**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | |
| | OEA Matter No. 1601-0215-11C21R23 |
| EMPLOYEE, | |
| | Date of Issuance: March 26, 2024 |
| v. | |
| | JOSEPH E. LIM, ESQ. |
| D.C. PUBLIC SCHOOLS, | SENIOR ADMINISTRATIVE JUDGE |
| Agency | |

Employee, *Pro se*
Lynette Collins, Esq., Agency Representative

**SECOND ADDENDUM COMPLIANCE DECISION ON REMAND**

INTRODUCTION AND PROCEDURAL HISTORY

On September 9, 2011, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public Schools' ("DCPS" or "Agency") final decision to remove him from his position as a School Psychologist due to two (2) consecutive years of a "Minimally Effective" IMPACT rating.[1] Employee's termination was effective August 12, 2011. On May 20, 2014, I issued an Initial Decision ("ID") dismissing the matter for lack of jurisdiction due to Employee's retirement.[2]

Employee subsequently filed a Petition for Review with OEA's Board on June 26, 2014. On February 16, 2016, the OEA's Board issued an Opinion and Order on Petition for Review denying Employee's petition.[3] It held that OEA had no jurisdiction over his appeal because the evidence supports a finding that Employee's decision to retire was of his own volition and was not a result of incorrect or misleading information on Agency's part.

Thereafter, Employee appealed to the Superior Court of the District of Columbia ("Superior Court"). On February 21, 2017, the Superior Court affirmed OEA's decision and denied

[1] IMPACT is the effectiveness assessment system Agency uses to rate the performance of school-based personnel.
[2] *Employee v. District of Columbia Public Schools,* OEA Matter No. 1601-0215-11, *Initial Decision* (May 20, 2014).
[3] *Employee v. District of Columbia Public Schools,* OEA Matter No. 1601-0215-11, *Opinion and Order on Petition for Review* (February 16, 2016).

Employee's appeal.[4] Employee's Motion for Reconsideration was denied on April 11, 2017.[5] Employee then appealed to the District of Columbia Court of Appeals ("DCCA"). On August 9, 2018, the DCCA vacated the ID on the issue of jurisdiction and remanded the case to the Superior Court for further remand to OEA.[6] The Superior Court then remanded the matter back to OEA on February 8, 2019, with instructions to proceed with the matter.[7] On June 14, 2019, I issued an Initial Decision on Remand ("IDR") upholding Agency's termination of Employee's employment due to his two (2) consecutive years of 'Minimally Effective' IMPACT ratings.[8]

Employee appealed the IDR and on May 19, 2020, the OEA Board upheld the legality of the IMPACT but remanded the matter to the Undersigned for the purpose of conducting an evidentiary hearing.[9] Specifically, the Board determined that a hearing was needed to address Employee's allegations of procedural errors in Agency's removal of Employee as it pertained to his IMPACT scores. After a July 23, 2020, Evidentiary Hearing,[10] I issued a Second Initial Decision on Remand ("Second IDR") on October 15, 2020, whereby I reversed Agency's action of separating Employee for receiving a "Minimally Effective" IMPACT rating for two consecutive school years but upheld his "Minimally effective" IMPACT score for school year 2010-2011.[11] Consequently, I ordered Agency to reinstate Employee to his last position of record and reimburse Employee all back-pay and benefits lost due to the separation less any retirement benefits he has received. Agency appealed, and on February 4, 2021, the OEA Board held that Agency failed to prove just cause in terminating Employee and denied Agency's Petition for Review.[12] Employee accepted Agency's job offer on or about December 21, 2020, and his position as a School Psychologist took effect on January 4, 2021.

