THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0032-14C21
[redacted]	
Employee	
	Date of Issuance: March 2, 2022
v.	
DEPARTMENT OF YOUTH REHABILITATION SERVICES, Agency	ARIEN P. CANNON, ESQ. Administrative Judge

Employee, *Pro se*[1]
Daniel Thaler, Esq., Agency Representative[2]

ADDENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL HISTORY

This matter is before the undersigned on a Motion for Enforcement after several rulings, appeals, and remands culminating with OEA's reversal of Employee's termination. An Initial Decision ("ID") was issued on September 18, 2015, reversing the Department of Youth Rehabilitation Services' ("Agency") decision to remove Employee from his position. Agency filed a Petition for Review with the Office of Employee Appeal's ("OEA") Board on October 23, 2015, asserting that the Initial Decision was based on an erroneous interpretation of statute. The OEA Board issued an Opinion and Order ("O & O") on Petition for Review on March 7, 2017, remanding this matter to the undersigned to make further determinations. The O & O specifically remanded the matter for two queries to be addressed: (1) whether evidence existed to establish that Employee was medically cleared or deemed to have overcome his disability; and (2) whether necessary medical treatments were performed to lessen Employee's disability.

[1] At the inception of this case, Employee was represented by Johnnie Louis Johnson, III. On July 2, 2019, Mr. Johnson's bar license was suspended on an interim basis pending the outcome of the Board on Professional Responsibility's recommendation to the D.C. Court of Appeals. After the interim suspension, Employee became self-represented.

[2] Frank McDougald served as Agency's representative until his retirement in May of 2021. Mr. Thaler entered his appearance shortly thereafter.

I issued an Initial Decision on Remand (First ID on Remand) on October 25, 2017, after consideration of the parties' arguments, which addressed the issues raised by the OEA Board's O& O. The First ID on Remand again reversed Agency's decision to terminate Employee. The reversal in the ID on Remand was based on the issues first identified by the OEA Board and my finding that evidence existed to establish that Employee was medically cleared or deemed to have overcome his disability. The reversal was also based on the second finding that necessary medical treatments were performed to lessen Employee's disability.

Agency appealed again, filing a Petition for Review of the Initial Decision on Remand. The OEA Board issued an Opinion and Order on Remand (Second O & O) on April 24, 2018. This time, the OEA Board upheld the undersigned's finding that: (1) Employee was medically cleared to return to work without restriction on November 5, 2012; and (2) Employee received medical treatments to lessen his disability after being injured on July 30, 2010. However, after addressing the issues raised in its first O & O, the Board's Second O & O addressed a separate issue, for the first time, and held that "it is unclear whether the AJ applied D.C. Code § 1-623.45(b)(1) or 7 DCMR § 139 in determining the date on which the two-year period began to run." As such, the Board again remanded the matter to the undersigned.

A Status Conference was convened on June 26, 2018, to address the Board's Second O & O regarding the appropriate date the two-year period began to run under D.C. Code § 1-623.45(b). On October 31, 2018, the undersigned issued a Second Initial Decision on Remand (this being the undersigned's third Initial Decision in this matter) again reversing Agency's action in terminating Employee. Agency appealed this decision to the OEA Board, which issued a Second Opinion and Order on Remand on October 23, 2019 (this was the OEA Board's third Order in this matter), affirming the undersigned's Second Initial Decision on Remand. Agency appealed the Second O & O on Remand to the Superior Court for the District of Columbia. In a September 21, 2020 Order, the Superior Court affirmed the OEA Board's Second Opinion and Order on Remand. This order was not appealed to the District of Columbia Court of Appeals and Employee was ultimately returned to work effectively on December 20, 2020.

On February 10, 2021, Employee filed a Motion to Re-Open his case, which was treated as a Motion for Enforcement/Compliance. Employee also raised the issue of attorney fees in this motion which has since been addressed in a separate Addendum Decision on Attorney Fees issued on September 15, 2021. In Employee's Motion for Enforcement/Compliance, he asserted that he had not received: (1) his back pay award; (2) interest in which Employee asserts is owed on the back pay award; (3) the cash value of his annual leave hours; and (4) the restoration of his sick leave hours. In the several status conferences that convened following this enforcement action, Employee also raised several issues which were not set forth in his Motion for Enforcement/Compliance. In particular, he raised issues regarding contributions to his 401(a) and 457(b) retirement accounts, lost benefits associated with his health and life insurance, and his social security benefits.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUE

Whether Agency has fully complied with this Office's order to reverse Employee's termination and restore all back pay and benefits lost as a result of his removal.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

OEA Rule 635, 59 DCR 2129 (March 16, 2012), 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.

Back Pay

The reversal of Employee's termination was ultimately upheld by the Superior Court for the District of Columbia in a September 21, 2020 Order. This matter was not appealed to the District of Columbia Court of Appeals. The District of Columbia's Office of Pay and Retirement, Special Pay Division, approved a Back Pay Worksheet on March 25, 2021, relating to back pay owed to Employee. This worksheet set forth the amount owed to Employee from the date of his wrongful termination through the date of reinstatement—December 1, 2013, through December 19, 2020. The Back Pay Worksheet was not approved until over six months after the issuance of the Superior Court Order, which upheld OEA's reversal of Employee's termination. Employee complained of not receiving the back pay he was owed in his February 10, 2021 Motion to Re-Open his case for enforcement. However, in a status conference that followed, both parties acknowledged that Employee had received his back pay. In Employee's Submission of Social Security Statement, filed on December 3, 2021, Employee attached a copy of the pay stub associated with his back pay award. This check is dated for March 31, 2021; thus, the back pay issue raised by Employee is now moot.

Interest

Employee argues that he is owed interest on the back pay awarded to him. Agency asserts that a reinstated employee cannot be "granted more pay or benefits than he or she would have been entitled by law, Mayor's Order, regulation, or agency policy."[3] Agency further points out that the authority for an assessment of interest is absent from the relevant regulations pertaining to back pay. Agency cites *Osterneck v. Ernst & Whitney*, 489 U.S. 169 (1989), in support of its position that an assessment of interest on Employee's back pay would be untimely and Employee's request for interest in his Motion to Enforce should be considered a "post judgment motion for discretionary prejudgment interest constitut[ing] a motion to alter or amend judgment." The instant case can be distinguished from *Osterneck.* Here, Employee seeks an assessment of interest

[3] *See* 6-B DCMR § 1149.10.

on his back pay award as a result of a wrongful termination. *Osterneck* involved the violation of federal securities laws and common law issues that resulted in a jury awarding compensatory damages. The facts in the instant case were largely uncontroverted. The outcome reversing Employee's termination is attributed to Agency's misapplication of the relevant statutes and regulations.

The District of Columbia Court of Appeals addressed the assessment of interest on a back pay in *D.C. Office of Human Rights v. D.C. Dep't of Corrections*, 40 A.3d 917 (D.C. 2012), where the Court found that an assessment of interest on back pay was appropriate. The Court stated 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. However, the Court held that when a claimant has endured a particularly long and procedurally complicated ordeal, interest is particularly appropriate to compensate the claimant for the lost time-value of their recovery. *Id*.

Here, Employee has certainly endured a long and procedurally complicated ordeal. Employee was wrongfully terminated in November 2013. Despite several appeals made by Agency challenging the reversal of Employee's termination, Employee survived each appeal and was ultimately reinstated to his position on December 20, 2021—over seven years later—after an order by the Superior Court upholding OEA's ruling. An interest award generally, merely recognizes the time-value of money, and in doing so affords an employee the full value of benefits owed for wrongful termination under the Comprehensive Merit Personnel Act ("CMPA").[4] I find an assessment of interest on the back pay here is appropriate to provide Employee the full value of his benefits lost as a result of his unlawful termination. Consistent with the D.C. Court of Appeal's decision in *D.C. Office of Human Rights*[5], I do not find any good reason for withholding an assessment of interest on the back pay awarded to Employee. The assessment of interest here considers the purpose of fully compensating Employee for the lost value of his recovery due to the significant passage of time.[6]

D.C. Code § 1-606.01, *et seq*., a provision of the CMPA, in which this office gets its authority, is silent as to the District's obligation to pay interest on back pay owed as a result of an unlawful adverse action. In *District of Columbia Public Schools v. Dep't of Employment Services*, 123 A.3d 947 (D.C. 2015), the Court of Appeals addressed the assessment of interest on back pay under the public workers' compensation framework pursuant to the CMPA. While it is true that OEA has denied requests to assess pre- or post- judgment interest on back pay, whether OEA has the *authority* to do so under the OEA provisions pursuant to the CMPA (D.C. Code § 1-606.01, *et seq.)* appears to be an issue of first impression.[7] It is also true that there remains no precedent by

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[4] *See D.C. Public Schools v. D.C. Department of Employment Services*, 123 A.3d 947 (D.C. 2015) (holding that an assessment of interest is not necessarily a form of penalty for either bad faith or negligent termination. The Court did not consider the District's intent or level of care in deciding whether interest may be awarded under the statute. On the contrary, an interest award on accrued disability benefits, as with interest generally, merely recognizes the time-value of money, and in doing so affords the worker the full value of benefits due for her injuries under the statute.)

[5] 40 A.3d 917 (D.C. 2012).

[6] *See D.C. Office of Human Rights v. D.C. Department of Corrections*, 40 A.3d 917 (D.C. 2012).

[7] *See Porter v. D.C. Dep't of Behavior Health*, OEA Matter No. 1601-0046012C16, Addendum Decision on Compliance (February 15, 2019); *Jackson v. D.C. Dep't of Health*, OEA Matter No. 2401-0020-10R17C19,

the OEA Board that has adopted a finding that an award of interest shall be included in any back pay amount. However, based on a recent OEA Board decision in *Employee v. Dep't of Small and Local Bus. Development*, Opinion and Order, OEA Matter No. J-0009-18R20 (June 17, 2021), it is unclear whether the Board would have the occasion to address an award of interest.

In *Employee v. Dep't of Small and Local Bus. Dev.*, *supra*, the OEA Board held that it is not permitted to consider Petitions for Review of an Addendum Decision on Compliance.[8] The Board further cited OEA Rules which provide no procedural avenue for an employee to appeal an Addendum Decision on Compliance to the OEA Board.[9] If an administrative judge of this office were to award or assess interest on back pay in an Addendum Decision on Compliance after a long and procedurally complicated ordeal, as in this case, an award of interest is unlikely to be addressed by the OEA Board. However, based on the Court of Appeals rulings in *D.C. Office of Human Rights* [10] and *Dep't of Employment Services*[11], *supra*, the undersigned finds that the applicable case law of this jurisdiction allows interest on a back-pay award as a component of making an employee whole. Accordingly, I find it appropriate to assess prejudgment simple interest at a rate of 4% per annum on the back pay owed to Employee, to be calculated from the date of his unlawful termination, December 1, 2013, through March 31, 2021, the date of his back pay check.[12]

Leave Hours

In Employee's Motion for Enforcement, he asserted that Agency had not paid the cash value or restored his annual leave hours. He further asserted that Agency had not reinstated his accrued sick leave hours. During the several status conferences addressing compliance in this matter, it was determined that the sick leave hours owed to Employee were restored and the annual leave hours owed were paid out in its cash value. Furthermore, in Employee's Submission of Social Security Statement, submitted on December 3, 2021, he attached two pay stubs—one for his back pay amount and the other for his annual leave pay out (referred to as Terminal Leave Pay).[13] As such, I find that Agency has complied with the Order of this office to provide Employee his leave benefits.

Addendum Decision on Compliance (September 23, 2019); *Junious v. D.C. Child and Family Servs*., OEA Matter No. 1601-0057-01C07, Addendum Decision on Compliance (November 15, 2007).

[8] *Employee v. Department of Small and Local Business Development*, Opinion and Order, OEA Matter No. J-0009-18R20 (June 17, 2021), at 6.

[9] *Id*. While *Dep't of Small and Local Bus. Dev* held that there is no procedural avenue for an employee to appeal an Addendum Decision on Compliance to the OEA Board, the same must also be true for an agency.

[10] 40 A.3d 917 (D.C. 2012).

[11] 123 A.3d 947 (D.C. 2015).

[12] *See* D.C.Code § 28–3302(b), imposing a 4% cap on interest on judgments against the District of Columbia. *See* Employee's Submission of Social Security Statement (December 3, 2021), Attachment, Pay Stubs (reflecting payment for back pay and Terminal/Annual Leave Pay, both dated for March 31, 2021—over six months from the Superior Court Order upholding OEA's reversal of Employee's termination.

[13] *See* Petitioner's Submission of Social Security Statement (December 3, 2021), Attachment, Pay Stub (reflecting payment for Terminal/Annual Leave Pay).

Retirement Accounts

Employee also raised the issue of his retirement accounts not being properly funded during the many status conferences convened to address his Motion for Enforcement. With respect to Employee's 401(a) retirement account, the Back Pay Worksheet provides that the District government contributed 5% of the total back pay owed, amounting to $20,800.36, to his employer-sponsored 401(a) retirement account. Employee further asserted that funds were missing from his 457(b) retirement account. However, upon review with the assistance of a representative from the District's Human Resources agency during a status conference convened on August 9, 2022, it was determined that Employee had withdrawn funds from his 457(b) account prior to his wrongful termination and no contributions were made by Employee after his withdrawal. As such, I find that Agency properly provided Employee his 401(a) retirement benefits and his 457(b) account was properly intact in accordance with Employee's corresponding elective contributions.

Health and Life Insurance

Employee raised the issue of the continuation of his health and life insurance benefits into retirement. Specifically, Employee asserted his intention on retiring in 2022 and carrying health and life insurance into retirement. However, to do so, a District government employee who elects to carry their medical insurance and life insurance benefits into retirement must be enrolled in the newly elected insurance plan for a continuous five years immediately preceding the retirement date.[14]

Here, Agency provided a copy of Employee's Benefits Restoration Agreement along with its September 9, 2021 Brief on Interest. The Restoration Agreement demonstrates that Employee voluntarily elected to forego his health and life insurance benefits for the time he was wrongfully terminated. Employee checked "Option B" on the form which provides that "[Employee] voluntarily elect, however, not to restore the selected benefits below during the time period specified in the. . . hearing decision." Employee initialed the "Benefits" box which indicated that Employee was waiving his option to have coverage for life and health insurance from the time of his termination (December 1, 2013) until the time he was reinstated (December 20, 2020). By choosing this option, Employee, in effect, instructed Agency not to deduct any premium payments towards his health or medical insurance that would have otherwise been deducted from Employee's back pay award. Therefore, Employee was not covered under the District government's sponsored health and life insurance from December 1, 2013, through December 20, 2020. The Benefits Restoration Agreement is a legally binding document which contains Employee's signature and I find no reason to disturb the agreement between Employee and Agency regarding the restoration of his benefits.[15]

[14] *See* E-DPM, Chapter 21, Issuance 21B-14 (March 4, 2010); *See also* E- DPM § 2202.2

[15] Perhaps this will serve as a cautionary tale for the consequences that may come about when an employee signs a Benefits Restoration Agreement when an agency's adverse action is reversed.

Social Security Benefits

In a December 3, 2021 submission**,** Employee maintains that the District government has not made any contributions towards his social security covering the periods from 2013-2020. To support his position, Employee submitted a printout of his Social Security account showing that the "Taxed Social Security Earnings" and "Taxed Medicare Earnings" were $0 during the years he was wrongfully terminated. Employee asserts that the money for his Social Security and Medicare earnings from 2020 were associated with other employment.

Agency highlights that the District government's Social Security and Medicare contributions in connection with Employee's back pay award are reflected in Employee's paystub, dated March 31, 2021, attached to Employee's December 3, 2021 Submission of Social Security Statement. This pay stub shows that $5,934.80 and $5,508.70 were withheld on Employee's back pay check by the District government to pay Employee's Medicare (MED/EE) and Social Security taxes (Fed OASDI/EE), respectively.

Agency explains that the omission of these taxes on Employee's Social Security account printout is explained in the printout itself. Specifically, the printout states, "[s]ome or all of your earnings from last year may not be shown on your Statement. It could be that we are still processing last year[']s earnings report when your Statement was prepared." Despite Employee's contention that Agency and the District government have not paid his Medicare and Social Security taxes for the years he was wrongfully terminated, the documents of records suggest otherwise. The printout of Employee's Social Security statement further provides a disclaimer that likely explains why these contributions are not reflected in Employee's Social Security account: these funds were still being processed at the time of the printout. While the Social Security Administration may have some lag time in having taxes paid on behalf of an employee reflected in its systems, I find that Agency has properly paid and accounted for the Social Security and Medicare benefits owed to Employee.

ORDER

Accordingly, it is hereby **ORDERED** that Agency pay Employee prejudgment simple interest at a rate of 4% per annum on the back pay amount, to be calculated from the date of his unlawful termination, December 1, 2013, through March 31, 2021, the date of his back pay check.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge