000 and 2001, the AJ found that Employee continued his job search by submitting approximately two paper applications each week and posted online applications on several recruiting platforms. According to the AJ, Employee began a telecommunications business between 2001 and 2003, during which he earned approximately $5,500 in income. In 2002, Employee continued to apply for jobs and received two interviews but no offers.[10]

Concerning his search effort from 2003 through 2009, the AJ concluded that Employee continued to post his resume on websites but only submitted approximately seventy-five electronic applications and twenty-five paper applications over the course of six years. Employee earned approximately $7,000 in income from a self-owned business called Walker Home Improvement; started an electrical wiring business called Telecommunication Enterprise Management; applied for IT a position with Prince George's County and Lockheed Martin; and created a construction business. Based on the testimony deduced during the evidentiary hearing, the AJ held that

[9] *Second Initial Decision on Remand* (February 25, 2021).
[10] *Id*.

Employee only attempted to mitigate his damages from 1997-2002. He opined that Employee failed to prove that he exercised reasonable diligence in attempting to find alternative employment in his field from January 1, 2003 until Agency reinstated him on November 1, 2009.[11]

As it related to Employee's potential entitlement to additional back pay from 2003 to 2009, the AJ explained that while Agency met its burden of proof in establishing that Employee failed to mitigate his damages during the aforementioned period, it failed to present any evidence as to what salary Employee could have earned had he attempted to find equivalent employment. However, he noted that Employee's own witness testified that Employee could have earned $50,000 per year as an IT professional. Thus, based on the D.C. Court of Appeal's holding in *Wisconsin Ave. Nursing Home v. D.C. Commission on Human Rights*,[12] the AJ believed that vocational rehabilitation counselor, Anthony Bird's ("Bird"), testimony was adequate to establish what salary Employee could have earned from 2003 through 2009 if he attempted to find suitable work. Accordingly, the AJ ordered that Employee be reimbursed all back pay and benefits lost as a result of his termination starting from the date of his removal through December 31, 2002, less any amounts paid and actual interim earnings. Agency was further ordered to reimburse Employee for back pay and benefits from January 1, 2003 to November 2, 2009, less an annual prorated amount of $50,000 for the months Employee was unemployed. Lastly, the AJ instructed Agency to pay Employee $139,603.49 for his annual leave hours, as previously agreed upon.[13]

On April 1, 2021, Agency filed a Petition for Review of the AJ's Second Initial Decision on Remand. It argues that the AJ's ruling on back pay from November 1, 1997 to December 31, 2002 was not based on substantial evidence. According to Agency, the testimonial evidence

[11] *Id.*
[12] 527 A.2d 282 (D.C. 1987).
[13] *Id.*

supports a finding that Employee failed to exercise reasonable diligence in seeking employment. It believes that Employee's testimony was not credible in establishing his mitigation efforts. Additionally, Agency reasons that Employee is not entitled to back pay from February 4, 2005 through November 1, 2009 because effective February 4, 2005, Chapter 6B, Section 1149 of the D.C. Municipal Regulations ("DCMR") limited back pay when there is a finding that an employee failed to mitigate his damages.[14]

Employee filed a Cross-Petition for Review on April 5, 2021. It contends that the AJ made an error of law in deducting $50,000 per year from his award of damages because the position he used to reach his conclusion was inferior to the one Employee previously held. He further opines that the AJ's determination that he failed to exercise reasonable diligence in his job search efforts to obtain employment from January 1, 2003 to November 1, 2009 was contrary to law and not supported by substantial evidence. Moreover, Employee claims that the OEA Board should affirm the portion of the Second Initial Decision on Remand regarding the AJ's finding that he is entitled to full back pay from November 1, 1997 to December 31, 2002. He also requests that the Board reverse the portion of the AJ's decision concluding that there must be a $50,000 per-year reduction in back pay from 2003 through 2009 because that is the salary Employee could have earned had he exercised diligence in securing employment.[15]

On April 29, 2021, Employee filed a Response to Agency's Petition for Review. He requests a reversal of the AJ's decision that he failed to mitigate damages from 2003 to 2009. Employee explains that he continued to seek outside employment during this time and created self-employment opportunities by establishing four businesses. Additionally, he argues and that it was

[14] *Agency's Petition for Review* (April 21, 2021). The parties agree that on Fenburary 4, 2005, the Council formally promulgated a new compensation system
[15] *Employee's Cross-Petition for Review* (April 5, 2021).

a legal error to impute projected income to an employee from an inferior position that he was neither required to search for nor accept. Moreover, Employee believes that the AJ's finding regarding the award of back pay from November 1, 1997 to December 31, 2002 is supported by the record because the AJ was the appropriate person to make the pertinent witness credibility findings. He also disagrees with Agency's contention that DCMR § 1149.11 changed the common law mitigation rule in a manner more favorable for the District and reasons that this argument is being raised for the first time before the OEA Board, after nearly twenty-four years of litigation. Therefore, Employee asks that his petition be granted.[16]