At the parties' request, an Evidentiary Hearing on the issue of the amount of backpay was held on June 23, 2021, with the parties submitting their written closing arguments by August 4, 2021. On September 29, 2021, I issued an Addendum Decision on Compliance where I found that Employee failed to adequately mitigate his damages from 2011 to 2020. I thereby ordered Agency to reimburse Employee all backpay and benefits lost as a result of the improper removal action

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[4] *Employee v. District of Columbia Public Schools, et al*., Case No. 2016 CA 001551 P(MPA) (D.C. Super. Ct. February 21, 2017).
[5] *Employee v. D.C. Pub. Schs.*, No. 2016 001551 P(MPA) (D.C. Super. Ct. Apr. 11, 2017) (order denying motion for reconsideration).
[6] *Employee v. D.C. Public Schools,* 191 A.3d 293 (D.C. 2018).
[7] *Employee v. D.C. Pub. Schs.*, No. 2016 001551 P(MPA) (D.C. Super. Ct. Feb. 8, 2019) (order remanding case).
[8] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18, *Initial Decision on Remand* (June 14, 2019).
[9] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18, *Opinion and Order on Remand* (May 19, 2020).
[10] Due to the District of Columbia's Covid-19 State of Emergency, the Evidentiary Hearing was held virtually via WebEx.
[11] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R20, *2nd Initial Decision on Remand* (October 15, 2020).
[12] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20, *2nd Opinion and Order on Remand* (February 4, 2021).

starting from August 2011 until January 3, 2021, less any annuity retirement benefits paid[13] and less any amounts he could have earned had he diligently sought other work, prorated to the months Employee was unemployed.[14] Employee took issue with the Addendum Decision and appealed to the OEA Board on October 28, 2021. On December 17, 2021, the OEA Board denied Employee's appeal.[15]

On January 27, 2022, Employee filed a motion that he titled "Motion for Compliance Addendum" whereby he complained that Agency failed to submit calculations regarding his annual leave payout, retirement pay adjustment, restoration of benefits, or attorney's fees. On February 3, 2022, I ordered Agency to submit detailed calculations and supporting documents to show the amount of backpay and benefits due Employee, if any, by February 22, 2022. The record closed after both parties submitted their briefs, supporting documents and counter-responses.

On March 15, 2022, I dismissed Employee's Motion for Compliance after I found that Agency had complied with the September 29, 2021, Addendum Decision on Compliance.[16] Employee filed three Motions for Attorney Fees, and on May 23, 2022, I issued an Addendum Decision on Attorney Fees denying his motions.[17] Employee appealed, and on June 8, 2023, the Superior Court issued an Order Affirming in Part and Reversing in Part, wherein it affirmed the May 23, 2022, Addendum Decision on Attorney Fees and affirmed in part and reversed in part the September 29, 2021, Addendum Decision and the October 15, 2020, Second Addendum Decision.[18] Employee again petitioned the Superior Court to reconsider its Order on August 25, 2023, and on November 28, 2023, the Superior Court denied Employee's Motions for the Superior Court to reconsider its Orders.[19]

I held a Status Conference on December 8, 2023. Thereafter, I ordered the parties to submit supplemental briefs by December 15, 2023, and January 19, 2024. The deadline was extended to March 5, 2024, due to the death of counsel's family member. The record was closed after all the briefs were submitted.

## JURISDICTION

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

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[13] *See* 6B DCMR 1149.12(b).
[14] The Addendum Decision on Compliance specified the amounts per year from 2011 to 2020 that Agency must deduct from Employee's backpay.
[15] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20C21, *Opinion and Order* (December 17, 2021).
[16] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20C21 (Mar. 15, 2022).
[17] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20AF22 (May 23, 2022).
[18] *Employee v. District of Columbia Public Schools, et al*., Case No. 2022 CA 000506 (D.C. Super. Ct. June 8, 2023).
[19] *Employee v. District of Columbia Public Schools, et al*., Case No. 2022 CA 000506 (D.C. Super. Ct. November 28, 2023).

## ISSUES

1. Whether the Employee is entitled to one (1) year of backpay pursuant to DCRM 6-1149, and if so, what is the amount.
2. Whether Employee was owed sick and/or annual leave payout under 6-B D.C.M.R. § 1149.

**Relevant Regulation**

6-B D.C.M.R. § 1149.11 states: In computing the amount of back pay under this section, the agency shall not include any of the following…

**(a)** Any period during which the employee was not ready and able to perform his or her job because of an incapacitating illness, except that the agency shall grant, upon the request of and documentation by the employee, any sick leave or annual leave to his or her credit to cover the period of incapacity by reason of illness;

**(b)** Any period during which the employee was unavailable for the performance of his or her job; or

**(c)** Any period after one (1) year from the date of the unjustified or unwarranted personnel action where it is determined that an employee has not actively sought employment.

