

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:)	
)	
EMPLOYEE ¹ ,)	
Employee)	OEA Matter No. 1601-0053-22C23
)	
v.)	Date of Issuance: October 30, 2024
)	
D.C. DEPARTMENT OF EMPLOYMENT)	
SERVICES,)	
Agency)	MICHELLE R. HARRIS, ESQ.
)	Senior Administrative Judge
_____)	
Morris E. Fischer, Esq., Employee Representative)	
Tonya Robinson, Esq., Agency Representative)	

ADDENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL HISTORY

On May 13, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Employment Services’ (“Agency” or “DOES”) decision to terminate him from his position as a Tax Examiner.² The effective date of the termination was April 14, 2022. This matter was assigned to the undersigned Senior Administrative Judge (“AJ”) on August 2, 2022. Following status conferences and the submissions of briefs in this matter, on May 2, 2023, I issued an Initial Decision (“ID”) reversing Agency’s adverse action. Agency did not file an appeal; thus, this decision became final. On June 15, 2023, Employee, by and through his counsel, filed a Motion for Attorney Fees. During a Status Conference held on August 17, 2023, Employee raised an issue regarding Agency’s failure to comply with the ID, thus initiating the instant matter for compliance. On August 18, 2023, I issued an Order requiring the parties to address the calculation of backpay issues raised by Employee. The parties’ briefs were due on or before September 1, 2023. Both parties filed their briefs as required. Agency asserted therein that the calculation of backpay (including restoration of leave etc.) was done by the District of Columbia Department of Human Resources (“DCHR”). Upon review of the record, the undersigned determined that a Status Conference was warranted for both the instant Compliance matter and the attorney fee petition (1601-0053-22AF23). As a result, on September 21, 2023, I issued an Order scheduling a

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

² Employee was charged with “Unauthorized absence of five (5) workdays or more” under DPM §1605.4(f)(2).

Status Conference for October 3, 2023. Both parties appeared for the Status Conference as required. Through email correspondence for which the undersigned was copied on, the parties exchanged information regarding the documentation needed to process Employee's backpay.

On November 2, 2023, Employee, by and through his counsel, filed a Motion for Sanctions. Employee asserted that Agency had not provided information in a timely manner and had "manufactured obstacles" that were holding up the restoration of backpay. As a result, Employee requested that Agency be sanctioned and "pay a penalty" to Employee for non-compliance in the amount of \$200 per day that the backpay had not been paid. On November 7, 2023, I issued an Order convening a Status Conference for November 14, 2023. Further, that Order required Agency to provide a statement regarding the status of Employee's backpay restoration. Both parties appeared for the conference as required. The undersigned advised the parties during the conference that monetary sanctions were not a part of the authority of this Office and that the motion would be denied. Further, it was determined that there were two (2) outstanding documents needed from Employee to continue the processing of his backpay. Employee needed to add his printed name to a form and was required to notify Agency whether he will provide copies of his tax transcripts or if he wants Agency to submit the request to the IRS directly. Agency advised that the submission to the IRS and the subsequent receipt of those documents could take several months. Additionally, during that conference, the undersigned also advised the parties that bi-weekly status updates regarding the process and submission of documents would be required moving forward. In a Post Status Order issued November 15, 2023, the undersigned denied Employee's Motion for Sanctions. Additionally, that Order required that Agency submit Status Updates on November 29, 2023, and December 14, 2023. Employee was also required to provide notice regarding tax transcripts by November 29, 2023. That Order also scheduled a Status Conference for December 14, 2023, if needed.

On December 12, 2023, by and through email correspondence, Employee's representative initiated a claim regarding Agency's requests of additional forms for backpay restoration and reinstatement.³ Agency's representative responded to the email thread and requested that the December 14, 2023, Status Conference be convened. The undersigned sent an email to the parties confirming that the December 14, 2023, Status Conference would proceed.⁴ All parties appeared at the conference as required. In a Post Status Conference Order issued December 14, 2023, the undersigned instituted a schedule for status updates regarding the restoration of Employee's backpay. Agency was required to provide Status Updates regarding the backpay restoration process; to include all relevant information pertaining to the review, calculation, and process of Employee's backpay. Agency was also required to address the following in the Status Update: (1) the identification of the District agency currently reviewing/processing documents (and identify the department/reviewing entity); (2) dates of last actions; (3) dates any documents were requested from Employee; (4) dates Employee responded to request; (5) any issues regarding documents; and (6) any timelines conveyed by the reviewing agencies regarding next steps in the process. That Order required the Status Updates to be submitted on or before the following dates: January 16, 2024; February 16, 2024; March 15, 2024; April 16, 2024. The dates of May 16, 2024, and June 14, 2024, were reserved dates if the matter had not yet been resolved. Further, the parties were reminded that all communications and submissions, whether via email, written

