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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ILBAY OZBAY,)	
Employee)	OEA Matter No. 1601-0073-09R11C15
)	
v.)	Date of Issuance: October 5, 2016
)	
D.C. DEPARTMENT OF)	Monica Dohnji, Esq.
TRANSPORTATION,)	Senior Administrative Judge
Agency)	
_____)	

Tyler Freiburger, Esq., Employee’s Representative
Michael O’Connell, Esq., Agency’s Representative

ADENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 22, 2009, Ilbay Ozbay (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the District Department of Transportation’s (“Agency”) decision to terminate him. This matter was originally assigned to retired Senior Administrative Judge (“AJ”) Rohulamin Quander. On March 18, 2011, AJ Quander issued an Initial Decision (“ID”), upholding Agency’s decision to terminate Employee.

Employee appealed the ID to the OEA Board. On July 23, 2012, the OEA Board issued an Opinion and Order (“O&O”) in this matter, granting Employee’s Petition for Review, and remanding the matter to the AJ. On June 4, 2013, AJ Quander issued an Initial Decision on Remand (“IDR”) reversing Agency’s decision to terminate Employee. Agency filed a Petition for Review with the OEA Board. On October 28, 2014, the OEA Board issued an O&O, denying Agency’s Petition for Review. The October 28, 2014, O&O also ordered Agency to reinstate Employee to his position with back pay and benefits within thirty (30) calendar days from the date the decision became final. On December 9, 2014, and December 15, 2014, Employee filed two (2) separate Motions for Enforcement and Compliance with OEA, noting that Agency had not complied with the terms of the October 28, 2014, O&O.

Pursuant to AJ Quander's retirement from OEA, this matter was assigned to the undersigned AJ. Following several Status Conferences and email correspondence, the parties informed the undersigned AJ that Agency had partially complied with the October 28, 2014, Order. The undersigned was informed that Employee had been reinstated and his back pay reimbursed. However, Employee's annual leave was not fully restored. The record is now closed.

JURISDICTION

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

ISSUE

Whether this matter should be certified to the General Counsel's Office for enforcement.

ANALYSIS AND CONCLUSIONS OF LAW

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. 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.)

The only outstanding issue in this matter is the full repayment of Employee's restored annual leave. Both parties agree that Employee has been reinstated to his position and reimbursed all his back pay. However, the parties disagree on the amount of annual leave house to be restored or if not restored, the amount of annual leave payout. In August of 2015, the parties agreed that Employee was entitled to back leave totaling 1424 hours. Agency gave Employee the option to either have his back leave restored or to receive monetary payment for the back leave. Employee chose to have his back leave restored. However, in February of 2016, Employee was informed that he would receive a payment for the total of 964 hours of leave and he would lose the remainder of his leave (460). Agency explained that annual leave is capped at 240 hours.¹

D.C. Code §1-612.03 (h) provides that,

(h) Annual leave which is not used by an employee accumulates for use in succeeding years until it totals not more than 30 days at the beginning of the 1st full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a calendar year.

¹ D.C. Code §1-612.03(h).

(1) Annual leave in excess of 30 days which was accumulated under an earlier statute remains to the credit of the employee until used. The excess annual leave is reduced at the beginning of the 1st full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year, by the amount of annual leave the employee used during the preceding year in excess of the amount which accrued during that year until the employee's accumulated leave does not exceed 30 days.

(2) *Annual leave which is lost due to administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960, exigencies of the public business when the annual leave was scheduled in advance, or sickness of the employee when the annual leave was scheduled in advance, shall be restored to the employee:*

(A) *Restored annual leave which is in excess of 30 days shall be credited to a separate leave account for the employee and shall be available for use by the employee for a period of 2 years.*(emphasis added). Restored leave shall be included in a lump-sum payment if unused and still available upon the separation of the employee;

(B) Annual leave otherwise accruable after June 30, 1960, which is lost because of administrative error and is not recredited because the employee is separated before the error is discovered, is subject to credit and liquidation by lump-sum payment only if a claim therefor is filed within 3 years immediately following the date on which the error is discovered.

In the instant matter, the parties agreed in August of 2015, that Employee was entitled to 1424 hours of back annual leave. Employee was given a choice by Agency – have the back annual leave restored or receive monetary payment for the 1424 hours. Employee chose to have the entire 1426 hours of back leave restored. Agency made a unilateral decision in February 2016 to only pay Employee for 960 hours, citing D.C. Code §1-612.03(h) as justification for its failure to pay Employee for the remaining 460 hours of back annual leave. I disagree with Agency's reasoning. While D.C. Code §1-612.03(h) caps the carryover of annual leave in excess of thirty (30) days into the next calendar year, this does not apply to restored leave that Employee was entitled to as a result of his reinstatement.

D.C. Code 1-612.03(h)(2)(A) provides in pertinent parts as follows: *Annual leave which is lost due to administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960, ...shall be restored to the employee:*

(A) *Restored annual leave which is in excess of 30 days shall be credited to a separate leave account for the employee and shall be available for use by the employee for a period of 2 years.*(emphasis added). Here, based on the October 28, 2014, O&O, Agency did not have cause to terminate Employee and as such it was required to restore all Employee's benefits (including

annual leave) stemming from the wrongful termination in 2009. Therefore, because the termination was a result of an “administrative error,” and this error caused Employee to lose annual leave which he would have otherwise accrued, Agency is required to restore all of Employee’s annual leave in excess of 30 days in compliance with D.C. Code §1-612.03(h)(2)(A). Further, Agency is required to put any back leave in excess of 30 days in a separate account for Employee and it shall be available for use by Employee for a period of two (2) years. Accordingly, I find that since Agency made the unilateral and arbitrary decision to payout 964 hours of the 1424 hours, Agency owes Employee 460 hours. Furthermore, Agency was required to credit these hours in a separate account and make it available for use by Employee for a period of two (2) years from 2015 when Employee was reinstated. Moreover, there is no evidence that Agency informed Employee that his back annual leave had to be in compliance with D.C. Code §1-612.03(h).

Additionally, Employee has provided an affidavit from another employee attesting that when he was reinstated by Agency about eighteen (18) months ago, he had accrued 1,200 hours of sick leave and 350 hours of annual leave, and all his accrued leave was restored to him upon his reinstatement. Agency does not contest this. Agency’s decision to pay Employee for 964 hours and denying to pay him for the remaining 460 hours is evidence that Agency has not fully complied with D.C. Code §1-612.03(h)(2)(A).

ORDER

Based on the aforementioned, it is hereby **ORDERED** that because Agency has not fully complied with the October 28, 2014 O&O requiring it to reimburse Employee all benefits (including leave) lost from his termination, this matter is certified to the Office of Employee Appeals’ General Counsel for enforcement of this Addendum Decision on Compliance.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge