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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
EMPLOYEE,	)	OEA Matter No. 1601-0215-11C21
v.	)	Date of Issuance: March 15, 2022
D.C. PUBLIC SCHOOLS,	)	JOSEPH E. LIM, ESQ.
Agency	)	Senior Administrative Judge
Employee <i>Pro se</i>	)	
Lynette Collins, Esq., Agency Representative	)	

**2<sup>nd</sup> ADDENDUM DECISION ON COMPLIANCE**

PROCEDURAL HISTORY

On September 9, 2011, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Public School’s (“DCPS” or “Agency”) final decision to remove him from his position as a School Psychologist due to two (2) consecutive years of a “Minimally Effective” IMPACT rating.<sup>1</sup> Employee’s termination was effective August 12, 2011. On May 20, 2014, I issued an Initial Decision (“ID”) dismissing the matter for lack of jurisdiction due to Employee’s retirement.

Employee subsequently filed a Petition for Review with OEA's Board on June 26, 2014. On February 16, 2016, the OEA's Board issued an Opinion and Order on Petition for Review denying Employee’s petition. It held that OEA had no jurisdiction over his appeal because the evidence supports a finding that Employee's decision to retire was of his own volition and was not a result of incorrect or misleading information on Agency's part.

Thereafter, Employee appealed to the Superior Court of the District of Columbia (“Superior Court”). On February 21, 2017, the Superior Court affirmed OEA’s decision and denied Employee’s appeal.<sup>2</sup> Employee’s Motion for Reconsideration was denied on April 11, 2017.

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<sup>1</sup> IMPACT is the effectiveness assessment system Agency uses to rate the performance of school-based personnel.

<sup>2</sup> *Johnson v. District of Columbia Public Schools, et al.*, Case No. 2016 CA 001551 (D.C. Super. Ct. February 21, 2017).

Employee then appealed to the District of Columbia Court of Appeals (“CA”). On August 9, 2018, the CA vacated the ID on the issue of jurisdiction and remanded the case to the Superior Court for further remand to OEA. The Superior Court then remanded the matter back to OEA on February 8, 2019, with instructions to proceed with the matter. On June 14, 2019, I issued an Initial Decision on Remand (“IDR”) upholding Agency’s termination of Employee’s employment due to his two consecutive years of ‘Minimally Effective’ IMPACT ratings.<sup>3</sup>

Employee appealed the IDR and on May 19, 2020, the OEA Board upheld the legality of the IMPACT but remanded the matter to the undersigned for the purpose of conducting an evidentiary hearing.<sup>4</sup> Specifically, the Board determined that a hearing was needed to address Employee’s allegations of procedural errors in Agency’s removal of Employee as it pertained to his IMPACT scores. After an Evidentiary Hearing on July 23, 2020,<sup>5</sup> I issued a Second Initial Decision on Remand (“Second IDR”) on October 15, 2020, whereby I reversed Agency’s action of separating Employee for receiving a “Minimally Effective” IMPACT rating for two consecutive school years but upheld his “Minimally effective” IMPACT score for school year 2010-2011. Consequently, I ordered Agency to reinstate Employee to his last position of record and reimburse Employee all backpay and benefits lost as a result of the separation less any retirement benefits, he has received. Agency appealed, and on February 4, 2021, the OEA Board held that Agency failed to prove just cause in terminating Employee and denied Agency’s Petition for Review.<sup>6</sup> Employee accepted Agency’s job offer on or about December 21, 2020, and his position as a School Psychologist took effect on January 4, 2021.

At the parties’ request, an Evidentiary Hearing on the issue of the amount of backpay was held on June 23, 2021, with the parties submitting their written closing arguments by August 4, 2021. On September 29, 2021, I issued an Addendum Decision on Compliance where I found that Employee failed to adequately mitigate his damages for 2011 to 2020. I thereby ordered Agency to reimburse Employee all backpay and benefits lost as a result of the improper removal action starting from August 2011 until January 3, 2021, less any annuity retirement benefits paid<sup>7</sup> and less any amounts he could have earned had he diligently sought other work, prorated to the months Employee was unemployed.<sup>8</sup> Employee took issue with the Addendum Decision and appealed to the OEA Board on October 28, 2021. On December 17, 2021, the OEA Board denied Employee’s appeal.<sup>9</sup>

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<sup>3</sup> *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18, *Initial Decision on Remand* (June 14, 2019).

<sup>4</sup> *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18, *Opinion and Order on Remand* (May 19, 2020).

<sup>5</sup> Due to the District of Columbia’s Covid-19 State of Emergency, the Evidentiary Hearing was held virtually via WebEx.

<sup>6</sup> *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20, *Opinion and Order on Remand* (February 4, 2021).

<sup>7</sup> See 6B DCMR 1149.12(b).

<sup>8</sup> The Addendum Decision on Compliance specified the amounts per year from 2011 to 2020 that Agency must deduct from Employee’s backpay.

<sup>9</sup> *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20C21, *Opinion and Order* (December 17, 2021).

On January 27, 2022, Employee filed a motion that he titled “Motion for Compliance Addendum” whereby he complained that Agency failed to submit calculations regarding his annual leave payout, retirement pay adjustment, restoration of benefits, or attorney’s fees. On February 3, 2022, I ordered Agency to submit detailed calculations and supporting documents to show the amount of backpay and benefits due Employee, if any, by February 22, 2022. The record closed after both parties submitted their briefs, supporting documents and counter-responses.

### JURISDICTION

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

### ISSUE

Whether Agency has fully complied with the September 29, 2021, Addendum Decision on Compliance.

### Positions of The Parties

Agency asserts that it has fully complied with the Addendum Decision on Compliance and submitted its arguments and a copy of the relevant regulations regarding backpay and corresponding benefits. Employee concedes that he is not due any backpay due to his receipt of the annuity retirement benefits paid to him from 2011 to 2020 as well as his failure to make reasonable efforts to mitigate his damages after August 12, 2011. However, Employee counters that he is still owed an annual leave payout in the amount of \$192,000, as well as a retirement pay adjustment.

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

#### **Employee’s Annual Leave payout from August 2011 to December 2020**

DCPS classifies ET 15/12, ET 15/11 and ET 15<sup>10</sup> employees as school-based employees and EG 09 employees as non-instructional employees who work a 40-hour week and fifty-two (52) weeks a year. The parties’ Collective Bargaining Agreement (“CBA”) provides that DCPS recognizes the Washington Teacher’s Union (“WTU”) as the sole and exclusive bargaining representative for the purpose of negotiating all matters related to rates of pay, wages, benefits, hours of employment, and working conditions for employees in the occupational bargaining units and job classifications. It is uncontroverted that Employee was a member of the WTU, and as such was covered by its CBA with Agency. It is also undisputed that at the time of the Employee’s termination, reinstatement and subsequent resignation, Employee was employed with the Agency as an ET 15 (10-month) employee. Thus, the CBA and DCPS’s Leave and Retirement Policy govern the issue of Employee’s entitlement to a payout for both sick and annual leave.

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<sup>10</sup> ET 12 are 10 month employees who do not work during the school summer.

According to the CBA between WTU and Agency, only EG-09 WTU members receive annual leave, all others receive sick leave. Section 17.2.1 of the CBA provides that only twelve (12) month WTU members receive annual leave.<sup>11</sup> As such, ET15 WTU members, including the Employee, do not accrue annual leave. Therefore, I find that Employee is not entitled to a payout of annual leave.

### **Employee's Sick Leave payout from August 2011 to December 2020**

CBA Article 17 Leave Policies govern whether Employee is entitled to a payout of sick leave. CBA Article 17, Section 17.1.1 outlines that twelve (12) days or (96) hours of sick leave are posted at the beginning of each school year for ten (10) month WTU members. Section 17.1.1. continues "unused sickleave shall be carried forward from one year to year."<sup>12</sup> In addition, the DCPS Leave and Retirement Policy outlines that "accumulated sick leave shall not be payable upon resignation or termination."<sup>13</sup> Because Employee voluntarily resigned his regained position after he was rehired on January 4, 2021, I find that, based on the CBA, Employee is not entitled to a payout of sick leave.

### **Employee's Retirement Annuity (retirement pay adjustment)**

Employee argues that there should be an increase in his retirement annuity. It is uncontroverted that for WTU members, retirement annuities are based solely on their contribution. Specifically, 8% of the Employee's pay for each pay period is placed in their retirement fund. In this case, the 8% would have been based on any backpay that was awarded to the Employee. However, because the Employee failed to mitigate his damages, he is no longer entitled to backpay. As such, no contributions can be made to his retirement annuity. Thus, he is not entitled to an increase in his annuity.

### **Employee's Attorney Fees**

While Employee asserts that Agency should pay his attorney fees, he has not submitted a full and final petition for attorney fees. Thus, this issue can only be dealt with once he has done so.

In conclusion, I find that Agency has fully complied with the September 29, 2021, Addendum Decision on Compliance. Therefore, Employee's Motion for Compliance is dismissed.

## **ORDER**

Since Agency has complied with this Office's decision, Employee's motion for compliance is dismissed.

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<sup>11</sup> Agency Exhibit 1. CBA Article 7. Leave Policies

<sup>12</sup> *Id.*

<sup>13</sup> See Agency's Exhibit Two. DCPS Employee Leave and Retirement Policy

FOR THE OFFICE:

s/ Joseph Lim  
JOSEPH E. LIM, ESQ.  
Senior Administrative Judge