

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. 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:)	
)	
WILLIE PORTER,)	OEA Matter No. 1601-0046-12C16
Employee)	
)	
v.)	Date of Issuance: December 3, 2019
)	
D.C. DEPARTMENT OF BEHAVIORAL)	
HEALTH,)	
Agency)	
)	

OPINION AND ORDER
ON COMPLIANCE

This matter was previously before the Office of Employee Appeals’ (“OEA”) Board. By way of background, Willie Porter (“Employee”) was a Psychiatric Nurse with the Department of Mental Health (“Agency”). On July 28, 2011, Agency issued a Notice of Final Decision informing Employee that he would be removed from his position. Employee was charged with any knowing or material misrepresentation on an employment application.¹

The AJ issued his Initial Decision on December 24, 2013. He found that Employee submitted an employment application on September 16, 2010, and then submitted another application on October 6, 2010.² The AJ provided that although Employee’s October 2010

¹ The notice explained that Employee omitted from his D.C. employment application that he previously worked at Walter Reed Army Medical Center (“Walter Reed”) and was terminated for misconduct.

² The AJ found that the October 2010 application was submitted under a different vacancy announcement number.

application provided that he resigned from Walter Reed, his Standard Form 50 (“SF-50”) indicated that he was terminated from his position for cause. Moreover, the AJ found that Employee did not offer any evidence to contradict the accuracy of the SF-50, nor did he prove that his resignation letter was received by Walter Reed. As a result, he ruled that Agency’s adverse action was taken for cause and that its penalty was appropriate. Accordingly, Agency’s action was upheld.³

Employee filed a Petition for Review with the OEA Board on February 4, 2014. He requested that the final decision by OEA be delayed until the Merit Systems Protection Board (“MSPB”) could provide new and material evidence from his personnel file to prove that he was unaware of Walter Reed’s adverse action charges.⁴ In opposition to the Petition for Review, Agency submitted that the petition should be denied because the Initial Decision was supported by substantial evidence, and Employee did not provide a reason for the Board to grant his Petition for Review.⁵

On January 8, 2015, Bradley E. Eayrs, Attorney for the Department of the Army, submitted a letter addressed to the OEA Administrative Judge. The letter provided that “the Department of the Army’s personnel records does not show that a notice of decision to terminate Mr. Porter was ever provided to him.” However, its records did “show that Mr. Porter submitted his resignation prior to 12 June 2006.” The letter went on to provide that Employee’s SF-50 forms would be updated to indicate that he resigned from his position and that “[a]ny documentation to indicate any action other than a voluntary resignation for the purposes of non-federal employment will be rescinded.”⁶

In its Opinion and Order on Petition for Review, the Board held that Employee provided

³ *Initial Decision*, p. 4-6 (December 24, 2013).

⁴ *Petition for Review* (February 4, 2014).

⁵ *Agency’s Response in Opposition to Employee’s Petition for Review of Initial Decision*, p. 5-10 (June 27, 2014).

⁶ *Letter from Bradley E. Eayrs to Administrative Judge* (January 8, 2015).

evidence which established that the SF-50 relied upon by Agency to terminate him was inaccurate. It reasoned that the evidence supported Employee's assertion that he voluntarily resigned from his position and was not removed on the basis of any adverse action. Accordingly, the matter was remanded to the AJ for reconsideration of the case on its merits.⁷

The AJ held a Status Conference and requested that both parties file briefs addressing the issues on remand.⁸ Subsequently, he issued an Initial Decision on Remand on September 8, 2015. The AJ held that the new and material evidence provided by Employee – the signed settlement agreement and Declaration from Attorney Eayrs – supported Employee's argument that he resigned from his position and was not removed. Therefore, in the interest of justice, the AJ ruled that Agency did not have cause to remove Employee. As a result, he ordered that Employee be reinstated with back pay and benefits.⁹

On October 13, 2015, Employee submitted a "Request for Review or C[larification] of the Initial Decision Benefits." In the petition, Employee contended that despite its assertions otherwise, Agency was aware of his previous employment status. Therefore, he requested that he be reinstated as a Grade 10, Step 10. Additionally, he sought back pay; interest; attorney's fees; removal of the action from her personnel file; and relief to cover his retirement, medical bills, and life insurance.¹⁰

The OEA Board issued a second Opinion and Order on March 7, 2017. It found that Employee's petition did not present any arguments in accordance with OEA Rule 633.3. The Board held that the Initial Decision addressed all of Employee's requests on Petition for Review,

⁷ *Willie Porter v. Department of Mental Health*, OEA Matter No. 1601-0046-12R15, *Opinion and Order on Petition for Review* (April 14, 2015).