Agency submitted an Opposition to Employee's Cross-Petition for Review on May 6, 2021. It reiterates its previous argument that the AJ's finding is supported by substantial evidence that Employee failed to exercise reasonable diligence to find employment between January 1, 2003 and November 1, 2009. It also believes that Employee's argument that the AJ committed an error by imputing $50,000 per year to his income in calculating back pay lacks merit. Consequently, it requests that Employee's Cross-Petition for Review be denied.[17]

Substantial Evidence

OEA Rule 633.3 provides that the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.[18]

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[16] *Employee's Response to Agency's Petition for Review* (April 29, 2021).
[17] *Agency's Opposition to Employee's Cross-Petition for Review* (May 6, 2021).
[18] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C.

Employee's Job Search: November 1, 1997 to December 31, 2002

In its 2015 remand, the Court of Appeals held that the AJ erroneously placed the burden on Employee to prove his mitigation efforts, when in fact Agency retained the burden of proof in establishing its affirmative defense that Employee failed to mitigate his damages. In *Howard University v. Lacy,*[19] the D.C. Court of Appeals recognized the well-settled principal that the burden of proof showing mitigation of damages is on the party raising the issue. An employer may satisfy this burden by showing "[the employee's] failure to take reasonable efforts to mitigate [his] damages by finding alternative employment."[20] Moreover, as the Court of Appeals instructed in its most recent order to this Office, the AJ was required to make a period-by-period determination as to whether Agency satisfied its burden.

In its petition, Agency argues that the AJ's finding that Employee exercised reasonable diligence in seeking employment from November 1, 1997 to December 31, 2002 is not based on substantial evidence. It provides that it elicited ample evidence of Employee's insufficient job search efforts during this period. Agency opines that Employee's testimony during the evidentiary hearings lacked credibility because it was uncorroborated and inconsistent with the statements he provided during his previous deposition testimony. Agency points to the amount of time Employee alleged he devoted to failed start-up businesses and self-employment ventures, as well as the large gaps of time during which Agency believed that he performed no job search. On the other hand, Employee reasons that the AJ's ruling pertinent to his mitigation efforts from November 1, 1997 through December 31, 2002 should be affirmed because there is substantial evidence in the record to support a finding that he conducted a reasonable search for employment in his field.

2002).

[19] *828 A.2d 733* (D.C. 2003).

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

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 in *Ford Motor Co. v. EEOC* held that an employee who has been improperly discharged must exercise "reasonable diligence in seeking alternative employment."[21] The Court noted that "[a]lthough the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied."[22]

Without going into explicit detail regarding the AJ's analysis of Employee's job search for each year, this Board believes that there is considerable evidence in the record to support the AJ's conclusion that Employee made reasonable search efforts to obtain a position in the Information Technology industry. For each year, the AJ made a finding as to the amount of paper and/or electronic applications Employee submitted per week and whether these efforts were sufficient to mitigate his damages. He also noted Employee's additional efforts to secure gainful employment, which included establishing several businesses, although they were unsustainable as a result of a lack of income.

The AJ evaluated testimony during both the 2011 and 2020 evidentiary hearings and was in the best position to make determinations as to witness demeanor and veracity. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*,[23] ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA AJ was the

[21] 458 U.S. 219, 231 (1982).
[22] *Id.*
[23] 564 A.2d 1155 (D.C. 1989).

fact finder in this matter. As this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[24] Consistent with the holding in *Baumgartner* and DPM § 8.11, we conclude that the AJ's determination that Employee's search efforts were satisfactory in attempting to mitigate his damages from November 1, 1997 through December 31, 2002. As such, his findings are supported by the record, even if there is evidence to reach an alternate conclusion. Consequently, Agency has failed to meet its burden of proof with respect to this time period and we find no credible basis for disturbing the AJ's conclusions. Thus, Employee is entitled to all back pay and benefits lost as a result of Agency's improper termination action from the effective date of his removal to December 31, 2002.

Employee's Job Search: January 1, 2003 to November 2, 2009

In his Second Initial Decision on Remand, the AJ held that Agency proved that Employee failed to mitigate his damages from January 1, 2003 through November 2, 2009. The AJ characterized Employee's job search efforts as unreasonable because he only submitted an average of one application per month over the course of approximately six years. Additionally, he reasoned that the testimonial evidence supported the theory that the industry standard for an individual seeking employment during this time was to spend four to five hours per week searching for and applying for positions. To buttress the AJ's dissatisfaction with Employee's efforts, he explained that Employee provided inconsistent testimony regarding his search efforts from 2003 through 2009, which the AJ determined to be detrimental to his credibility. As a result, he resolved that

[24] *Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601- 0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

Employee failed to exercise reasonable and sufficient diligence in attempting to find alternative employment during the relevant time period.

In addition, Vocational Counselor and expert witness, Debbie Moreau ("Moreau"), provided relevant evidence regarding Employee's prospects for obtaining employment following Agency's wrongful termination action. As a vocational specialist, Moreau's duties included developing individual profiles for those seeking work, assessing the types of positions that were appropriate for, and determining whether an individual made a reasonable effort to find work. In 2011, she prepared a Labor Market Research Report for Employee.[25] Relying on data from the Bureau of Labor Statistics, Moreau determined that Employee was qualified for positions such as a computer and information systems manager, network and computer systems administrator, and computer specialist.[26] Moreau's testimony also revealed that the job market for these positions in the District and surrounding areas increased significantly from 2003 to 2009. Thus, she opined that Employee's submission of just 100 applications over the course of six years did not constitute a reasonable effort to obtain a position in his field.[27]

Employee points to several reasons why his attempts to obtain equivalent employment were adequate; however, his assertions are merely disagreements with the AJ's analysis of the testimonial and documentary evidence. This is not a valid basis for overturning his ruling. Accordingly, the AJ's findings are supported by substantial evidence and Agency met its burden of proof in establishing that Employee failed to exercise reasonable diligence in his job search efforts during this time.

Substantially Equivalent Work

[25] *2011 Evidentiary Hearing Transcript*, Agency Exhibit 13.
[26] *Id*. at 35.
[27] *Id*. at 49.

In *Anastasio v. Schering Corp.*, 838 F.2d 701 (3d Cir. 1988), the Court held that an employer may satisfy its burden of proving that an employee failed to mitigate damages by showing that: 1) substantially equivalent work was available and 2) the employee failed to exercise reasonable diligence to obtain employment. Agency has satisfied the second prong in establishing that Employee failed to exercise sufficient efforts to secure employment from January 1, 2003 to November 2, 2009. The question now turns on whether the AJ erred in concluding that substantially equivalent work was available to Employee. In *Rasimas v. Michigan Dept. of Mental Health*,[28] the Court characterized "substantially equivalent" as "virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status." However, substantially equivalent employment has also been interpreted by the Equal Employment Opportunity Commission to mean positions similar in nature, geographic location,[29] duties, and within a reasonable commuting distance.[30]

Here, the AJ provided a reasoned analysis of the evidence in reaching the conclusion that comparable work in Employee's field was available from 2003 through 2009. He relied on Monreau's comprehensive Labor Market Research Report, which included ninety-two jobs from the Washington Post Mega Employment Job Sampling that were available in the area. Based on her analysis, there were many positions in the Information Technology field that matched Employee's training, work history, and experience. Employee's skills included completing online training with Microsoft Office, experience with FrontPage, HTML, internet protocol advances, and data communications technology, to wit. Additionally, several of the positions relied upon by

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[28] 714 F.2d 614 (6th Cir. 1983).
[29] *Geraldine G. v. U.S. Postal Servs.*, EEOC Petition No. 0420170001 (May 4, 2017).
[30] *See, e.g., Monroig v. U.S. Comm'n on Civil Rights*, EEOC Petition No. 04A40029 (Sept. 29, 2005); *Spicer v. Dep't of the Interior*, EEOC Petition No. 04980007 (Sept. 24, 1998); *Patterson v. Dep't of Agriculture*, EEOC Request No. 05940079 (Oct. 21, 1994). *Toney E. v. Dep't of Agric.*, EEOC Petition No. 0420150019 (March 18, 2016).

Monreau were managerial and senior, supervisory level jobs.[31] Accordingly, a review of the evidence nets a conclusion identical to that of the AJ. Comparable and suitable work was available to Employee from January 1, 2003 to November 2, 2009; however, he failed to exercise reasonable diligence in pursing these positions. As a result, we find that the AJ did not err in concluding that similar work was available to Employee and that he did not exercise reasonable diligence to obtain such a position.

Damages

Concerning the mitigation of damages defense raised by Agency, a back pay award should equal the salary the aggrieved employee would have received from the time of the employer's violation, minus the employee's actual interim earnings or the amounts he or she would have earned had they diligently sought other work.[32] It is the employee's burden to present evidence demonstrating the amount of his or her damages, but once such evidence has been presented, the burden shifts to the employer to establish the amount by which those damages should be reduced to reflect the complainant's interim earnings.[33] The issue here is whether there is substantial evidence in the record to support a finding that Agency met its burden of proof in establishing the amount that Employee could have netted had he exercised reasonable diligence in searching for employment.[34]

The AJ's decision to offset Employee's back pay award by $50,000 from 2003 through 2009 is obfuscated by his holding that Agency utterly failed present any evidence as to what amounts Employee would have earned if he attempted to find equivalent work. The AJ even

