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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
GEORGE F. WALKER,)	OEA Matter No. 1601-0046-97R01
Employee)	
)	Date of Issuance: April 14, 2008
)	
)	
DEPARTMENT OF ADMINISTRATIVE)	
SERVICES,)	
Agency)	
_____)	

OPINION AND ORDER
ON
REMAND

Mr. George Walker (“Employee”) worked as a Supervisory Computer Specialist at the Department of Administrative Services (“DAS”) which was later subsumed by the Office of the Chief Technology Officer (“OCTO”/“Agency”). On October 9, 1996, Employee received a notice of final decision to remove him from his position with Agency. Agency asserted that Employee entered into a contract after his authority to do so had been rescinded and that he attempted to exceed his procurement ceiling by splitting one procurement into four. As a result, the causes of his removal were insubordination; inexcusable neglect of duty; dishonesty; and misuse, mutilation, or

destruction of District property, public records, or funds.¹ However, on November 1, 1996, Agency issued an addendum to its final decision and dismissed all of the causes with the exception of the insubordination charge.²

On November 14, 1996, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) alleging that he was improperly terminated. Employee argued that Agency could not support its allegations and that his termination was the result of an angry, vindictive supervisor.³ On May 29, 1997, Agency filed its response to Employee’s Petition for Appeal. It argued that removal was within the range of penalty for the charge of insubordination.⁴

The Administrative Judge (“AJ”) for OEA issued his Initial Decision on October 19, 1998. He found that Employee did not violate the rescission of his procurement authority. He also found that Agency failed to prove that Employee submitted the four procurements to avoid detection of an unauthorized split procurement. Therefore, Agency’s action to remove Employee was reversed. The AJ ordered that Employee be reinstated to his position and that he be reimbursed for all salary and benefits lost as a result of the removal action.⁵

On November 23, 1998, Agency filed a Petition for Review arguing that the Initial Decision was not based on substantial evidence. Employee countered by filing a response to Agency’s Petition for Review; he argued that Agency’s Petition for Review

¹ *Petition for Appeal*, Attachment #4 (November 14, 1996).

² *Agency Addendum to Final Agency Decision*, p. 1-2 (November 1, 1996).

³ *Petition for Appeal*, Attachment #1 (November 14, 1996).

⁴ *Agency Response to Employee’s Petition for Appeal*, p. 1-3 (May 29, 1997).

⁵ *Initial Decision*, p. 16-17 (October 19, 1998).

was based on frivolous claims and requested that the AJ's Initial Decision be upheld. The OEA Board agreed with the Employee and affirmed the Initial Decision.⁶

Agency then filed an appeal with the Superior Court of the District of Columbia. Judge Richter issued an order on October 30, 2000. He affirmed the OEA Board's decision, but remanded the matter back to OEA to determine if there was a comparable position for Employee and whether he took any efforts to mitigate damages after his removal.⁷

Employee argued that he made reasonable efforts to mitigate damages after his removal, therefore, he was entitled to back payment since his removal. He also claimed that he should have been reinstated to the Telecommunications Director position within OCTO. The position was held by Mr. Amado Alvarez. Agency countered by asserting that Employee was not qualified for Mr. Alvarez's position. Consequently, Agency offered Employee a Data Center Services Manager position.⁸ Additionally, Agency argued that Employee failed to make reasonable efforts to mitigate damages. After two days of hearings and closing briefs from both parties, the AJ issued an Addendum Decision on Remand.

In addressing the issue of there being a comparable position for Employee, the AJ found that the position of Supervisory Computer Specialist (held by Employee before his improper removal) and that of Telecommunications Director (held by Mr. Alvarez) were not comparable. Therefore, Employee was not entitled to the Telecommunications

⁶ *Opinion and Order on Petition for Review* (April 30, 1999).

⁷ *District of Columbia Department of Administrative Services v. George Walker and District of Columbia Office of Employee Appeals*, Civil Action No. 99-MPA-10 (October 30, 2000).

⁸ Agency offered Employee the Data Center Services Manager position six days before the second day of hearings on the matter remanded to the AJ. Employee declined the position.

Director position. However, the AJ did find that the Data Center Services Manager position which Agency offered was comparable. He reasoned that the Data Service Center Manager position would serve as the proper remedy for Employee's removal.⁹ The AJ went even further and determined the proper grade and step to give Employee the salary that he would have made but for Agency's improper removal.¹⁰

On the issue of Employee's efforts to mitigate damages following his removal, the AJ found that after June of 1997 Employee did not make reasonable efforts to mitigate his damages. The AJ did, however, make known that both parties stipulated that had Employee not been removed, he would have remained with the Department of Administrative Services until March 26, 1999, which was the day OCTO was created. The AJ ruled that Employee exercised reasonable and sufficient diligence in attempting to find gainful employment from the time of his separation until June of 1997.¹¹ Because the parties stipulated that Employee would have been with Agency until March 26, 1999, had he not been terminated, the AJ found that Employee was not entitled to back pay beyond March 26, 1999.¹²

The AJ's Addendum Decision on Remand provided that Agency place Employee in the position of Data Center Services Manager, DS, 14-9. He also ordered that Agency reimburse Employee for back pay and benefits from November 1, 1996 to March 26, 1999. Agency was given 30 calendar days from the date of the decision to comply with

⁹*Addendum Decision on Remand*, p. 21 (December 16, 2004).

¹⁰ Agency claimed that Employee would have been a DS, 14-6. However, after careful review the AJ determined that he would have been a DS, 14-9 with an annual salary of \$77,461.

¹¹ Employee was able to provide cover letters and resumes that he sent out to employers within his field.

¹² *Id.* at 22.

the AJ's Addendum Decision on Remand.¹³

Both parties disagreed with at least some portion of the AJ's Decision on Remand and filed Petitions for Review. On January 19, 2005, Employee filed his Petition for Review, arguing that the Data Center Services Manager position was created to muddle the issue for the AJ. Employee claimed that this position was not comparable and was outside of the Telecommunications Division at OCTO. He also provided that the AJ violated the remand order issued by Judge Richter because he had no authority to independently accept the Data Service Center Manager as a satisfactory position for him.¹⁴

Employee asserted that the only comparable position for which he is qualified is that of OCTO Chief. He claimed that the general function and responsibilities that he possessed at DAS are the same required of the OCTO Telecommunications Division. He further argued that the only change was the organizational department name and structure from DAS to OCTO.¹⁵ Additionally, Employee provided that the AJ failed to consider him for the unfilled Deputy Telecommunications Chief position within OCTO as an alternative to the Data Center Services Manager position offered by Agency.¹⁶

Employee further argued that the AJ's decision regarding his pay grade and step were not based on substantial evidence because he did not consider his previous performance evaluations or quality step increases. Consequently, he provided that he should receive back pay from November 1, 1996, until he is properly reinstated. He

¹³ *Id.* at 26.

¹⁴ *Employee Petition for Review of Addendum Decision on Remand*, p. 3 (January 19, 2005).

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 7.

asserted that his failure to keep records of his cover letters and job applications after June 1997 is not enough to prove that he did not exercise reasonable and sufficient diligence to secure alternative employment.¹⁷

Therefore, Employee requested that the OEA Board reverse the AJ's Addendum Decision on Remand. He sought to be reinstated to Chief of Telecommunications in OCTO as a MS, 16-1. He also requested that he receive back pay with interest and all leave and benefits from November 1, 1996 until he is reinstated.¹⁸

Agency filed its Petition for Review on January 21, 2005. It asserted that the AJ erred in awarding Employee back pay from November 1, 1996 until March 26, 1999, because the decision was not based on substantial evidence. Agency claimed that the stipulation on which the AJ relied to arrive at the March 26, 1999, date pertained to DAS documents. Agency provided that because it was unable to provide DAS documents to Employee during discovery, it stipulated that Employee's job description and functions would have remained the same when OCTO took over many of DAS functions including Employee's former position.¹⁹

Agency pointed out that the AJ found that Employee made reasonable efforts to mitigate his damages from November 1, 1996 until June 1997. It claimed that the AJ's misunderstanding of the nature of the stipulation between it and Employee led the AJ to extend the date to March 26, 1999. Consequently, the Addendum Decision was not based on substantial evidence.²⁰

¹⁷ *Id.* at 9.

¹⁸ *Id.*, 15-16.

¹⁹ *Agency's Petition for Review*, p. 4-5 (January 21, 2005).

²⁰ *Id.* at 6.

On March 2, 2005, Agency also filed an Opposition to Employee's Petition for Review. It argued that Employee provided no basis for the OEA Board to grant his Petition for Review. Agency asserted that the AJ accurately compared Employee's old position to those within OCTO and found the Data Center Services position to be comparable to that which Employee was improperly removed.²¹

Employee replied by filing an Opposition to Agency's Opposition of his Petition for Review. He argued that Agency's Petition for Review nor its Opposition to the Petition for Review, were filed in a timely manner. Employee claimed that Agency's Petition for Review was to be filed by January 20, 2005. However, it was not filed until January 21, 2005. Therefore, its Petition for Review was untimely and should not be considered.²²

In this case the AJ was charged with determining if there was a comparable position for Employee, and whether Employee made efforts to mitigate damages after his removal.²³ After carefully reviewing the record, this Board agrees with the AJ's assessment that the Data Center Services position is comparable to the Supervisory Computer Specialist that Employee held at the DAS. The AJ relied heavily on witness testimony, and this Board found the testimony of Mr. Truman Pewitt to be especially convincing.

²¹ *Agency's Opposition to Employee's Petition for Review*, p. 3 (March 2, 2005).

²² *Employee's Opposition to Agency's Opposition to Employee's Petition for Review*, p. 1 (March 18, 2005). It should be noted that Employee is correct that Agency's Petition for Review was untimely filed. Therefore, the Agency's Petition for Review will not be considered. This Opinion and Order will, however, consider the record as a whole including the hearing transcripts, Initial Decision, Addendum Decision on Remand and Employee's Petition for Review.

²³ *District of Columbia Department of Administrative Services v. George Walker and District of Columbia Office of Employee Appeals*, Civil Action No. 99-MPA-10 (October 30, 2000).

According to Mr. Pewitt, Deputy Chief Technology Officer for OCTO, he was privy to Employee's resume and his Supervisory Computer Specialist position description when he created the Data Center Services Manager position. He was aware that the position of Data Center Services Manager would be offered to Employee.²⁴ Mr. Pewitt provided testimony that Human Resources informed him that OCTO wanted to create a position for Employee in which he would be qualified and successful since his position no longer existed. To that regard, he took parts of Employee's previous position as Supervisory Computer Specialist and incorporated it into the Data Center Services Manager position.²⁵ Therefore, the position of Data Center Services Manager was created by Agency solely for Employee.

This Board believes that because Agency went through great length to incorporate skills specifically outlined in Employee's previous position and utilized his resume to help create the new position, the Data Center Services Manager position is highly comparable to the Supervisory Computer Specialist position previously held by Employee. Although Employee believed that the position of Telecommunications Manager was more comparable, he offered no evidence that he possessed the extensive technical experience possessed by Mr. Alvarez.

This Board also agrees with the AJ's ruling regarding the issue of back pay and mitigation. Employee demonstrated that he made reasonable efforts to mitigate damages from November 1, 1996 until June 11, 1997. Employee was able to provide cover letters

²⁴ *OEA Hearing Transcript*, p. 173-175 (October 20, 2003).

²⁵ *Id.*, 175-177.

that were sent to companies within his field during this time.²⁶ However, the AJ awarded back pay from November 1, 1996 until March 26, 1999, because he believed that Agency stipulated that Employee would have remained in his position until March 26, 1999, the date DAS was abolished and OCTO created. The stipulation in question occurred during an OEA hearing and reads as follows:

- Judge Hollis:** ...now, at this point, are there any questions or any preliminary matters?
- Ms. Brown:** I think there is one other preliminary matter with regard to records that were not located for the time period of '96 through '99. Those were DAS documents. The Agency has only been able to locate OCTO documents from '99 forward. So in a telephone conference, I know we had some sort of stipulation that would be placed on the record today and I would ask that that be placed on the record.
- Judge Hollis:** Any objection to that, Mr. Buchholz?
- Mr. Buchholz:** I need to hear the stipulation.
- Ms. Brown:** Well as far as I can recall – let me just get my notes out – the conversation was held with Daryl J. Hollis on January 24th at about 10 a.m. Where the stipulation was that Mr. Walker remain in his position until DAS was defunct and OCTO was created in 1999 – would have remained in his position.
- Mr. Buchholz:** Oh, would have remained in his position.
- Ms. Brown:** Yes
- Judge Hollis:** That's my recollection also.
- Mr. Buchholz:** Yes, okay. Barring any unforeseen circumstances, yes.²⁷

Initially, the stipulation seemed to discuss the DAS documents that were unable to be located. However, Employee's Representative made it very clear what the parties agreed to in their telephone conference with the AJ. She provided in clear language that the agreement was that Employee would have remained in his position until DAS was

²⁶ *OEA Hearing Transcript*, Employee's Exhibit #9 (January 30, 2003).

²⁷ *Id.*, 10-11.

defunct and OCTO created. Agency's Representative then repeated the stipulation and stated affirmatively barring any unforeseen circumstances. Therefore, Agency cannot now attempt to backtrack on the terms of the stipulation because it does not wish to provide back pay for an additional two years.²⁸ The language of the stipulation is plain on its face.

As for Employee's arguments that he should receive back pay until he is reinstated, he offered no reasonable proof that he actively pursued employment after June 11, 1997. Therefore, this Board has no basis to disturb the AJ's findings. Additionally, there is no way for this Board to determine that Employee would have received "quality step increases." We cannot speculate that Employee would have continued to receive "outstanding" performance ratings; there is no way for us to determine that. Consequently, we agree with the AJ's assessment of Employee's "required time" based step increases that he would have received had he not been removed.

Accordingly, the position of Data Center Services Manager, DS 14-9 is the position comparable to that held by Employee at the time of his removal. Moreover, Agency should reimburse him for back pay and benefits from November 1, 1996 to March 26, 1999.

²⁸ Employee proved that he mitigated damages until June 11, 1997. However, because Agency stipulated that he would have remained in his position until March 26, 1999, it would be required to pay damages until then.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**; and Agency's Petition for Review is **DENIED**.

FOR THE BOARD:

Sherri Beatty-Arthur, Chair

Barbara D. Morgan

Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.