⁸ *Order Scheduling Status Conference* (April 17, 2015) and *Order to Submit Written Briefs* (May 15, 2015).

⁹ *Initial Decision on Remand*, p. 3-4 (September 8, 2015).

¹⁰ *Request for Review and Clarification of the Initial Decision Benefits Lost as the Result of Employee Removal*, p. 1-2 (October 13, 2015).

with the exception of attorney's fees.¹¹ Moreover, the Board noted that the Superior Court for the District of Columbia issued a decision on February 14, 2017, upholding OEA's ruling for Agency to reinstate Employee with back pay and benefits. Accordingly, it denied Employee's Petition for Review.¹²

On March 24, 2017, Employee filed a Motion for Reconsideration. Employee requested that the Board vacate its order and remand the matter to the AJ to determine his full relief.¹³ On November 3, 2017, Agency filed a response. It asserted that Employee was returned to work on May 30, 2017 and that any delay in processing back pay and benefits were the result of Employee's failure to submit any requisite paperwork. Moreover, Agency contended that Employee's counsel acknowledged at a September 15, 2017 status conference that Employee was reinstated at his proper level. Thus, it was Agency's position that there were no outstanding issues with which it needed to comply.¹⁴

On January 30, 2018, the OEA Board issued its Opinion and Order on Motion for Reconsideration. The Board held that there is no statutory procedural authority bestowed upon OEA to grant Employee's Motion for Reconsideration. Additionally, it explained that there were no provisions within any rules, regulations, or statutes pertaining to OEA that allowed it to address

¹¹ The record indicated that Employee was *pro se* and was not represented by an attorney. Moreover, he did not offer any proof that he was an attorney. Therefore, an award of attorney's fees did not appear to be warranted in this case, at that time.

¹² *Willie Porter v. Department of Mental Health*, OEA Matter No. 1601-0046-12R15, *Opinion and Order on Remand*, p. 4-5 (March 7, 2017).

¹³ *Motion to Reconsider and Vacate Opinion and Order of March 7, 2017, and to Remand to Administrative Judge*, p. 1-3 (March 24, 2017). Employee filed a status report on July 14, 2017. He stated that he received a letter on May 16, 2017, that he would be reinstated to his position as of May 20, 2017. Employee explained that he reported to Agency and went through a refreshment training regime. Further, he stated that he was working with Agency regarding his grade and step level; issues concerning his retroactive reinstatement and shift assignment; post-judgment interest; back pay; reinstatement of benefits; retroactivity and valuation issues; leave accruals; and attorney's fees and costs. Therefore, he requested that the AJ hold a status conference to discuss his relief. *Mr. Willie Porter's Status Report*, p. 1-2 (July 14, 2017).

¹⁴ *Agency's Response to Employee's Motion for Compliance Nunc Pro Tunc and Motion to Dismiss or Bar Attorney Fees for the Instant Action*, p. 2-8 (November 3, 2017).

the merits of a Motion for Reconsideration. Moreover, the Board opined that once a final decision has been made on a petition before the Board, the only procedural option available to parties is to appeal the Board's decision to the Superior Court of the District of Columbia. Consequently, it dismissed Employee's Motion for Reconsideration.¹⁵

Subsequently, Agency informed the AJ that it made Employee aware that a back-payment check was available for pick up on March 30, 2018. On April 4, 2018, the AJ issued an Order Regarding Compliance. He ordered Agency to provide Employee with the back pay worksheet calculations and any documents relied upon when making its calculations of the back pay amount by April 11, 2018.¹⁶

Agency complied with the AJ's order and submitted documentation verifying that it complied with the final decision of OEA. Agency noted that it attached a copy of the check issued to Employee on March 30, 2018, as reimbursement for back payment and benefits. Additionally, Agency provided a copy of Employee's acknowledgement of receipt of the check on April 4, 2018.¹⁷

On May 23, 2018, Employee filed a response in opposition to Agency's Notice of Compliance. He submitted that Agency did not include pay commencing on August 6, 2011, the date of termination, but instead, Agency's calculations commenced on August 25, 2011. Employee also claimed that the back pay calculation concluded on May 27, 2017; however, Employee returned to work on May 30, 2017. Furthermore, Employee argued that Agency failed to include his out-of-pocket medical payments, as well as overtime, night differential, holiday, and Sunday premium pay in determining his back pay award. According to Employee, Agency

¹⁵ *Opinion and Order on Motion for Reconsideration*, p. 1-8 (January 30, 2018).

¹⁶ *Order Regarding Compliance* (April 4, 2018).

¹⁷ *Agency's Submission Regarding Compliance with Final Decision and Order Regarding Compliance* (April 10, 2018).

incorrectly offset earnings from Medical Staffing Network, a company for which Employee also worked while employed by Agency. Employee contended that he would have continued to work at Medical Staffing Network had he continued employment with Agency.¹⁸ Thus, he concluded that there was no offset for earnings with the company.¹⁹

The AJ convened a telephonic Status Conference on June 22, 2018.²⁰ On July 9, 2018, Agency filed a Sur-Response Regarding Back Pay. It argued that Chapter 11B of the DPM addressed employee compensation as well as back pay awards. Agency noted that DPM § 1149.14 explicitly states that “overtime pay shall not be included in the back pay award.” With regard to night differential, holiday pay, and Sunday premium rates of pay, Agency confirmed that it would correct the prior calculations by including these rates. Finally, Agency argued that Employee was not entitled to out-of-pocket medical costs and insurance premiums in its calculation of back pay. It explained that when an employee is returned to work, the employee can either retroactively reinstate medical benefits and have the applicable premiums deducted from the settlement or back pay award, or they can decline restoration of health benefits. Agency asserted that Employee did not elect to retroactively reinstate medical coverage. Had Employee elected the option to have his coverage retroactively reinstated, Agency posited that he would have been able to submit out-of-pocket medical expenses to the insurance provider for reimbursement. However, medical coverage was not retroactively reinstated, and health insurance premiums were not deducted from his back pay award. Therefore, Agency did not reimburse Employee for his out-of-pocket medical expenses.²¹

On August 6, 2018, Employee filed numerous pleadings with OEA regarding back

¹⁸ Employee provided that the total earnings with Medical Staffing Network were \$40,517.32.

¹⁹ *Employee’s Response/Objections to Agency’s Notice of Compliance*, p. 1-3 (May 23, 2018).

²⁰ *Status Conference Order* (May 31, 2018).

²¹ *Agency’s Sur-Response Regarding Back Pay*

payment calculations. Employee argued that he should be compensated for the overtime hours that he would have worked at Agency had he not been terminated. He further submitted that Title 6-B, Chapter 11, Section 1149.14 conflicts with the provisions of the Comprehensive Merit Personnel Act (“CMPA”).²² Employee explained that the CMPA is the authority upon which the D.C. Department of Human Resources (“DCHR”) relied upon to issue the municipal regulation at issue. Thus, it is Employee’s assertion that the award should include projected overtime that he would have earned subsequent to his termination.²³ Employee also contended that his award should include the reimbursement of out-of-pocket medical expenses. Employee provided that he would not have made payments for insurance coverage had he not been involuntarily terminated by Agency.²⁴

With regard to calculating Employee’s interim earnings, Employee argued that Agency erred in its calculations that would have offset his projected earnings had he not been terminated by Agency. Employee claimed that his projected earnings including differential pay, without offset of interim earnings, would have totaled \$568,096.33.²⁵ He maintained that Agency improperly offset his earnings as he worked his second job prior, during, and after his employment with Agency.²⁶ Employee also argued that he was entitled to an award of interest.²⁷ Additionally, Employee submitted that he should be entitled to an additional amount for tax neutralization or tax

²² Employee provided that Section 1-601.02(b)(2) of the CMPA states that employees are to be provided with equitable and adequate compensation. Section 1-611.03(d) and (e) provides for the payment of compensatory and overtime to employees.

²³ *Mr. Willie Porter’s Memorandum of Points and Authorities in Support of his Request that his Backpay Award Include Projected Overtime*, p. 1-2 (August 6, 2018).

²⁴ *Mr. Willie Porter’s Memorandum of Points and Authorities in Support of his Request for Reimbursement of his Out-of-Pocket Insurance Payments*, p. 1-2 (August 6, 2018).

²⁵ Employee acknowledged that the interim earnings would be \$561,880.83 should overtime pay be excluded.

