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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| DEBORAH GUDGER, |) | |
| Employee |) | OEA Matter No. 1601-0087-16C19 |
| |) | |
| v. |) | Date of Issuance: December 17, 2019 |
| |) | |
| DISTRICT OF COLUMBIA |) | |
| PUBLIC SCHOOLS, |) | MICHELLE R. HARRIS, ESQ. |
| Agency. |) | Administrative Judge |
| |) | |
| |) | |
| |) | |
| _____ |) | |
| Sara Safriet, Esq. Employee Representative |) | |
| Nicole Dillard, Esq., Agency Representative |) | |

ADDENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL HISTORY

An Initial Decision was issued on December 28, 2018 (“December 28th Initial Decision”), which reversed the District of Columbia Public Schools’ (“Agency” or “DCPS”) decision to remove Deborah Gudger (“Employee”) from service. The Initial Decision ordered Agency to reinstate Employee and reimburse her all back-pay and benefits lost as a result of her removal. Agency was also ordered to file documents evidencing compliance with the terms of the Initial Decision within thirty (30) days from the date the Initial Decision became final. Because Agency elected not to file a Petition for Review with OEA’s Board or with the District of Columbia Superior Court of the December 28th Initial Decision, it became the final decision of this Office. Accordingly, Agency had to comply with the Initial Decision pursuant to OEA Rule 635.1. An Addendum Decision on Attorney Fees was issued in this matter on June 17, 2019.

The procedural background regarding the compliance issues in this matter is as follows:

1. On June 26, 2019, Employee filed a Motion to Enforce Judgement and Notice Regarding Attorney Fees. Employee asserted that she had been reinstated and had received back pay, but as of the date of the motion, she was not certain that she had been fully paid and

reimbursed for lost benefits. Employee indicated that on May 23, 2019, her counsel emailed Agency's representative and noted that it appeared that the back pay had been calculated incorrectly. Employee's counsel requested that the DCPS pay scale be shared for the Fiscal Years (FY) '16, '17, and '18, and requested the cost of living increases for 2016, 2017, 2018 and 2019. On May 30, 2019, Employee's counsel received information from Agency's representative that they "noticed the issue and were working on recalculations."

2. Employee received a check on or around June 17, 2019, in the amount of \$1,679.86 and was told it was for retroactive pay for 2016. As of the date of the Motion for Enforcement, Employee also indicated that she had not received the information for the pay scale and had not been restored the 420 hours of annual leave and 280 hours of sick leave that she was owed. Also, an additional 48 hours of LWOP that Employee had to use had not been restored.
3. Employee also indicated that she thought she was owed DCPS' portion of the medical benefits that she did not use while she was terminated and requested those benefits be paid to her as well.
4. Employee also said that she had not received confirmation that her IMPACT rating had been changed to "no consequences." Employee also cited that she still appeared as "terminated" in the PeopleSoft system.
5. On July 1, 2019, the undersigned Administrative Judge issued an Order scheduling a Telephonic Status Conference to address Employee's Motion. The conference was scheduled for July 19, 2019.
6. Following the Telephonic Status Conference on July 19, 2019, I issued an Order the same day requiring the following:
 - a. On or before July 24, 2019, Agency will provide an update regarding Employee's IMPACT rating status for the year Employee was terminated, which should reflect "no consequence". Additionally, Agency will provide an update as to Employee's status in the PeopleSoft HR system regarding Employee's reinstated/active status (she should not show as "terminated" in Peoplesoft).
 - b. On or before July 26, 2019, Agency shall provide the pay scale information for the 2016, 2017, and 2018 pay years; as well as any cost of living increases/percentages applicable for those same years. Agency shall also provide all relevant information regarding the calculations utilized to determine Employee's back pay. On or before August 16, 2019, Agency shall provide an update about the outstanding Annual Leave issue (48 LWOP previously documented, six (6) hours outstanding to reflect 408 Annual Leave Hours).
 - c. Employee raised an issue regarding her receipt of any premium percentages that Agency would have paid for benefits (Health, Dental, Vision, Life Insurance) had

she not been terminated, now that she has been reinstated. Parties were instructed to brief this issue. Employee's brief was due on or before August 16, 2019. Agency's brief was due on or before August 26, 2019.

