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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0012-14C22
)	
Employee)	
)	Date of Issuance: September 30, 2022
v.)	
)	
D.C. DEPARTMENT OF EMPLOYMENT)	ARIEN P. CANNON, ESQ.
SERVICES,)	Administrative Judge
Agency)	
_____)	

Charles Tucker, Jr., Esq., Employee Representative
Starr Granby-Collins, Esq., Agency Representative¹

SECOND ADDENDUM DECISION ON COMPLIANCE

On January 18, 2022, Employee filed a Motion to Reopen for Enforcement and Assessment of Attorney Fees.² In a January 24, 2022 Order, I granted Employee's Motion to Reopen for Enforcement and Assessment of Attorney Fees. The focus of the instant order addresses Employee's Motion to Reopen for Enforcement relating to Employee's first OEA case. The Motion for Assessment of Attorney Fees was addressed under a separate order issued on September 28, 2022.

On April 22, 2016, the undersigned issued an Initial Decision reversing Agency's termination action against Employee. Agency was ordered to reimburse Employee all backpay and benefits lost because of her removal. This decision was not appeal by Agency to the OEA Board or to the Superior Court for the District of Columbia. What followed was over a one-year

¹ Prior to Ms. Granby-Collins' appearance, Agency was represented by Rhesha Lewis-Plummer, Esq..

² This filing also contained an Opposition to Agency's Request for a Hearing and Partial Motion for Summary Judgment on Retaliation relating to Employee's second OEA case (OEA Matter No. 1601-0059-20). This Order held the second matter in abeyance until full compliance stemming from the April 22, 2016, Initial Decision Order has been satisfied. The filings by both parties regarding Agency's request for a hearing and partial motion for summary judgment conflate issues presented in two separate OEA matters relating to Employee. Agency's Request for a Hearing and Partial Motion for Summary Judgment on Retaliation relate to Employee's second OEA case—OEA Matter No. 1601-0059-20. Employee's Motion to Reopen for Enforcement and Assessment of Attorney Fees pertains to Employee's first OEA case—OEA Matter No. 1601-0012-14.

effort by the undersigned to attempt to get Agency to come into full compliance with the April 22, 2016 Order. From May 2016, through August 2017, the undersigned held over a dozen status conferences and exhausted all avenues to get Agency to come into full compliance with the April 2016 Order. Unfortunately, these efforts fell short, and this matter was certified to OEA's General Counsel's Office on August 11, 2017, pursuant to OEA Rule 635.9, 59 DCR 2129 (March 16, 2012).

On August 21, 2017, OEA's General Counsel's Office certified this matter to the Executive Office of the Mayor's Office of the General Counsel ("EOM OGC") as an attempt to get Agency to come into full compliance with the OEA April 2016 Order. In response to OEA's General Counsel's Office certifying this matter, the EOM OGC issued a Memorandum and Decision on its findings on July 31, 2018. Employee appealed the EOM OGC's findings to the D.C. Superior Court, however, the appeal was dismissed for lack of jurisdiction. Subsequently, a separate but related OEA matter (OEA Matter No. 1601-0059-20) involving Employee came before the undersigned when Employee was "terminated" from her position again. During the November 16, 2021 Prehearing Conference for the separate matter, the undersigned was informed that Agency still had not restored all benefits owed to Employee relating to the instant matter nor had any documentation been provided to Employee regarding the breakdown of the backpay check issued, thus calling into question the accuracy of the backpay amount.³

Accordingly, Employee's Motion to Reopen for Enforcement is being treated as a second motion for enforcement.⁴ OEA Rule 635, 59 DCR 2129 (March 16, 2012), addresses the process for enforcing an OEA order. The instant case is unique given that it is the first and only case that the undersigned is aware of where an agency fails to fully comply with an OEA order, acknowledges its shortcomings, yet still chooses not to comply with a lawful order for reasons that remain unclear. Exacerbating the ongoing non-compliance of Agency here is the EOM OGC's July 31, 2018 findings which misstate the benefits in which Employee has a claim. Specifically, EOM OGC mistakenly asserted that Agency has complied with the April 2016 Order because Employee has been credited the annual leave hours she is owed, totaling 194.5 hours. Part of the basis for Employee's termination action in October 2013 was an Absence Without Leave ("AWOL") charge. When the termination action was reversed in the April 2016 Order, Agency credited back the hours which served as a basis for her termination which were accumulating *prior* to her termination. However, the annual leave benefits in which Employee is entitled are leave hours that would have accrued *after* her wrongful termination until the time she was reinstated pursuant to the April 2016 reversal order.

Agency acknowledges that around the time a backpay check was issued in August 2017, Employee had 256 annual leave hours and 312 sick leave hours to her credit.⁵ These hours presumably include annual leave hours that Employee would have accrued *after* her wrongful termination until the time she was temporarily reinstated. However, Agency contends that the annual leave hours were not paid out upon Employee's separation because the last fund she was

³ The documentation in the OEA record is contradictory and incomplete regarding Employee's backpay.

⁴ Employee filed her first Motion to Enforce on July 13, 2016 (This motion was captioned as a Motion to Compel; however, it was treated as a Motion to Enforce).

⁵ See Agency's Motion to Close Issue of Compliance and Response to Employee's Motion for Attorney's Fees, Costs or Related Expenses, at 2, FN 4, Exhibit C (OEA Matter No. 1601-0059-20). (March 25, 2022).

compensated from was workers' compensation.⁶ Agency maintains that all of Employee's leave hours were restored but because her last payout type was Workers' Compensation, annual leave hours are not automatically paid out to an employee upon separation from the District government. While there may not be an automatic lump-sum pay out of annual leave hours as Agency asserts here, it has not offered any solution or mechanism for Employee to follow to have these leave hours paid out. Agency has not maintained that Employee is precluded from asserting a claim to these annual leave hours. Thus, it is evident that unless Agency is relying upon a rule, regulation, or law that precludes Employee from having a claim to the lump-sum cash value of annual leave hours, there is still a deficiency in Agency's compliance with the undersigned's April 2016 Initial Decision Order.⁷

Additionally, in a March 25, 2022 filing submitted by Agency, captioned, "Agency's Motion to Close the Issue of Compliance and Response to Employee's Motion for Attorney's Fees, Cost or Related Expenses,"⁸ one of the documents within Exhibit B is a spreadsheet with a handwritten notation at the end stating, "Total Amount Due \$264,002.72." Underneath the total amount due is a signature dated June 8, 2017. However, in Agency's Prehearing Statement filed in the second matter (OEA No. 1601-0059-20), Exhibit B, is the backpay check stub associated with the instant matter, dated August 4, 2017, with the gross amount being \$213,269.94.⁹ The two different amounts in the two different exhibits are in contradiction and Agency makes no attempt to reconcile the difference in these gross amounts. The closest document to a worksheet showing the breakdown of deductions associated with the backpay is the August 4, 2017 paystub with a gross amount of \$213,269.94. However, because of the contradiction in the spreadsheet discussed above with a gross amount of \$264,002.72, it cannot be determined whether Employee has received the appropriate amount of backpay. Without reconciling these numbers, Agency is still in non-compliance with the April 2016 Order.

Furthermore, although OEA's General Counsel elected to certify this compliance matter to the EOM OGC via email on November 15, 2017, it is worth noting the potential conflict of interest this poses with such a division under the umbrella of the Mayor's Office.¹⁰ City Administrator's Order No. 2018-2, issued on October 16, 2018, orders that "no governmental department, agency, office, commission, and board under the direct administrative control of the Mayor shall enter into, or agree to enter into, the settlement of any litigation or legal claim involving an employee or personnel related matter, where such settlement includes the payment of a monetary sum, without prior approval of the City Administrator." To obtain approval of the City Administrator, an agency must submit a proposed settlement agreement to the Director of the Mayor's Office of Legal Counsel ("MOLC"). While the MOLC and EOM OGC are ostensibly two different divisions, they both fall directly under the umbrella of the Mayor's Office. This potentially creates a conflict of interest given that the EOM OGC made findings regarding Agency's compliance with an OEA Order and MOLC is tasked with approving any settlements involving a monetary component. The instant case certainly involved a monetary component which may still be outstanding, depending

⁶ *Id.*, at Exhibit C., Declaration of Keely Williams, Deputy Director of the Office of Pay and Retirement Services.

⁷ Agency has not proffered any information or documentation to suggest that such regulations exists.

⁸ This filing was made under the OEA Matter No. 1601-0059-20.

⁹ See Agency Prehearing Statement, Exhibit B, OEA Matter No. 1601-0059-20 (November 15, 2021).

¹⁰ See Memorandum and Decision issued by the Executive Office of the Mayor, Office of General Counsel to the Mayor (July 31, 2017).

on the reconciliation of the two different gross amounts discussed above regarding Employee's backpay.¹¹

Nevertheless, pursuant to OEA Rule 635, 59 DCR 2129 (March 16, 2012), the undersigned is limited in enforcing outstanding compliance issues. OEA Rules and the corresponding statutory provisions regarding enforcement and compliance tie the hands of an administrative judge of this Office from compelling an agency to fully comply with an OEA order, despite clear non-compliance. The necessary actions warranted to compel an agency to fully comply is left for a different authority beyond the scope granted to the undersigned. Given the extensive procedural history in this matter solely regarding enforcement and compliance, coupled with the extensive efforts by the undersigned to address the outstanding issues, the undersigned has no choice but to leave the enforcement of this instant matter to another entity to address outstanding compliance issues, perhaps in the Superior Court for the District of Columbia. Accordingly, I must deny Employee's Second Motion for Enforcement.

ORDER

It is hereby **ORDERED** that Employee's Second Motion for Enforcement is hereby DENIED for the reasons set forth above.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge

¹¹ The undersigned is not asserting that the instant matter presents a conflict of interest; rather, the *potential* conflict of interest posed by divisions under the Mayor's Office handling the certification for non-compliance of a personnel related case and the City Administrator's Order requiring that monetary settlements involving personnel legal matters also be authorized by a legal division of the Mayor's Office.