²⁶ *Mr. Willie Porter’s Memorandum of Points and Authorities Regarding Calculation of his Interim Earnings*, p. 1-3 (August 6, 2018).

²⁷ *Mr. Willie Porter’s Memorandum of Points and Authorities Regarding his Request for an Award of Interest, Both Pre-judgment and Post-judgment*, p. 1-3 (August 6, 2018).

gross up to make him whole. He explained that when an individual receives back pay as a lump sum payment, they are entitled to a tax offset payment for the tax year in which the individual received the payment. Further, Employee cited to several cases claiming that the MSPB precedent is in favor of tax neutralization awards. As a result, Employee requested that he be permitted to introduce evidence of the tax impact of this matter, once the amount of the award was conclusively established.²⁸

On September 21, 2018, Agency filed a response in opposition to Employee's memorandums. Agency asserted that Employee was not entitled to any enhancement of his back pay award; and his projected overtime, interest, offset, medical benefits, and tax neutralization claims lacked merit. It explained that pursuant to 6B DCMR § 1149.14, back pay awards do not include overtime. Additionally, Agency argued that Employee failed to cite to law, Mayor's Order, regulation, or agency policy in support of his requests. Agency noted that Employee's assertions relied on inapplicable case law from unrelated jurisdictions. Further, Agency submitted that it is required to offset back pay awards by all income an employee received from alternate employment during the relevant period in question. It claimed that Employee failed to provide supporting documentation, including timesheets or pay stubs, that he worked at Medical Staffing Network while working full time at Agency. Agency also argued that Employee's assertions regarding medical expenses was incorrect. It explained that Employee would have had to pay insurance premiums in order to receive insurance coverage during his back pay period. Agency asserted that Employee chose to receive the monetary amount of his medical insurance premiums rather than have those premiums deducted retroactively. It provided that had Employee chosen to reinstate his insurance coverage, he could have submitted his expenses to his insurance company

²⁸ *Mr. Willie Porter's Memorandum of Points and Authorities Regarding Tax Neutralization*, p. 1-6 (August 6, 2018).

for reimbursement. Finally, Agency contended that Employee is not entitled to an additional award for tax neutralization. It explained that Employee cited to federal and civil rights laws intended to address insidious forms of employment discrimination. Furthermore, Agency asserted that Employee failed to present evidence of an increased tax burden. Therefore, it requested that Employee's requests be denied.²⁹

The AJ issued his Addendum Decision on Compliance on February 15, 2019. He held that 6-B DCMR § 1149.14 is clear that overtime pay shall not be included in any award for back pay. The AJ reasoned that Employee's assertions for medical reimbursement were incorrect. He explained that Employee would have still been responsible for paying a portion of the health insurance premiums through payroll deductions if he elected coverage through one of the District-provided health insurance plans. The AJ opined that because Employee elected to receive his full back pay amount without having his health insurance retroactively reinstated, he was not entitled to be compensated for his out-of-pocket insurance payments. Additionally, he found that OEA did not have authority to grant a tax gross-up. As for Employee's claim for interest, the AJ held that the new and material evidence presented to the OEA Board did not exist at the time Agency terminated Employee, nor at the time he issued his Initial Decision. Thus, he did not find an award for interest appropriate in the matter. However, the AJ did rule that Employee's income from his second job at Medical Staffing Network was to supplement his employment income, rather than replace it from his employment with Agency. He reasoned that 6B DCMR § 1149.13 provides that Agency shall deduct "only that employment engaged in by the employee to takes the place of employment from which the employee was separated." Accordingly, the AJ ordered that Agency recalculate the amount of outside earnings that was deducted from the total back pay due to

²⁹ *Agency's Reply Brief in Opposition to Employee's August 2018 Pleadings Regarding Back Pay Calculations*, p. 1-15 (September 21, 2018).

Employee. Specifically, he determined that the \$40,449.35 earned by Employee from Medical Staffing Network and attributed to Employee's outside earnings on the Reinstatement with Back Pay Worksheet should not be reflected as outside earning for purposes of awarding the back pay owed to Employee.³⁰

On March 22, 2019, Employee filed a Petition for Review. He posits that interest should be awarded to him since interest has been held to be virtually mandatory. Additionally, Employee argues that the AJ erred in denying his request that he be reimbursed for out-of-pocket insurance payments. He contends that the AJ incorrectly implied that the insurance carrier would have reimbursed his out-of-pocket expenses had Employee elected to retroactively reinstate his coverage as part of his reinstatement package. Therefore, Employee requests that the AJ's decision be reversed.³¹

Agency filed a Motion to Strike Employee's Petition for Review on April 19, 2019. It argues that OEA Rule 633.1 permits a party to file a Petition for Review of an Initial Decision, not a Petition to an Addendum Decision on Compliance. Moreover, Agency asserts that OEA Rules 635.1-635.11 permit parties to address compliance issues by motion to the presiding AJ. Accordingly, Agency requests that Employee's petition be stricken.³²

On April 29, 2019, Employee filed a response in opposition to Agency's motion. Employee submits that in the past, Agency has appealed to the OEA Board from an AJ's decision titled as an addendum decision. Additionally, Employee claims that Agency failed to cite any authority for its position that his Petition for Review should be stricken. As a result, Employee requests that Agency's motion be denied.³³

³⁰ *Addendum Decision on Compliance*, p. 3-7 (February 15, 2019).

³¹ *Mr. Willie Porter's Petition for Review*, p. 1-3 (March 22, 2019).

³² *Agency's Motion to Strike Employee's Petition for Review*, p. 1 (April 19, 2019).

³³ *Employee's Opposition to Agency's Motion to Strike Employee's Petition for Review*, p.1-2 (April 29, 2019).

In response to Employee's Opposition to Agency's Motion to Strike, Agency admits that it inadvertently failed to include citation to authority to support its position. It argues that in *Delores Junious v. D.C. Child and Family Services*, OEA Matter No. 1601-0058-01C07, *Opinion and Order on Petition for Review* (January 25, 2010), the OEA Board held that "OEA's rules do not contain a specific provision for filing a petition for review in response to an addendum decision on compliance. If a party wishes to contest the findings of a decision regarding compliance, the matter must first be certified to this Office's General Counsel for enforcement." Agency asserts that Employee's matter was not certified to the Office's General Counsel for enforcement. Furthermore, it contends that OEA Rules 635.8 and 635.9 specifically provide the available remedy upon a finding of non-compliance by an agency and neither rule provides for an appeal. Therefore, Agency requests that Employee's Petition for Review be denied.³⁴

OEA Rules 635.1 through 635.11 provide the following:

635.1 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.

635.2 If any agency fails to comply with the final decision of the Office within the time period specified in § 635.3, the employee may file a motion to enforce the final decision. The motion shall be directed to the Administrative Judge who decided the appeal.

635.3 An agency must file an answer within twenty (20) calendar days of receipt of the employee's motion.

635.4 The employee, with specificity, shall explain in the motion how the agency has failed to comply with the Office's decision. The agency shall include in its answer a statement which admits or denies each allegation in the employee's motion.

635.5 The parties shall serve the motion and answer on each other.

³⁴ *Agency's Reply to Employee's Opposition to Agency's Motion to Strike Employee's Petition for Review*, p. 1-4 (April 30, 2019).

635.6 Failure by the agency to file an answer to the motion for enforcement shall be construed as an admission of the employee's allegations.

635.7 The Administrative Judge shall take all necessary action to determine whether the final decision is being complied with and shall issue a written opinion on the matter.

635.8 The Administrative Judge may, for good cause shown, allow the agency additional time to submit proof of compliance with the initial decision.

635.9 If the 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 (2006 Repl.).

635.10 No additional filings are permitted once the General Counsel certifies the final decision.

635.11 If the agency fails to comply with the order, the General Counsel may take such actions as are necessary to secure compliance with the order.

In its Motion to Strike Employee's Petition for Review, Agency argues that the OEA Rules permits a party to file a Petition for Review of an Initial Decision; however, it contends that there is no OEA Rule that permits a party to file a Petition for Review of an Addendum Decision on Compliance.³⁵ Agency is correct. OEA Rule 633.1 provides that "any party to the proceeding may serve and file a petition for review of an *initial decision* with the Board within thirty-five (35) calendar days of issuance of the initial decision (emphasis added)." Moreover, as Agency contends, a review of the section 635 related to compliance and enforcement provides no procedural avenue for an employee to appeal an Addendum Decision on Compliance to the OEA Board. There is no mention of OEA Board within any of the provisions of OEA Rule 635. Procedurally, this Board has already issued an Opinion and Order on Petition for Review and an Opinion and Order on Remand which addressed issues raised on appeal of the Initial Decision.

³⁵ Agency's Motion to Strike Employee's Petition to Review (April 19, 2019).

All issues of material law and fact have been adjudged and Employee has been reinstated to his position. Therefore, the only outstanding issue from the Initial Decision on Remand is the restoration of Employee's back pay and benefits.

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" Moreover, OEA Rule 635.7 provides that "the Administrative Judge shall . . . determine whether the final decision is being complied with and shall issue a written opinion on the matter." Therefore, when addressing matters on compliance, it is the AJ's responsibility to determine if Agency complied with their order. In response to the Initial Decision on Remand, Agency submitted a copy of a reimbursement check to verify that it had indeed complied with the Initial Decision on Remand.³⁶ However, Employee raised five issues with Agency's back-payment calculations. Those issues included projected overtime pay; reimbursement for out-of-pocket insurance payments; tax neutralization or tax gross up; pre- and post-judgment interest; and calculations of interim earnings.³⁷

The AJ found that Agency complied with most of his order, except for one issue. In his Addendum Decision on Remand, the AJ found that Employee was not entitled to overtime pay; out-of-pocket insurance payment; or pre- and post-judgment interest and that OEA lacked the authority to address tax neutralization issues.³⁸ Consequently, Agency complied with his order by

³⁶ *Agency's Submission Regarding Compliance with Final Decision and Order Regarding Compliance*, Attachment #1 (April 10, 2018).

³⁷ *Mr. Willie Porter's Memorandum of Points and Authorities Regarding Calculation of his Interim Earning* (August 6, 2018); *Mr. Willie Porter's Memorandum of Points and Authorities Regarding his Request for an Award of Interest, Both Pre-Judgment and Post-Judgment* (August 6, 2018); *Mr. Willie Porter's Memorandum of Points and Authorities Regarding Tax Neutralization* (August 6, 2018); *Mr. Willie Porter's Memorandum of Points and Authorities in Support of his Request for Reimbursement of his Out-of-Pocket Insurance Payments* (August 6, 2018); and *Willie Porter's Memorandum of Points and Authorities in Support of his Request that his Backpay Award Include Projected Overtime* (August 6, 2018).

³⁸ *Addendum Decision on Compliance*, p. 3-7 (February 15, 2019).

not considering these calculations when computing Employee's back pay. As provided in *Junious*, an addendum decision on compliance cannot be appealed to the OEA Board where the AJ has specifically determined that Agency has complied with its order. This Board will follow the *Junious* precedent regarding this issue. If an Administrative Judge has determined that an agency adhered with an order on compliance, then the procedural remedies are exhausted because the terms of the AJ's order have been satisfied. This Board's reasoning regarding this issue is bolstered by OEA Rule 635.9 which provides a procedural avenue only where the AJ has determined that Agency has *not* complied with the final decision (emphasis added). Hence, there is no outstanding compliance issue regarding the calculation of these four back-pay issues.

However, there is one issue that the AJ determined that the Agency improperly deducted from its total back pay calculations which may result in the AJ's use of the only procedural avenue available in this matter. In his Initial Decision on Remand, the AJ ordered Agency to recalculate Employee's interim earnings that were previously deducted from the total back pay owed to him.³⁹ Unfortunately, the record does not reflect that Agency has complied with the AJ's order regarding Agency's recalculation of interim earnings. As previously provided, OEA Rule 635.9 provides that "if the Administrative Judge determines that the agency has not complied with the final decision, the Administrative Judge shall certify the matter to the General Counsel." Therefore, of the five compliance issues presented by Employee, this issue is the only one ripe for the AJ to certify to the General Counsel's Office to issue an order on compliance. If the AJ chooses to certify this matter to the OEA General Counsel, a General Counsel's Order on Compliance will be issued to inform Agency that it has thirty days to comply with the AJ's order. If proof that the recalculations have not been completed by the end of the thirty-day period, then, in compliance

³⁹ *Id.* at 7.

with OEA Rule 635.11, the General Counsel will take actions necessary to secure compliance with the order and certify the matter to the Mayor's General Counsel.

Accordingly, this Board must wholly deny Employee's Petition for Review. The Board lacks jurisdiction to consider matters over which Agency properly complied. As it relates to the outstanding issue of interim earnings calculations, procedurally, the AJ must certify this matter to the General Counsel's office for a decision to be issued. Therefore, the Petition for Review is denied.

ORDER

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

FOR THE BOARD:

Clarence Labor, Chair

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

Dionna M. Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.