THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LAURA JACKSON,	)	
Employee	)	OEA Matter No. 2401-0020-10R17C19
	)	
v.	)	Date of Issuance: September 23, 2018
	)	
D.C. DEPARTMENT OF HEALTH,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	

Donald Temple, Esq., Employee's Representative
Milena Mikailova, Esq., Agency Representative

ADDENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL HISTORY

On October 6, 2009, Laura Jackson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting the District of Columbia Department of Health's ("Agency") action of terminating her employment through a Reduction-in-Force ("RIF"). Employee's position of record at the time she was separated from service was Compliance Specialist. Employee worked in Career Service status at the time she was terminated. This matter was initially assigned to former Administrative Judge ("AJ") Murphy. On April 19, 2013, she issued an Initial Decision ("ID") upholding Agency's decision to abolish Employee's position. In November of 2013, Employee, through her attorney, appealed the AJ's ID to the District of Columbia Superior Court, and later to the District of Columbia Court of Appeals, which remanded the case to the District of Columbia Superior Court with directions to remand the case to OEA for further proceedings. The Court explained that OEA should address the issue of errors in the calculation of Employee's service computation date ("SCD") which was not addressed in the ID. The Court also requested that OEA clarify what Agency must do to meet its burden.

Following former AJ Murphy's promotion to Deputy General Counsel for OEA, this matter was reassigned to the undersigned AJ. On May 1, 2018, I issued an Initial Decision on Remand ("IDR") reversing Agency's decision to separate Employee pursuant to the RIF. On October 24, 2018, Employee filed a Motion for Status Hearing, noting that Agency had not fully complied with the May 1, 2018, IDR. A Status Conference was held on December 10, 2018,

wherein, the issue of benefits restoration was raised. During the Status Conference, the parties requested additional time to research and try to resolve this issue out of court. The undersigned granted the parties' request and requested that the parties periodically update the undersigned on their progress.

On January 17, 2019, Employee filed a Consent Motion to Enlarge the Time in Which to File Employee's Petition for Legal Fees. Employee noted in this Motion that while Agency had provided Employee with a proposed back pay amount, this amount excluded her annual leave. Subsequently, Employee filed a Motion for Status Hearing on January 28, 2019, reiterating that Employee's back pay check did not include a payout for annual leave hours. Another Status Conference was held on February 27, 2019, wherein the issue of annual leave was discussed. The parties again requested additional time to resolve these issues out of court. Again, the undersigned granted the request. On May 13, 2019, Employee notified the undersigned that Agency had still not fully complied with the May 1, 2018, IDR. Another Order was issued on May 30, 2019, scheduling a Status Conference for June 24, 2019. On June 6, 2019, Agency filed a Consent Motion to Continue Status Conference.

On August 2, 2019, the parties informed the undersigned via email that they were unable to reach an agreement with regards to Employee's annual leave, interest on Employee's back pay amount and contributions to Employee's 457(b) account. Thereafter, on August 6, 2019, I issued an order requiring the parties to submit briefs addressing these issues. Both parties have submitted their respective briefs. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency has fully complied with the May 1, 2018 IDR

BURDEN OF PROOF

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

> 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:
>
> > That 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 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

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 parties have raised three (3) outstanding issues: (1) full restoration of Employee's annual leave; (2) interest payment on Employee's back pay sum; and (3) restoration of Employee's 457(b) account.

Restoration of Annual Leave

Both parties agree that Employee has been reinstated to her position and reimbursed all her back pay. However, the parties disagree on the amount of annual leave hours to be restored, or if not restored, the amount of annual leave payout. Agency argues that although D.C. Official Code § 1-612.03(h)(2)(A) allows an agency to create a separate account where an Employee can be credited annual leave lost due to administrative error in excess of the maximum 30 days, pursuant to D.C. Official Code § 1-612.03(h), Employee is only entitled to 240 hours or 30 days of annual leave. Agency maintains that the maximum amount of leave a District of Columbia employee is entitled to carry from one year into the next is 240 hours or 30 days. Agency argues that District employees are precluded from accruing all the annual leave that a reinstated employee could have earned. Agency explains that the additional annual leave that the reinstated employee would have earned in excess of 240 hours maximum in each calendar year prior to the year of reinstatement is forfeited under D.C. Official Code § 1-612.03(h) and 6-B District of Columbia Municipal Regulations ("DCMR") § 1238.2.[1]