³ Employee's counsel asserted that "DOES again alleges this [submission of forms] is for his benefit, etc., - We see it quite the other way." It should be noted that based on an email thread that the undersigned was copied on, that Employee submitted forms to Agency on December 13, 2023. The undersigned advised the parties that moving forward that the undersigned should not be copied on correspondence of this nature unless otherwise ordered/directed.

⁴ The undersigned also required the parties to submit email documentation regarding the forms that were requested/referenced to in the email correspondence.

or during Status Conferences before this Office, should be professional and respectful in nature.⁵ The undersigned advised that future filings or submissions that contained unprofessional references or which were disrespectful to the other party would be stricken from the record. The undersigned also noted that while Employee (or his representative) was within his rights to question and/or refuse to submit requested information/documentation during this process, that any delays and/or refusals to submit required documentation would impact receipt of backpay. The undersigned also advised Employee and his representative to review the District Personnel Manual (DPM) guidance (DCHR E-DPM Instruction No. 11B-80) regarding the restoration of backpay, so that they would be better informed regarding the District mandated requirements for backpay. That Order also waived Agency's December 14, 2023, Status Report since a Status Conference was held.

The following is representative of the procedural history regarding the Status Reports required by the December 14, 2023, Order:

1. Agency filed its "Second Status Report Regarding Compliance With Post Status Order" on January 17, 2024. Agency asserted that on January 10, 2024, DOES sent the required reinstatement packet to DCHR for review and approval.
2. Agency filed its "Third Status Report" on February 16, 2024.⁶ Agency asserted therein that:
 - a. "Based on District Personal Manual (DPM) §09, [Employee] cannot return to his position of record with DOES because (1) on July 22, 2019, he was non-competitively appointed to a Not to Exceed (NTE) term position; (2) NTE term appointments are limited to 4 years; and (3) [Employee's] fourth and final NTE term ended on July 23, 2023, assuming no breaks in service."
 - b. Agency further noted that "once an employee reaches the end of the fourth and final NTE term, the employee has the option to apply for career service positions with the District government or pursue other employment options, if the employee was non-competitively appointed to the original NTE term rather than through open competition. See, DPM §209.9"
 - c. Agency also cited that "[Employee] was removed from his position with DOES on April 14, 2022, prior to the expiration of his third NTE term. Based on the reversal of the termination, [Employee] will receive backpay through his fourth and final NTE term that ended on July 21, 2023."
 - d. Agency further asserted that "since [Employee's] fourth and final NTE term expired on July 21, 2023, [Employee] will need to either apply for a career service position with District government or pursue other employment opportunities. [Employee] is not eligible for conversion to a permanent position, pursuant to DPM §209.9(a), because his original NTE term appointment was the result of a non-competitive appointment rather than open competition....Accordingly, [Employee] will receive backpay through July 21, 2023, the end of the fourth and final NTE term. The backpay package remains under review with DCHR."
3. Following the receipt of Agency's February 16, 2024, Status Report, through email correspondence, the undersigned ascertained that the parties were amenable to attempt to resolve the matters through mediation. Mediation was scheduled for March 7, 2024.

⁵ Correspondence from Employee's representative was addressed.

⁶The assertions raised in the February 16, 2024, Status Report were not raised before this Office during the adjudication of the matter.

4. On March 8, 2024, Employee filed a Motion regarding Reinstatement.⁷
5. Mediation was not held on March 7, 2024, due to Employee's filing of the Motion regarding Reinstatement. A subsequent notice for mediation was issued on March 18, 2024, which scheduled mediation for April 9, 2024.
6. On March 18, 2024, Agency filed its "Fourth Status Report." Agency noted therein that there had been no updates since its February 2024 Status and reiterated that Employee could not be reinstated because his term had ended.
7. Mediation was held in this matter on April 9, 2024. On April 10, 2024, the undersigned was notified that mediation was unsuccessful. As a result, on April 10, 2024, I issued an Order requiring Agency to submit a response to Employee's March 8, 2024, Motion regarding reinstatement. Agency's response was due by or before May 15, 2024. That Order also required Agency to submit Status reports for May and June 2024.
8. On April 4, 2024, Agency filed its "Fourth Status Report."
 - a. Agency provided therein that on March 19, 2024, DOES received an email from DCHR citing that a document provided by Employee "with the additional disclaimer language was unacceptable."
 - b. "DCHR advised that (1) the additional disclaimer language can be added elsewhere in the packet, should [Employee] desire to submit the language again; and (2) the document needed to be completed and submitted again, in order to continue processing the backpay package."
 - c. Agency asserted that it contacted Employee on March 19, 2024, and advised him of the DCHR correspondence. Agency cited that its email to Employee noted that "DCHR says the "contingency clause" added to the bottom of the form is not acceptable. The form is needed to process your backpay request and they will not move forward with the form you submitted in its modified state."
 - d. Agency cited that Employee resubmitted the form to DOES on March 20, 2024, and that on March 27, 2024, DOES confirmed that all was sent to DCHR. Agency also named the DCHR representative as Carmen Ealey Tate.
 - e. Agency again asserted that Employee could not be reinstated.
9. On May 15, 2024, Agency filed Response to Employee's Motion⁸ and contemporaneously filed its "Sixth Status Report."
 - a. Agency reported in the Status Report that "as of April 12, 2024, DOES HR contacted [Employee] via email and advised of the latest communication from DCHR. [Employee] responded with additional questions to be posed to DCHR." Agency cited those questions were sent to DCHR on April 17, 2024.
 - b. Agency also noted that on April 24, 2024, email correspondence was exchanged in response to Employee's inquiry regarding the time frame to issue back pay. Agency advised that "additional time would be needed because [Employee] has requested an additional step in the process prior to payment."
 - c. On May 2, 2024, "DCHR advised DOES HR of the transmission of the back pay package to OPRS." Agency notified Employee on May 3, 2024.

⁷ This Motion was filed by Employee, *Pro se*.

⁸ Agency's arguments and positions will be addressed in the analysis portion of this decision.

10. On June 10, 2024, Agency submitted its “Seventh Status Report.”
 - a. Agency asserted that on May 22, 2024, Employee was paid the backpay as calculated by DCHR and OPRS. After receiving the payment, [Employee] sent a communication to OPRS claiming that he is due a 3.5% bonus from FY 22.
 - b. Agency provided that “DOES reviewed the emails associated with this bonus payment and reached out to DCHR to have the issue of the bonus payment resolved, since DCHR process the bonus payment for all District government employees.
11. On June 11, 2024, the undersigned issued an Order requiring Agency to address the backpay and bonus issue and include all relevant information. Further, this Order required Employee to provide a reply to and also provide confirmation of the receipt of backpay and denote the amount. Agency’s response was due by or before June 26, 2024. Employee’s response was due by or before July 9, 2024.
12. On June 27, 2024, Agency filed its “Eighth Status Report”
 - a. Agency cited that on June 26, 2024, “DOES submitted the memorandum required by DCHR and OPRS to calculate the 3.5% bonus from FY 22. OPRS advised that the bonus calculation and payment would be processed expeditiously.”
13. On July 8, 2024, Employee filed his Reply regarding Backpay⁹.
 - a. Employee provided therein that on “05/22/24 the employee received the calculation worksheet for backpay indicating the amount awarded was \$106,193.12 and the net amount of \$58,114.56 was directly deposited into the employee’s bank account.”
 - b. Employee further noted that upon review he had questions regarding bonus pay and wage increases which he presented to OPRS.
 - c. Employee also cited that “On 06/28/24 OPRS confirmed that the required documentation to calculate the bonus had been received, the bonus was processed, and funds were directly deposited into employee’s account. The employee verified that a net amount of \$1,1765.36¹⁰ was deposited into the account. Upon request on 07/02/24, OPRS provided the transaction details with a gross bonus amount of \$2,875.18.”
 - d. Employee also noted that he was instructed to ask DOES HR about the cost-of-living adjustments.
 - e. Employee cited that “on 07/01/24 DOES HR (Tracey Langley) responded in an email stating: You reached your four-term limit on your appointment effective 7/22/23. You were ineligible for payment on 10/9/23.”

Upon review of the submissions as noted above in the procedural history of this matter, the undersigned determined that an Evidentiary Hearing was not warranted. The record is now closed.

JURISDICTION

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

⁹ Employee’s position regarding back pay will be discussed in the analysis portion of this decision. Employee avers that other coworkers were serving in term positions for over five (5) years. Employee also asserted that the term date should have affected the payment made on 10/9/2023.

¹⁰ The undersigned believes that this number is representative of a typo and that the amount is \$1,765.36.

ISSUE

Whether Agency has complied with the Initial Decision.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

In the instant matter, an Initial Decision was issued May 2, 2023. Agency did not file an appeal; thus, this decision became final. On June 15, 2023, Employee, by and through his counsel, filed a Motion for Attorney Fees. During a Status Conference held on August 17, 2023, in the matter related to the attorney fee petition, Employee raised an issue regarding Agency's failure to comply with the ID, thus initiating the instant matter for compliance. OEA Rule 640¹¹ addresses compliance and enforcement of Orders issued by this office. OEA Rule 640.1 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. Further, OEA Rule 640.10 states that if an Administrative Judge determines that the agency has not complied with the final decision, the Administrative Judge shall certify the matter to the General Counsel. The General Counsel shall order the agency to comply with the Office's final decision in accordance with D.C. Official Code § 1-606.02.

Analysis

OEA has held the following as it relates to the benefits that are reimbursable to an employee upon an administrative ruling that reversed a personnel action:

“Pursuant to 6-B DCMR 1149.2, “[a]n employee who, on the basis of a timely appeal of an administrative determination is found, by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have undergone an unjustified or unwarranted personnel action resulting in the withdrawal or reduction of all or part of an employee's pay or benefits, shall be entitled, on correction of the personnel action, to back pay under this section.” Further, E-DPM Instruction No. 11B-80 (II)(a) (October 4, 2011), highlights that, upon authorization from the appropriate authority to correct the personnel action, an agency shall determine the employee's back pay entitlement by recomputing the period covered by the action. The affected employee's pay and benefits (as prescribed by law and regulation) shall be recomputed as if the unjustified or unwarranted personnel action had not occurred (emphasis added). E-DPM Instruction No. 11B-80 (II)(b)(2)(i) additionally provides that, when an employee is entitled to receive back pay, the agency shall offset and deduct from the gross back-pay award, “authorized deductions that would have been made from the employee's pay”¹²

In the instant matter on May 22, 2024, Agency, by and through DCHR and OPRS, paid Employee backpay in the amount of \$58,114.56 which was directly deposited into Employee's bank account. Agency cited in its June 10, 2024, Status Report (“Seventh Status Report”) that it had paid Employee and Employee confirmed receipt of this payment in his July 8, 2024, response. Agency also asserted in the Seventh Status Report that Employee had raised an issue with OPRS regarding a bonus of 3.5% from FY'22. As a result, on June 11, 2024, I issued an Order requiring Agency to provide a

¹¹ 6-B DCMR Ch. 600 (December 27, 2021)

¹² *Laura Jackson v. DC Department of Health*, OEA Matter No. 2401-0020-10R17C19 (September 23, 2018).

response regarding this assertion and ordered Employee to submit a reply. Agency filed its “Eighth Status Report” on June 27, 2024, wherein, Agency cited it was informed by OPRS that the bonus would be processed expeditiously. Employee cited in his July 8th Reply that he had received the bonus of \$1,765.36 deposited into his bank account as well. Employee also asserted that he received the transaction information regarding the gross amount of pay.

Employee asserts that Agency failed to pay him the cost-of-living increase that was received on October 9, 2023. Agency asserts that because Employee’s term ended on July 22, 2023, he was not eligible for this cost-of-living increase. Employee also avers that he has not been appropriately reinstated to his position of record. Employee avers that he should be reinstated and converted to a permanent position. Employee contends that in 2016, the “DC Council passed the Universal Paid Family Leave Amendment” which “provided a permanent source of funding for the Department of Employee Services (DOES) and the Office of Paid Family Leave (PFL).”¹³ Employee avers that “PFL recruited personnel in open competition process from the general public using Monster.com in 2019 to open the office.” Employee asserts that he applied during the open competition process using Monster.com.¹⁴ Employee avers that “DPM Instruction 8-O & 38-19 defines open competition for recruitment of a position open to the general public,”¹⁵ thus, Agency’s reliance upon DPM §209 is incorrect. Employee maintains that because he applied via Monster.com, he was recruited via open competition. Additionally, Employee cites that his offer letter stated the following: “Congratulations! You have been selected for the Career Service.” Employee maintains that this “documents that employee was selected from a pool of applicant through the open competition process.”¹⁶ Employee also references email correspondence from Joseph Pino (“Mr. Pino”) that notes the same. As a result, Employee argues that he should be converted to a permanent position and reinstated.

Agency asserts that Employee cannot be reinstated because he was classified as a term employee¹⁷ and was “non-competitively appointed to a Not-to Exceed (NTE) term position; (2) NTE term appointments are limited to 4 years; and (3) [Employee’s] fourth and final NTE term ended on July 23, 2023, assuming no break in service.”¹⁸ Agency avers that pursuant to DPM §209 that “an employee’s NTE term expires at the end of the term.” Further, Agency maintains that Employee’s term began on July 22, 2019, thus ended on July 23, 2023. Agency avers that “once an employee reaches the end of the fourth and final NTE term, the employee is not automatically converted to a permanent position.” Instead, the Agency proffers that an employee has the “option to apply for career service positions with the District government or pursue other employment options, if the employee was non-competitively appointed to the original NTE term rather than through open competition.” Agency further asserts that “Employee was removed from his term position on April 14, 2022, prior to the expiration of his third NTE term.” Agency cites that because Employee’s termination was reversed, “[Employee] will receive backpay through his fourth and final NTE term that ended on July 21, 2023.

In the instant matter, the undersigned finds that DPM §209 is applicable and that based upon the documents in the record, namely the SF-50 provided by Agency in its May 15, 2024, response, that

¹³ Employee’s Motion (March 8, 2024)

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶¹⁶ *Id.*

¹⁷ As was previously cited, Agency did not raise this issue while this matter was before adjudication.

¹⁸ Agency’s Response (and Motion to Dismiss) to Employee’s Motion to Convert Reinstatement Position to a Permanent Position (May 15, 2024).

Employee's classification was a NTE term appointment.¹⁹ DPM §209, specifically provides that: §209.6 – “An employee serving under a temporary or term appointment shall not acquire permanent status solely on the basis of their temporary or term appointment.” Further, §209.9 provides that “an employee continuously serving in a Career Service term appointment for more than four (4) years shall: (a) be converted to a permanent position, if his or her term appointment was originally made through open competition and funding for the employee is expected to continue; (b) be hired into a permanent position through open competition; or (c) not be appointed to a term.” Here, while Employee avers that he was hired through open competition, it is clear from the record that he was non-competitively hired. Further, Employee's offer/hire letter dated June 25, 2019, specifically cites that his status was “Career Service – Term Position” which was to begin on July 22, 2019, and had an NTE of August 21, 2020. Additionally, Employee's email exchanges with Mr. Pino also reflect that Employee specifically inquired whether the position would be permanent and Mr. Pino on several occasions noted it would not be. In an email dated May 23, 2019, Mr. Pino responded to Employee's inquires and noted that he “wish we could offer permanent” but that it was not available. Further, in a subsequent email on May 24, 2019, Mr. Pino cited that “all positions with PFL are term.” As a result, the undersigned finds that Employee's reinstatement is governed under DPM §209. This noted, I also find that Employee would not be eligible for the October 22, 2023, cost of living increase as his NTE term ended on July 22, 2023. Further, this Office has consistently held that OEA does not have the jurisdictional authority to convert a term appointment to a permanent position.²⁰

As a result of the aforementioned, I find that Agency's backpay payment of \$58,114.6, plus the additional amount of \$1,765.36 for FY'22 bonus to Employee which was received via direct deposit and confirmed in Employee's July 8, 2024, Reply, evinces that Agency has met the requirements for compliance with the orders of the May 2, 2023, Initial Decision. Consequently, I further find that this Office does not have the authority to further address Employee's claims regarding reinstatement. As a result, I find that Employee's Motion for Compliance/Enforcement should be dismissed.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Motion for Compliance/Enforcement is **DISMISSED**.

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Senior Administrative Judge

¹⁹ Agency's Response at Attachment A.

²⁰ See *Carolynn Brooks v. D.C. Public Schools*, OEA Matter No. J-0136-08, *Opinion and Order on Petition for Review* (July 30, 2010); *Roxanne Smith v. D.C. Department of Parks and Recreation*, OEA Matter No. J-0103-08, *Opinion and Order on Petition for Review* (May 23, 2011).