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

In its June 8, 2023, Order Affirming in Part and Reversing in Part, the Superior Court held that while OEA's Addendum Decision was based on substantial evidence, OEA had miscalculated Employee's backpay. In coming to this conclusion, the Superior Court held that: 1) OEA properly deducted the amount of retirement annuity paid to Employee from the total amount of back pay owed Employee. 2) The OEA properly granted DCPS's timely request for an evidentiary hearing on back pay because determining whether Employee mitigated his damages was necessary to calculating the amount of back pay to which he was entitled.; 3) The OEA properly considered DCPS's request for an evidentiary hearing on back pay because the request was timely.; 4) There was substantial evidence to support the OEA's conclusion that DCPS met its burden in showing Employee failed to adequately mitigate his damages.; 5)The OEA properly admitted Ms. Moreau's testimony as an expert witness.; 6) There is substantial evidence supporting the OEA's factual finding that the clinical counseling and school psychologist job market from 2011 through 2020 was robust and provided opportunities for Employee to secure substantially equivalent employment.; and 7) Regardless of the availability of substantially equivalent employment for Employee, there is substantial evidence to support OEA's conclusion that Employee failed to mitigate his damages.

Applying the strictures of Title 6, Subtitle B, the Superior Court, however, found that "OEA incorrectly calculated the amount of backpay Employee was owed by not properly identifying the period of time for which re-computation of Employee's back pay is required pursuant to § 1149.9, which is tied to the requirements of § 1149.11. OEA was required to consider

whether 6-B D.C.M.R. § 1149.11(c) applied to the facts of this case and thus was required, but failed, to make two related determinations pertaining to the computation of back pay." The Court held that "OEA failed to exclude from the calculations the one-year grace period for Employee during which he had no duty to mitigate, as DCPS argues was Employee's entitlement under 6-B D.C.M.R. § 1149.11(c)."[20]

**Whether the Employee is entitled to one year of backpay pursuant to 6-B D.C.M.R. § 1149.11(c), and if so, what is the amount.**

In my prior Second Addendum Decision on Compliance, I found that Employee failed to mitigate his damages from 2011 when he was separated to 2020 when he was reinstated.[21] 6-B D.C.M.R. § 1149.11(c) states: In computing the amount of back pay under this section, the agency shall not include … Any period after one (1) year from the date of the unjustified or unwarranted personnel action where it is determined that an employee has not actively sought employment. Agency agrees that 6-B DCMR 1149.11(c) applies to this instant matter. As such, the Employee had no duty to mitigate his damages during the 2011-2012 school year. The Employee's salary for that school year is $97, 521.31.[22]

6B DCMR 1149.12(b) states that, "In computing the amount of back pay due an employee, the agency shall deduct… Any erroneous payment received from the District or Federal Government as a result of the unjustified or unwarranted personnel action, which, in the case of erroneous payments received from the federal Civil Service Retirement System, Police and Fire Retirement System, and any District retirement system, shall be returned to the appropriate system." Thus, consistent with 6B DCMR 1149.12(b), from that first year's salary, the amount would be subtracted by any annuities or benefits that were received or would have been received by the Employee during the 2011-2012 school year.

Agency agrees that 6-B D.C.M.R. § 1149.11 applies in this matter. In this case, during the 2011-2012 school year the Employee received an annuity of $24,141.44.[23] Therefore, the total retro pay minus annuity payments is $73, 379.87. Also deducted from the retro pay are benefits that the Employee would have paid during the 2011-2012 school year. The Employee's benefits total $4,766.43, which leaves a retro pay amount of $68, 613.44, which is subject to federal and state taxes.