Employee on the other hand argues that pursuant to D.C. Official Code § 1-612.03(h)(2)(A), annual leave lost after June 30, 1960, due to administrative error shall be restored to the employee in a separate account, and available for the employee to use for a period of two (2) years. Employee maintains that Agency is required to restore all of Employee's benefits because she was terminated as a result of an administrative error. Employee avers that the administrative error caused her to lose annual leave which she would have otherwise accrued, and Agency is therefore required to restore all of her annual leave hours in excess of 30 days, in compliance with D.C. Official Code § 1-612.03(h)(2)(A).[2]

Employee also asserts that DC government personnel guidance, specifically E-District Personnel Manual ("E-DPM") Instruction No. 11B-80 contradicts Agency's argument on annual leave as it requires agencies to restore annual leave to an employee reinstated due to an unwarranted or unjustified personnel action that exceeds the maximum allowable accumulation as authorized by law, into a separate leave account as provided in 6-B DCMR § 1239. Employee

[1] *See* Agency's Brief (August 26, 2019).
[2] *See* Employee's Brief (September 9, 2019)

again agues that she was reinstated due to an unwarranted or unjustified personnel action and pursuant to the foregoing, Agency should determine the amount of leave she is entitled to, deposit the hours in excess of 240 hours in a separate account, and allow her to use the earned hours over the course of a two (2) year period from the date of her reinstatement.[3]

D.C. Official 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)** 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;
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> **(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, I find that Employee was unjustly terminated as a result of an administrative error; thus, I conclude that D.C. Official Code §1-612.03(h)(2)(A) applies to Employee and she is entitled to all the leave she would have accrued from when she was terminated in 2009 until when she was reinstated in 2018. While D.C. Official Code §1-

[3] *Id.*

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 her reinstatement.

D.C. Official Code 1-612.03(h)(2)(A) provides in pertinent parts as follows: A*nnual 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 May 1, 2018, IDR, Agency did not have cause to RIF 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 she would have otherwise accrued, I find that Agency is required to restore all of Employee's annual leave in excess of 30 days in compliance with D.C. Official Code §1-612.03(h)(2)(A). I further find that Agency is required to put any 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.

Contrary to Agency's reasoning, D.C. Official Code §1-612.03(h), does not supersede D.C. Official Code §1-612.03 (h), as Agency would want the undersigned to believe. Instead it is an extension to D.C. Code §1-612.03(h), as it further provides guidelines for agencies faced with annual leave challenges for reinstated employees who were unjustly terminated, like the current Employee. Consequently, I find that Agency's reasoning with regards to this issue is flawed.

Agency further argues that although D.C. Official Code §1-612.03(h)(2)(A) provides that Employee qualifies to have her leave restored and placed in a separate account, according to D.C. Official Code §1-612.03(h), no employee is permitted to carry over more than 30 days into the next year. In making this argument, Agency ignores the fact that these are two separate provisions that apply to two separate group of employees. D.C. Official Code §1-612.03(h) applies to current District employees, whereas, D.C. Official Code §1-612.03(h)(2)(A) applies to District employees who have been reinstated due to unjust termination or administrative error. Furthermore, the above referenced D.C. Code provision specifically directs agencies to *restore any leave in excess of 30 days* into a separate account for a period of two (2) years, for employees who due to administrative error, lost annual leave they would have otherwise accrued (emphasis added). Consequently, I find that Agency's argument is without merit.

I also disagree with Agency's argument that Employee would receive a windfall if Agency reinstated all the annual leave Employee would have *earned* had she not been wrongfully terminated (emphasis added). As Agency rightly stated, Employee would have *earned* and be entitled to the annual leave had she not been *unjustly terminated* (emphasis added). Had Employee not been unjustly terminated, she would have been able to use her accrued annual leave. Therefore, I find that Agency is required to restore all the annual leave Employee would have accrued had she not been unjustly terminated, as well as afford Employee two (2) years to use the annual leave. If at the end of the two (2) year period Employee has not used all the restored leave, she will then forfeit any unused annual leave. Based on the above, I

find that by failing to restore all of Employee's annual leave, pursuant to D.C. Official Code §1-612.03(h)(2)(A), Agency has not fully complied with the May 1, 2018, IDR.

Interest on Back Pay Sum

Employee argues that she is entitled to interest on her back-pay sum as her case is similar to *D.C. Office of Human Rights v. D.C. Department of Corrections*, 40, A.3d 917 (D.C. 2012). Employee explains that based on the substantive record and long winded procedural history, as a matter of law, this Office should find that Employee, consistent with the D.C. Court of Appeals' ruling in *OHR*, has "endured a particularly long and procedurally complicated ordeal…"[4] Citing to 6-DCMR 1149, Agency argues that a reinstated employee cannot be granted more pay or benefits than he or she would have been entitled to by law, Mayor's Order, regulation, or agency policy. Citing to case law[5], Agency also noted that this tribunal has previously denied requests for pre-judgment and post judgement interest on back pay sums.

Agency correctly stated that this tribunal has previously denied requests for pre-judgment and post judgement interest on back pay sums. Although the current case is similar to *D.C. Office of Human Rights v. D.C. Department of Corrections*, *supra*, in terms of the long procedural history, I find that there is no precedent by the OEA Board that has adopted a finding that an award of interest shall be included in any back pay amount ordered as a result of a wrongful adverse action under D.C. Official Code § 1-606.01, et seq. Moreover, the Court of Appeals in *D.C. Office of Human Rights v. D.C. Department of Corrections*, specifically held that, it did not mean to suggest that an interest award be required in every case before OHR in which there is a back-pay award.[6] Accordingly, I conclude that Employee is not entitled to an award for interest on her back-pay sum.

457 Account

Employee contends that had she not been unjustly terminated, she would have enjoyed the benefits of the 457(b) plan which included the opportunity to make annual tax deferred contributions to the plan. Employee avers that the District government offers and automatically enrolls employees such as herself, to the 457(b). Employee states that she made annual contributions to her 457(b) account prior to her separation in 2009. Accordingly, Employee seeks to deposit $25,000 of her income for each year she was separated, to wit, 2010-2019, which amounts to the sum of $225,000, with deferred taxes.[7] Agency argues that contributions to a 457(b) account for past years is not included in the definition of pay or benefits in 6-DCMR 1149.1, and it is not a mandatory entitlement. Therefore, Agency is not obligated to allow Employee to make the missed contributions to her 457(b) account.[8]

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[4] *See* Employee's Brief (September 9, 2019).
[5] *Willie Porter v. D.C. Department of Behavioral Health*, OEA Matter No. 1601-0046-12C16, Addendum Decision on Compliance (February 15, 2019); and *Delores Junious v. D.C. Child and Family Services*, OEA No. 1601-0057-01C07, Addendum Decision on Compliance (November 15, 2007)
[6] *D.C. Office of Human Rights v. D.C. Department of Corrections*, 40 A.3d 917 (D.C. 2012).
[7] Employee's Brief, *supra*.
[8] Agency's Brief, *supra*.

Pursuant to 6-B DCMR 1149.2, "[a]n employee who, on the basis of a timely appeal of an administrative determination is found, by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have undergone an unjustified or unwarranted personnel action resulting in the withdrawal or reduction of all or part of an employee's pay or benefits, shall be entitled, on correction of the personnel action, to back pay under this section." Further, E-DPM Instruction No. 11B-80 (II)(a) (October 4, 2011), highlights that, upon authorization from the appropriate authority to correct the personnel action, an agency shall determine the employee's back pay entitlement by recomputing the period covered by the action. The affected employee's pay and benefits (as prescribed by law and regulation) *shall be recomputed as if the unjustified or unwarranted personnel action had not occurred* (emphasis added). E-DPM Instruction No. 11B-80 (II)(b)(2)(i) additionally provides that, when an employee is entitled to receive back pay, the agency shall offset and deduct from the gross back-pay award, "*authorized deductions that would have been made from the employee's pay … subject to any applicable law or regulation, including, but not limited to, the following types of deductions as applicable*: mandatory retirement contributions … (emphasis added)." In addition, the May 1, 2018, IDR Ordered Agency to reimburse Employee *all back-pay and benefits* lost as a result of the separation (emphasis added). 6-B DCMR 1149 defines 'benefits' as "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."

Prior to her termination, Employee was entitled to, and she contributed to her 457(b) retirement account. Her contribution to her 457(b) account was an authorized deduction which was regularly made from Employee's pay prior to her unjust RIF. While I agree with Agency's assertion that contribution to the 457(b) account is not mandatory, I find that, this constituted a benefit which Employee was entitled to by law or regulation. Based on the definition of benefits as stated above, I find that Agency is required to deduct whatever contribution Employee would have made to her 457(b) account from her back-pay sum, for the period of 2010 through 2018, in compliance with application laws and regulations.[9] Because Agency has not deducted the missed contributions to Employee's 457(b) account from her gross back pay sum, I conclude that Agency has not fully complied with the May 1, 2018, IDR.

ORDER

Based on the aforementioned, Agency has not restored Employee's annual leave nor deducted Employee's missed pre-tax contributions to her 457(b) account from her gross back pay sum. It is hereby **ORDERED** that because Agency has not fully complied with the May 1, 2018, IDR, 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

[9] The Internal Revenue Services ("IRS") regulates the pre-tax amount an employee can contribute to a retirement tax deferred account such as the 457(b) account, for any given year.