7. On August 15, 2019, Employee filed a Consent Motion to Extend Time to File Briefs. On August 16, 2019, I issued an Order granting the Motion and required that Employee's brief be submitted on or before September 6, 2019, and Agency's brief be submitted on or before September 17, 2019.
8. Employee's brief was received at OEA on September 12, 2019. On September 19, 2019, Agency filed a Consent Motion for an Extension Time to file its brief, citing that it had only received Employee's brief on September 11, 2019, and that time was needed to submit its reply brief that was due on September 17, 2019. On September 20, 2019, I issued an Order granting Agency's Motion and required that its reply brief be submitted on or before October 4, 2019. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency has complied with OEA December 28, 2018 Order, and if so, should Employee's Motion for Enforcement be dismissed.

ANALYSIS AND CONCLUSION

OEA Rule 635¹ 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. Here, an Initial Decision was issued on December 28, 2018, which reversed Agency's decision to remove Employee and ordered that Employee be reinstated. Agency was also ordered to reimburse Employee all back pay and benefits lost as a result of her removal. Agency elected not to file a Petition for Review with OEA's Board or with the Superior Court of the District of Columbia. Thus, the December 28, 2018 Initial Decision became the final decision of this Office. As of the date of this Order, Agency has completed the following²:

- (1) Employee returned to employment with DCPS on April 1, 2019.

¹ 59 DCR 2129 (March 16, 2012).

² Compliance was verified via email to the undersigned and all parties. Should there have been an issue outstanding, pursuant to the July 19, 2019 Order, Employee was to provide an update on or before August 16, 2019. Employee submitted her brief on September 6, 2019 regarding the out of pocket medical expenses but did not submit any notice about any other compliance issue.

- (2) Agency provided an update regarding Employee's IMPACT rating status for the year Employee was terminated, which now reflects "no consequence."³
- (3) Employee received all backpay for the time separated as of July 26, 2019.
- (4) Agency made all corrections to Employee's leave, including the 420 hours of leave, 280 hours of sick leave, reimbursement of 48 hours of leave which had erroneously been coded as Leave Without Pay (LWOP).
- (5) Agency provided the pay scale information for the 2016, 2017, and 2018 pay years as well as any cost of living increases/percentages applicable for those same years. Agency also provided all relevant information regarding the calculations utilized to determine Employee's back pay.⁴

An outstanding compliance issue raised by Employee was one regarding out-of-pocket medical expenses she incurred while terminated. Specifically, Employee indicated that she incurred expenses of \$589 for an Emergency Department visit and an additional \$295 for care while in the hospital. Employee also cited that she incurred \$209 for vision expenses.⁵ As a result, Employee asserts that Agency owes her \$1,093, as these expenses would have been covered by Agency had she been employed. Employee explained that she could not find any case law from OEA, so she relied on other forums, namely appeals from the Equal Employment Opportunity Commission (EEOC) regarding the reimbursement of back pay and benefits. Employee notes that the EEOC held that "an award of backpay should compensate a prevailing complainant for loss of health insurance by either: (1) reimbursing for health insurance premiums paid to continue in an agency-sponsored insurance plan or to secure alternative coverage; or (2) paying for uninsured medical expenses incurred during the relevant period up to the amount the agency would have contributed to health insurance premiums."⁶ Accordingly, Employee argues that in October 2018 she incurred out of pocket vision and health expenses totaling \$1,093, that she believes would have been covered by her DCPS health and vision benefits but for her wrongful termination. As a result, Employee asserts that Agency should reimburse her for the out-of-pocket expenses incurred.

Agency disagrees with Employee's assertions regarding the reimbursement for out of pocket health and vision expenses. Agency asserts that Employee's request for reimbursement of these funds would constitute "unjust enrichment" since Employee is not seeking reimbursement for unemployment premiums or uninsured medical expenses; but wants to be paid for out-of-pocket expenses she incurred while she was insured by another provider (which she did not seek reimbursement for).⁷ Further, Agency avers that Employee voluntarily waived her right to past health benefits, which makes her ineligible to make any claims for medical benefits that occurred during that time. Agency notes that following the December 28th Initial Decision to reinstate Employee back to service, Employee was asked to complete a Benefits Restoration Agreement

³ Verified via email on Friday July 19, 2019.

⁴ Verified via email on Wednesday, July 24, 2019.

⁵ Employee Brief at Page 3. See also Exhibits 1-2. (September 12, 2019).

⁶ *Id.* at Page 2. citing to *Williams v Department of Navy*, Appeal No. 01A01421 (June 19, 2002); and *Dropka v. United States Postal Service*, Appeal No. 01A2087 (December 6, 2003).

⁷ Agency Brief at Page 2. (October 4, 2019).

which provided two options regarding the receipt of back pay and benefits.⁸ The two options provided were:

Option A- “I _____, understand pursuant to the settlement and/or hearing decision my benefits will be fully restored if I choose this option. I further understand that DCPS must deduct from the settlement amount all monies necessary to restore my benefits”;

Option B – “I _____, understand that pursuant to the settlement and/or hearing officer decision, my benefits would be fully restored subject to deductions from the settlement amount to cover my share of the cost of restoring those benefits. I voluntarily elect, however, not to restore my benefits during the time period I was terminated from employment. Therefore, no money will be taken from the settlement amount which would be necessary to restore such benefits.

Agency asserts that Employee elected Option B, and as a result, declined the right to claim reimbursement for any past premiums paid for in her benefits restoration agreement. Agency argues that even if Employee had been employed and insured by DCPS during this time that she still would/could have incurred out of pocket expenses that her DCPS health insurance would not have covered. Accordingly, Agency argues that to reimburse Employee for these expenses would result in unjust enrichment. Further, Agency asserts that notwithstanding Employee’s election and waiver of her rights to claim, that Employee never provided any out-of-pocket insurance premiums that she paid. Agency notes that Employee’s declination to restore past benefits, meant she waived any claims to expenses incurred during the time of separation. Agency further notes that had Employee elected to have her benefits restored, she would have been able to forward any receipts for out-of-pocket expenses and premiums paid to her original insurer and could have recouped expenses, at least in part, had she elected Option A. However, Employee’s election of Option B meant that the employee contribution for health care was left in the total award amount and benefits were only restored moving forward, not retroactively.⁹

The undersigned agrees with Agency’s assertion regarding the out-of-pocket expenses. The December 28th Initial Decision required that Employee be reinstated and be paid back pay and benefits. Additionally, the Back-Pay process is guided by Section 11B of the District Personnel Manual, which provides that back pay computations must be “re-computed as if the unjustified or unwarranted personnel action had not occurred.” Further, these instructions provide that when calculating the back-pay computation, that the agency has to offset and deduct from the gross back pay award the health benefit premiums that are retroactively reinstated at the employee’s election.”¹⁰ This election is made when an employee completes the Benefit Restoration Agreement required by the DPM. During Employee’s reinstatement process, Employee signed the Benefits Restoration Agreement on April 8, 2019, and selected “Option B” which explicitly stated that she was voluntarily electing not to restore any benefits during the time period she was terminated from

⁸ *Id.* at Page 4.

⁹ *Id.* at Page 6.

¹⁰ E-DPM Section 11B -II (b)(3).

employment, and that no money from the back-pay award would be necessary to restore such benefits.¹¹ Accordingly, I find that Employee's election of Option B also waived her right to claim any past benefits, which would include the \$1,093 out-of-pocket health expenses incurred during the time of termination. If Employee had elected Option A, she may have possibly had the opportunity to file receipts with her previous insurer for \$1,093 out-of-pocket expenses she incurred to ascertain any reimbursement; but under the Benefits Restoration Agreement she signed, I find that she waived her eligibility for such reimbursement and that Agency is not required to pay these out-of-pocket expenses. As a result, I find that Agency has otherwise complied with the December 28th Initial Decision and is not required to reimburse Employee the \$1,093 for out-of-pocket health and vision expenses.

ORDER

Accordingly, it is hereby **ORDERED** that since Agency has complied with this Office's December 28th Initial Decision, Employee's Motion for Enforcement is **DISMISSED**.

FOR THE OFFICE:

Michelle R. Harris, Esq.
Administrative Judge

¹¹ *Id.* at Benefits Restoration Agreement Exhibit.