In his brief, Employee did not address 6-B DCMR 1149.11. Instead, he attempts to relitigate issues previously ruled upon and upheld, such as arguing that he did attempt to

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[20] *Employee v. District of Columbia Public Schools, et al*., Case No. 2022 CA 000506 (D.C. Super. Ct. June 8, 2023) on page 24.
[21] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20C21 (Mar. 15, 2022). The D.C. Superior Court incorrectly stated that I found Employee failed to mitigate his damages from 2014 to 2020. The ID stated that I found he failed to mitigate his damages from 2011 to 2020.
[22] Agency Backpay Calculations Pursuant to DCMR 6-1149, Agency Exhibit One (August 23, 2023).
[23] Agency Second Amended Backpay Calculations Pursuant to DCMR 6-1149, Agency Exhibit One (March 5, 2024).

mitigate his damages. Employee also submitted his own calculation on the total net backpay he claims he is still owed after deducting his retirement annuity payments. Employee asserts that he is owed $1,738,889.07 for the years 2011 through 2023. He explained that he came up with a yearly 2.5% increase for each year to account for inflation, cost of living, and salary progression to account for his figures. He also applied the same yearly 2.5% increase to his benefits. Employee also added interest totaling $190,549.50 to his figures but does not cite any statute or regulation that would authorize him to charge Agency with interest.

Comparing Agency's calculations with those of Employee's, I find that Agency's calculations are supported by the relevant regulations while Employee's calculations are not. Therefore, I find Agency's figures to be more credible than Employee's. In the prior Initial Decision, I also found (and the Court has upheld) that Employee failed to mitigate his damages in a robust job market for Employee's profession from 2011 to the time that he was rehired by Agency.[24]

To reiterate, the Employee's retro pay amount during the 2011-2012 school year is $68, 613.44 after deducting the $24,141.44 annuity benefits and the $4,766.43 benefits that the Employee would have paid during the 2011-2012 school year.[25]

**Whether Employee was owed sick and/or annual leave payout under 6-B D.C.M.R. § 1149.**

With regards to OEA's Second Addendum Decision, while the Superior Court held that there is substantial evidence supporting the OEA's finding that Employee would not have been entitled to annual leave payout, it posited that because OEA did not determine the period for computing back pay, OEA failed to properly apply D.C. Municipal Regulations in determining whether Employee was owed sick or annual leave payout under 6-B D.C.M.R. § 1149.

6-B D.C.M.R. § 1149 governs the computation, payment, and restoration of pay and benefits for a D.C. government employee who undergoes an unjustified or unwarranted personnel action resulting in the withdrawal, reduction, or denial of all or any part of the pay or benefits otherwise due the employee. 6-B D.C.M.R. § 1149.3. Under this Section, the definition of "pay" also includes annual and sick leave. 6-B D.C.M.R. § 1149.1. The Superior Court instructed OEA to consider the issue of annual and sick leave payouts in determining the amount of pay to which Employee would have been entitled. *Id.* at §§ 1149.10-1149.14.[13]

DCPS classifies ET 15/11, ET 15/12, and ET 15[26] employees as school-based employees and EG 09 employees as non-instructional employees who work a 40-hour week and fifty-two (52) weeks a year. The parties' Collective Bargaining Agreement ("CBA") provides that DCPS recognizes the Washington Teacher's Union ("WTU") as the sole and exclusive bargaining

[24] *Employee v. DCPS*, OEA Matter No. 1601-0215-11C21 (September 29, 2021).
[25] *Id.*, Agency Exhibit Two and Three.
[26] 10-month employees who do not work during the school summer.

representative for the purpose of negotiating all matters related to rates of pay, wages, benefits, hours of employment, and working conditions for employees in the occupational bargaining units and job classifications.[27] It is uncontroverted that Employee was a member of the WTU, and as such was covered by its CBA with Agency. It is also undisputed that at the time of Employee's termination, reinstatement and subsequent resignation, Employee was employed with Agency as an ET 15 (10-month) employee. Thus, the CBA and DCPS's Leave and Retirement Policy govern Employee's entitlement to a payout for both sick and annual leave.

According to the CBA between WTU and Agency, only EG-09 WTU members receive annual leave, all others receive sick leave. Section 17.2.1 of the CBA provides that only twelve (12) month WTU members receive annual leave. [28] As such, ET15 WTU members, including Employee, do not accrue annual leave. WTU members do not accrue sick leave, nor do they accrue annual leave. Therefore, I find that Employee is not entitled to an annual or sick leave payout.

The Court also held that because the OEA did not include sick leave in calculating Employee's pay or determine the period for which computation of Employee's back pay is required, the OEA prematurely ruled on Employee's retirement annuity. Employee's retirement annuity, as a member of the WTU, is based solely on Employee's contribution, specifically eight percent of Employee's pay for each pay period. Because the eight (8%) percent annuity would thus be tied to Employee's back pay, the OEA erred in assessing Employee's annuity before correctly calculating his back pay. Thus, the Court remanded the case to the OEA to determine the amount of back pay owed Employee under D.C. Municipal Regulation 6-B § 1149 and in accordance with its Order.

**Employee's Sick Leave payout from August 2011 to December 2020**

CBA Article 17 Leave Polices govern whether Employee is entitled to a payout of sick leave. CBA Article 17, Section 17.1.1 outlines that twelve (12) days or (96) hours of sick leave are posted at the beginning of each school year for ten (10) month WTU members. Section 17.1.1. continues "unused sickleave shall be carried forward from one year to year.[29] In addition, the DCPS Leave and Retirement Policy outlines that "accumulated sick leave shall not be payable

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[27] D.C. Official Code §1-606.3 authorizes this Office to hear appeals of career service employees challenging removals, reductions in grade or suspensions of at least ten days. In doing so, the Office is governed by the requirements set forth in the D.C. Official Code and the District Personnel Manual (DPM). However, if, during the relevant time period, the employee filing the petition for appeal with OEA was covered by a negotiated agreement which addresses disciplinary matters, then, pursuant to D.C. Official Code §1-616.52(d), cited below, states that the negotiated provisions "take precedence" over the statutory provisions:

> Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for employees in a bargaining unit represented by a labor organization. If an employee does not pay dues or a service fee to the labor organization, he or she shall pay all reasonable costs to the labor organization incurred in representing such employee.

[28] Agency Exhibit 1. CBA Article 7. Leave Policies

[29] *Id*.

upon resignation or termination."[30] Because Employee voluntarily resigned his regained position after he was rehired on January 4, 2021, I find that, based on the CBA, Employee is not entitled to a payout of sick leave.

The court upheld the AJ's determination that the Employee failed to mitigate his damages. The Court further found that the amount of yearly deductions ordered by the AJ were also correct. However, the Court in their remand required the AJ to provide specific calculations during the period for which the employee "failed to mitigate."

In his brief, Employee again attempts to relitigate all issues that had already been decided and upheld, including his contention that his retirement annuities that he had received should not be deducted from any backpay. This repeated argument is in direct contravention to 6B DCMR Section 1149.12. Based on Agency's calculations, Employee's earnings for the period of 2012-2020 totaled $976,032.12.[2] The retirement annuities that the Employee received during the same period totaled $235,386.00.[31] Moreover, benefits that the Employee would have paid during the same timeframe totaled $16,607.78.[32] According to Agency, the Court ordered deductions totaled $1,056.360.00.[33] As such, earnings less retirement benefits less court ordered deductions total negative $332,321.70.[34] Therefore, I find that Employee is not entitled to backpay for the time period of 2012-2020.

**Employee's Retirement Annuity (retirement pay adjustment)**

Employee argues that there should be an increase in his retirement annuity. It is uncontroverted that for WTU members, retirement annuities are based solely on their contribution. Specifically, 8% of the Employee's pay for each pay period is placed in their retirement fund. In this case, the 8% would have been based on any backpay that was awarded to the Employee. However, because the Employee failed to mitigate his damages, he is no longer entitled to backpay. As such, no contributions can be made to his retirement annuity. Thus, he is not entitled to an increase in his annuity.

In conclusion, I find that Agency has fully complied with the September 29, 2021, Addendum Decision on Compliance. Therefore, Employee's Motion for Compliance is dismissed.

## ORDER

Since Agency has complied with this Office's decision, it is hereby ORDERED that Employee's motion for compliance is DISMISSED.

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[30] See Agency's Exhibit Two. DCPS Employee Leave and Retirement Policy
[31] Agency's Second Amended Backpay Calculations Pursuant to DCMR 6-1149. Exhibit One.
[32] Agency's Second Amended Backpay Calculations Pursuant to DCMR 6-1149. Exhibit Two.
[33] Agency's Second Amended Backpay Calculations Pursuant to DCMR 6-1149.
[34] Based on Agency's calculations, it appears that Employee had been overpaid.

FOR THE OFFICE:

s/ *Joseph Lim*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge