THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROBERT ALVARADO,	)	
Employee	)	OEA Matter No. 1601-0173-12-C16
	)	
v.	)	Date of Issuance: December 30, 2016
	)	
D.C. FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge

Megan K. Mechak, Esq., Employee Representative
Andrea G. Comentale, Esq., Agency Representative

ADDENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL BACKGROUND

The District of Columbia Fire and Emergency Medical Department ("FEMS" or "the Agency") hired Robert Alvarado ("Employee") in April 2000. Employee was promoted to Sergeant in 2008 and, ultimately, to Lieutenant. On January 4, 2012, then-Lieutenant Alvarado provided an interview to Paul Wagner, a reporter for WTTG (Washington's Fox 5 News). The purpose of this interview was so that Employee could provide his viewpoint on a prior interview given by then FEMS Chief Ellerbe regarding a recent change to the Agency's uniform policy. During Employee's interview, a patient arrived at the firehouse needing immediate medical assistance. Employee immediately delivered care to the patient. However, a portion of the care that was provided was recorded by Fox 5 and later broadcast in a news segment. As a result of this incident, FEMS charged Employee with Neglect of Duty for violating the patient's right to privacy.[1] Shortly thereafter on February 21,2012, Employee was assisting a colleague outside of the FEMS Training Academy when he was approached by Battalion Fire Chief ("BFC") Mark J. Wynn who noted in a special report that Employee was wearing logo noncompliant gear. BFC

[1] This was the basis for Case No. U-12-073. Employee was suspended for 240 duty hours pursuant to this charge and its specification.

Wynn then ordered Employee to change into gear that was compliant. Employee noted that he did not have compliant gear that was weather appropriate and accordingly refused the order. As a result of this incident, FEMS charged Employee with Insubordination.[2]

The Agency conducted a Fire Trial Board for both cases on May 16, 2012. As a result of these proceedings the Trial Board recommended that Employee be demoted from the rank of Lieutenant to Sergeant and that he be suspended for a combined two hundred and sixty four (264) duty hours. FEMS then-Chief Ellerbe accepted the recommendation in full. On July 31, 0212, Employee appealed Agency's adverse action to the Office of Employee Appeals ("OEA" or 'the Office"). Thereafter, the parties attended a Status Conference wherein it was determined that this matter would be adjudicated based on the standard outlined in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). The parties submitted their briefs as required. After reviewing the record, the Undersigned issued an Initial Decision ("ID") in this matter on February 2, 2015. As part of the ID, I determined that FEMS adverse actions should be reversed. As a result, FEMS was ordered to do the following:

1. Agency's action of demoting Employee from Lieutenant to Sergeant is **REVERSED**; and

2. Agency's action of suspending Employee for two hundred sixty four (264) duty hours is **REVERSED**; and

3. The Agency shall reimburse Employee all back-pay and benefits lost as a result of his suspension and demotion; and

4. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.[3]

FEMS did not to contest the ID. Therefore, it became the Final Decision of the OEA on or about March 8, 2015. Of note, Employee was the subject of another adverse action (another demotion).[4] In that matter, Agency opted to rescind that adverse action while it was pending before Senior Administrative Judge Joseph Lim. In a Motion dated March 9, 2016, Employee contested whether Agency had fulfilled the mandates of my ID. Employee explained that he had not received the necessary paperwork to prove that he had been awarded the proper amount of back-pay; that FEMS had not restored Employee's annual and sick leave that he had used while this matter was pending; and that he was not promoted to the rank of Captain. Agency contends that it had retroactively reinstated Employee to the rank of Lieutenant; it has provided all back-pay legally owed to Employee; it has erased all mention of the overturned matter from his personnel file; and that Employee cannot, at this time, be promoted to the rank of Captain. FEMS has submitted its legal brief responding to Employee's Motion. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is

[2] This was the basis for Case No. U-12-077. Employee was suspended for 24 duty hours and was demoted from the rank of Lieutenant to Sergeant pursuant to this charge and its specifications.
[3] Initial Decision at 10.
[4] *See Robert Alvarado v. DC Fire and EMS*, OEA Matter No. 1601-0069-13 (March 9, 2016).

now closed.

JURISDICTION

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

BURDEN OF PROOF

Pursuant to this Office's rules, Agency has the burden of proof in this appeal. *See* OEA Rule 628.2, 59 DCR 2129 (March 16, 2012). The standard of proof with regard to material issues of fact shall be by a preponderance of the evidence, which is defined by this Office's rules as follows:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean the degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012).

ISSUE

Whether the Agency has complied with the Initial (Final) Decision.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The procedure for computing back pay and benefits pursuant to an order from the OEA is set forth in Chapter 11B of the District Personnel Manual ("DPM") and codified in the Code of D.C. Municipal Regulations ("CDCR") at CDCR 6-B1149 (2016).

> CDCR 6-B1149.1 defines "pay" and "benefits," respectively, as:
>
> Pay--the rate of basic pay or basic compensation as defined under the applicable pay system; pay increases; within-grade increases; premium pay (including holiday, Sunday, night, administrative closing, and local environment pay); on-call pay; retained rates; and pay adjustments for District Service supervisors. For the purpose of this section, pay also means annual, sick, court, and military leave. Benefits--monetary and employment benefits to which an employee is entitled by law or regulation, including but not limited to health and life insurance, and excluding pay as defined in this section.
>
> CDCR 6-1149.10 provides that:

> When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action, the agency shall determine the employee's back pay entitlement by recomputing for the period covered by the corrective action the pay and benefits of the employee as if the unjustified or unwarranted personnel action had not occurred**, but in no case shall the employee be granted more pay or benefits than he or she would have been entitled by law, Mayor's Order, regulation or agency policy.** (Emphasis Added).

Agency notes that Employee has been issued multiple checks as part of its effort to fully reimburse Employee since he prevailed in the instant matter. More specifically, Employee was reimbursed $10, 440.84 for his suspension and $51,557.80 to recompense his demotions. With respect to reimbursing Employee for his suspension, Agency noted the following:

> Employee's period of suspension encompassed two (2) partial pay periods – 7/1/12 through 7/14/12 and 8/12/12 through 8/25/12 – and two (2) full pay periods – 7/15/12 through 7/28/12 and 7/29/12 through 8/11/12. Employee's annual salary at the rank of Lieutenant during that time period was $79,730.00 (*see* page 1 of Attachment 2 hereto) which equates to an hourly rate of $36.51. During the four pay periods affected by the suspension, Employee would have been paid a total of $12,267.36 had he not been suspended (84 hours per pay period x 4 pay periods x $36.51 per hour = $12, 267.36). In 2012, Employee was paid a total of $1,689.95 for the 2 partial pay periods he worked. *See* Excel spreadsheet attached hereto as Attachment 1. On October 17, 2014, he was paid $34.57 for a retroactive salary raise during the pay period ending August 25, 2012. *Id.* On June 26, 2015, he was paid 4 checks totaling $10,440.84 for the suspension hours. *Id* Additionally, on that date, he was separately paid $84.84 for the retroactive reversal of the demotion. Therefore, the total amount that has been paid to Employee for the suspension period is $12,250.20. Accordingly, Agency owes Employee $17.16 in back pay for the reversed suspension ($12,267.36 - $12,250.20 = $17.16) and will pay that amount forthwith.[5]

With respect to reimbursing Employee for his demotion, Agency noted as follows:

> On June 26, 2015, Agency issued to Employee four checks as reimbursement for back pay for the reversed demotions. Check #606460 in the gross amount of $5,166.53 covered the pay periods of August 12, 2012 through April 6, 2013; check #606461 in the gross amount of $19,341.47 covered the pay periods of April 7, 2013 through April 5, 2014; check #606462 in the gross amount of $11,406.90 covered the pay periods of April 6, 2014 through October 18, 2014; and check #606463 in the gross amount of $15,642.90 covered the pay periods of October 19,

[5] Agency's Response to Employee's Motion to Enforce at 3 – 4 (April 29, 2016).

> 2014 through May 30, 2015. Attached hereto as Attachment 2 are the Agency's retroactive pay request forms showing the corrected salaries and the number of hours for which Employee was owed back pay for the reversed demotion. Accordingly, Agency denies that it has failed to fully pay Employee back pay owed for the reversed demotion.[6]

After reviewing the documents of record, particularly Agency's Response to Employee's Motion to Enforce and its detailed attachments outlining all monies paid to Employee; I find that Agency has fully reimbursed Employee all back-pay due him as a result of his prevailing in the instant matter.

Employee further contends that he should be retroactively promoted to the rank of Captain. Agency counters that Employee has been reinstated to his former rank of Lieutenant and that is all that is due to him at this time. Agency further notes that promotion to the rank of Captain is not automatic. In order to advance to the rank of Captain, Employee herein must first take and pass an examination. It is uncontroverted that Employee has not passed the "Captain" exam. Since promotion to the rank of Captain is predicated on, *inter alia*, passing a "Captain" exam, I find that Employee herein is not entitled to promotion to the rank of Captain as part of the instant Addendum Decision on Compliance.

Employee asserts that he should be reimbursed 1363 hours of sick and annual leave that he used while this matter was pending before the Undersigned. Employee further asserts that the leave that was utilized was related to medical issues that occurred as a result of his having to endure the adverse actions that were "temporarily" imposed upon him. Agency notes that all of the leave cited by Employee was paid to Employee at the time that he used it. Agency further contends that to restore leave (sick and annual) that was utilized by Employee would result in a double benefit. I agree with the Agency. From the record, it is clearly noted that Employee was paid for the leave that he used when he used said leave. Moreover, I have already found that Employee has been fully recompensed for all back-pay that was due him as a result of his prevailing in the instant matter. Accordingly, I find that Employee is not entitled to be reimbursed for 1,363 hours of sick and annual leave.

Conclusion

Based on the foregoing, I CONCLUDE that the evidence of record reflects that the Agency's has COMPLIED with the final decision. Therefore, this matter may now be dismissed.

[6] *Id.*

ORDER

It is hereby ORDERED that Employee's Motion to Enforce (Compliance) is DISMISSED.[7]

FOR THE OFFICE:

_____
Eric T. Robinson, Esq.
Senior Administrative Judge

[7] As noted above, Employee's Motion for Attorney's Fees and Costs is a separate matter. In order for it to be actively considered, said motion should be updated to reflect all of the billable hours with corresponding curriculum vitae(s) and affidavit(s) to substantiate the time and effort spent in furtherance of this matter.