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[31] *2011 Evidentiary Hearing Transcript*, Agency Exhibit 4.
[32] *See Clark v. Marsh*, 214 U.S.App. (D.C.1981).
[33] 528 F.Supp 1380.
[34] *Jackson v. Wheatley School Dist. No. 28*, 464 F.2d 411 (8th Cir. 1972); *District of Columbia v. Jones*, 442 A.2d 512 (D.C. 1982) and *Hegler v. Board of Education of Bearden School District*, 447 F.2d 1078 (8th Cir. 1971).

referenced a number of federal cases which reinforce the requirement that an employer must satisfy its affirmative defense of lack of mitigation by presenting evidence of the amount of the salary the employee could have reasonably attained had he or she sought other work.[35] We certainly acknowledge the AJ's impasse here, as there was only a modicum of evidence available in the record to make a decision as to what Employee could have earned had he properly mitigated his damages. We are further perplexed by Agency's outright negligence in presenting any evidence to satisfy its burden of proof on this issue, especially in light of the twenty-four years of litigation before OEA, Superior Court, and the Court of Appeals.

In sum, instead of requiring Agency to present concrete and reliable evidence to compute an accurate amount by which Employee's damages should be offset to meet its burden of proof, the AJ utilized testimony from Employee's own witness. Bird provided an uncorroborated estimate that Employee could have earned $50,000 a year had he attempted to gain employment from 2003 until 2009.[36] Bird even admitted that he did not address the adequacy of Employee's job search in the report that he prepared to present to this tribunal.[37] He also expressed to the AJ that he was simply offering his personal opinion as it related to the state of the job market from 2003 through 2009.[38] Most notably, the AJ assessed Bird's testimony as less credible than expert witness Monreau. This evidence falls short of the standard necessary to establish the amount that should be imputed to Employee's income as an offset to his damages. Therefore, we cannot reasonably conclude that the AJ' holding is supported by substantial evidence. This Board is undoubtedly reluctant to remand this matter to the AJ yet again; however, the record in its current state is

[35] *District of Columbia v. Jones*, 442 A2.d 512 (D.C. 1982; *Trustee of the University of the District of Columbia*, 963 A 2d. 1162 (D.C. 2009); and *Wisconsin Nursing Home supra*.
[36] *Second Initial Decision on Remand* at 24-25.
[37] *2011 Evidentiary Transcript*, pp. 114-204.
[38] *Id.*

inadequate to base our decision on reasoned and satisfactory findings of fact. This requirement cannot be circumvented by any means. As a result, this matter must be remanded to the AJ for the limited purpose of permitting Agency to establish what salary, if any, Employee could have earned had he exercised reasonable efforts in seeking employment.

Applicability of 6B DCMR § 1149

Next, Agency submits that Employee is not entitled to back pay from February 4, 2005 through November 1, 2009 because the District's compensation system limits back pay when there is a finding that an employee failed to mitigate his damages. In support thereof, Agency cites to 6B DCMR § 1149(c), effective February 4, 2005, which provides the following in relevant part:

> In computing the amount of back pay under this section, the agency shall not include any of the following:
>
> (c) Any period after one (1) year from the date of the unjustified or unwarranted personnel action where it is determined that an employee has not actively sought employment.

While Employee vehemently objects to Agency raising this specific issue for the first time before OEA, we believe that the regulation's applicability or lack thereof, is relevant to the disposition of this case. Employee opines that the provision of the DCMR unfairly alters the common law mitigation rule in a manner more favorable to the District. However, whether Employee's award under § 1149(c)[39]should be denied from February 4, 2005 through November 1, 2009 will have a significant effect on the total damages he is entitled to receive. In that regard, in the interest of justice, we believe it is appropriate to remand this matter to also determine whether 6B DCMR § 1149(c) applies to the facts of this case and, if so, whether Employee's back pay reward following the effective date of the regulation should be denied.Conclusion

[39] § 1149(c) allows for a one-year grace period in which an employee is not required to mitigate his or her damages. Agency concedes that Employee was compensated for this period.

Based on the foregoing, this Board finds that the AJ's conclusion that Employee exercised reasonable diligence in seeking employment following his termination until November 2, 2009 is supported by substantial evidence. Likewise, we conclude that the AJ did not err in determining that Employee failed to mitigate his damages from 2003 until 2009. However, because the record in its current state is insufficient to make a reasoned finding as to the proper amount by which Employee's earnings should be offset beginning in 2003 this matter must be remanded to the AJ for the limited purposes of determining such. The AJ must also determine whether 6B DCMR § 1149(c) applies to this matter, and if so, whether the regulation bars Employee's back pay award after the regulation became effective.

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for proceedings consistent with this Order.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

_____
Peter Rosenstein

_____
Dionna Maria Lewis

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.