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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
HASSAN ABDULLAH,)	
Employee)	OEA Matter No. 1601-0126-13
)	
v.)	Date of Issuance: September 23, 2015
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	MONICA DOHNJI, Esq.
_____)	Administrative Judge
Lee Jackson, Esq., Employee Representative)	
Carl K. Turpin, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 30, 2013, Hassan Abdullah (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Public Schools’ (“DCPS” or “Agency”) decision to terminate him from his position as Teacher at Garrison Elementary School, effective August 10, 2013. Employee was terminated for having an “Ineffective” rating under the IMPACT, DC Public Schools’ Effective Assessment System for School-Based Personnel (“IMPACT”), during school 2012-2013. On September 9, 2013, Agency submitted its Answer to Employee’s Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge (“AJ”) on May 14, 2014. A Status/Prehearing Conference was held in this matter on June 18, 2014, wherein, Employee notified the undersigned that he received a letter from Agency in January 2014, reinstating him to his previous position of record, along with back pay. The parties requested that the matter be rescheduled for a later date so the parties can engage in settlement talks. After several months of negotiations, the parties notified the undersigned that they were not able to reach a settlement in this matter.

Additionally, Agency notified the undersigned that OEA does not have jurisdiction over this matter because Employee voluntarily retired. In an Order dated February 24, 2015, Employee was required to submit a brief addressing the jurisdiction issue in this matter. Agency also had the option to submit a reply brief. Both parties submitted their respective briefs. Agency withdrew its jurisdiction claim in its brief, conceding that OEA has jurisdiction over this matter.

Subsequently, a Status/Prehearing Conference was held on May 6, 2015. Following the Status/Prehearing Conference, the undersigned AJ issued a Post Status Conference Order requiring

the parties to address the issues raised during the Conference. On June 5, 2015, Employee filed a Motion to Clarify or Correct Post Status Conference Order. The undersigned ruled on Employee's Motion in an Order dated June 8, 2015. Both parties have now submitted their respective briefs. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUE

Whether Employee is entitled to back pay after January 2014.

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.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a performance rating.

Employee's Position

In his submissions to this Office, Employee avers that, he received a letter from DCPS Chief of Human Capital, Jason Kamara notifying him that his termination had been based on an "insufficient communicated policy" regarding the calculation of IMPACT scores.¹ Employee submits that contrary to Agency's unsupported claim, Agency never gave him a detailed offer of reinstatement dealing with all the issues both parties knew must be resolved for him to resume his employment as a teacher with Agency. Rather, Agency merely invited Employee to commence

¹ Employee's Brief at Exhibit 2 (June 19, 2015).

negotiations over the terms he would resume employment with Agency. Employee submits that the letter lacked crucial details regarding his potential reinstatement and receipt of back pay. Employee explained that the letter did not highlight what school Employee would return to; in what role he would serve; what grade level and subject he would be responsible; when he could return; whether his 2012-2013 IMPACT score would be purged from his personnel file; or how Employee would be compensated for the benefits that he would have received had he not been wrongfully terminated.²

Employee explains that on January 6, 2014, he contacted Ms. Erin Pitts of DCPS as noted in the letter, to discuss the offer of reinstatement. Employee asserts that he informed Ms. Pitts on January 6, 2014, that he was accepting the offer of reinstatement. Employee further notes that he was told by Ms. Pitts that he did not necessarily have to return to Garrison Elementary School. Employee also states that he informed Ms. Pitts that he would prefer to work at Dr. Charles R. Drew Elementary School and would also prefer to return to a non-classroom role or to retire early, but he remained open to a classroom position. Ms. Pitts then informed him that they would meet to further discuss the details.

Thereafter, on January 17, 2014, Employee emailed Ms. Pitts wherein, he parts that "... my major goal at this point in my life and career is to be able to retire at 56.5 Full Retirement Pension...without any penalties for service shortage, if there are any... and/or be able to work the remaining years in DCPS outside of the classroom. Ms. Pitts, in all honesty, I'm very skeptical about returning to the classroom. In my opinion, I think that would be a big mistake! DCPS will only come after me again..."³ Additionally, on that same date, a Washington Teachers' Union ("WTU") representative contacted Ms. Pitts on behalf of Employee.

On February 20, 2014, Employee, and his Union representative met with Ms. Pitts to discuss a resolution of the situation. Employee and his representative continued working with DCPS to try to work out the terms of Employee's return to work for more than a year following the February 20, 2014 meeting. His negotiation discussions continued with Agency's then attorney, Sara White.⁴ The process was mutual, as Agency continued to discuss the matter and never issued an ultimatum to Employee or made a final offer. Consequently, Employee believed that both parties were working in good faith to establish the terms of his return to work. He never received a detailed offer of reinstatement and back pay from Agency addressing the issues he raised. Employee argues that although he accepted the reinstatement in principle, he was never provided a sufficiently detailed offer of reinstatement from Agency that he could accept or reject.⁵

Employee further submits that his statement in the January 17, 2014, email to Ms. Pitts did not constitute a rejection of reinstatement; it was tentative and did not state definitively that he would not accept reinstatement; and he should not be punished for honestly expressing his feelings about his options. Employee argues that Employee's comments in the January 17, 2014, letter discussed a classroom role, not reinstatement in general. The January 3, 2014, letter did not specify a role in which Employee could return to, and Employee and Ms. Pitts had recently discussed potential non-

² *Id.* See also Employee's Reply Brief (August 5, 2015).

³ *Id.* at Exhibit 3.

⁴ *Id.* at Exhibit 7. He explained that the parties engaged in a mutually agreed upon process of negotiation and the issue of the possible limitation of Employee's back pay was raised for the first time by Ms. White.

⁵ *Id.*

classroom roles for Employee. Also, Employee's mention of retirement was part of an open-ended conversation between Employee and Ms. Pitts regarding possible options to resolve the situation.⁶

Employee contends that since January 3, 2014, he has diligently sought to work out the necessary details regarding his return, and DCPS has reciprocated for the most part as it engaged in discussions through Ms. Pitts and later Ms. White. Employee reasonably believed that the parties were making progress towards a resolution. However, DCPS now insists that Employee should have mitigated his damages by accepting reinstatement in January or February 2014, even though there was no detailed offer of reinstatement for Employee to accept or reject. Moreover, it was not until February of 2015, after more than a year of discussions that Agency informed Employee that he should have accepted reinstatement by February 20, 2014, and that it would not pay back pay after this date. Employee argues that Agency has the burden to prove that Employee reasonably could have mitigated his damages by accepting a job offer, and on the current facts, Agency cannot meet that burden because Employee acted reasonably in seeking reinstatement and yet never received a detailed offer that he could accept.⁷

Agency's Position

Agency concedes that it erroneously terminated Employee and it acknowledges liability in the termination of Employee.⁸ Agency explains that Employee's IMPACT score was not calculated accurately, and a recalculation of his scores ranks him as "Minimally Effective" and not "Ineffective" for the 2012-2013 school year.⁹ Additionally, Agency maintains that Employee was informed of the mistake in a letter dated January 3, 2014, and he was offered reinstatement, along with back pay, however, Employee never accepted Agency's offer and he continued to refuse to return to work.¹⁰ Instead, Employee, through the Union filed a grievance contesting Employee's termination, requesting the same relief Agency offered Employee in the January 3, 2014 letter. Agency further notes that on October 31, 2014, Employee advanced a settlement offer that went beyond a "make whole" relief. Agency states that because it advanced a legitimate "make whole" relief offer to Employee in its January 3, 2014, letter, Employee's back pay and benefit relief should only cover the period from the date of his termination until January 3, 2014.¹¹

According to the signed Affidavit submitted by Ms. Pitts, Employee was notified via telephone, overnight mail and email of the changes made to his 2012-2013 IMPACT score.¹² Ms. Pitt notes she received an email from Employee on January 17, 2014, detailing that he was skeptical about returning to the classroom; that his current major goal in his life and career was to retire at 56 percent Full retirement Pension and/or be able to work the remaining years in the DCPS outside of the classroom. Ms. Pitts also states that she received an email from Employee's Union representative, Taylor Lewis, on January 17, 2015, notifying her about the change in Employee's IMPACT score. In an email to Ms. Lewis, Ms. Pitts informed Ms. Lewis that Employee had asked about his retirement

⁶ *Id.*

⁷ *Id.*

⁸ Agency's Response to May 19, 2015 Post Status Conference Order at Exhibit 5 (July 17, 2015).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Affidavit (July 20, 2015). Agency initially submitted an unsigned Affidavit from Ms. Pitts along with its Brief on July 17, 2015. Thereafter, Agency submitted a signed Affidavit from Ms. Pitts on July 20, 2015, along with a Motion for leave to file Instantly signed Pitts Affidavit. Employee filed a response to Agency's July 20, 2015, Motion on August 5, 2015.

options, to which Ms. Lewis responded that she would make sure Employee was “clear” on this and he would provide a written response by the “close of business on Wednesday, January 22, 2014.”¹³

In addition, Ms. Pitts notes that on January 22, 2014, she again requested from Employee and Ms. Lewis a response to Agency’s settlement offer by the close of the business day, and Ms. Lewis responded that Employee would need more time to provide a response. Ms. Pitts requested that Employee provide a response by Monday January 27, 2014. However, instead of a response, on January 27, 2014, Ms. Pitts received a grievance from WTU on behalf of Employee requesting reinstatement with back pay and the purging of all reference to his discharge and incorrect evaluation from his file. Agency notes that because Employee had already filed a Petition for Appeal with OEA, he was barred from filing a grievance. Subsequently, on January 29, 2014, Ms. Pitts contacted Ms. Lewis and Employee, requesting a meeting to review Employee’s request as outlined in the grievance and to obtain an answer to DCPS’ settlement offer to no avail. Ms. Pitts states that Agency’s “make whole” offer to Employee included compensation for all lost wages, benefits and entitlement for the 2012-2013 school year because he was forced to take involuntary retirement. Agency was ready to implement this offer and waited for Employee’s acceptance, but he never provided a response. Instead, Employee requested punitive damages; compensation for having been forced to accept undesirable mortgage terms; his personnel file be changed to reflect a final IMPACT rating of “Effective” for the 2013-2014 school year; and payment for lost contribution to his retirement fund.¹⁴

Agency notified the undersigned on August 31, 2015, that Employee had returned to work as a DCPS teacher on August 20, 2015, after Employee indicated that he planned on returning to DCPS for the 2015-2016 school year.¹⁵

Analysis

Because Agency conceded and acknowledged liability for Employee’s termination, and Employee has returned to work, the only issue to be address in this matter is the issue of back pay.¹⁶

Back Pay

Agency argues that it is only liable for back pay from when Employee was terminated (August 10, 2013) to January 3, 2014, when Agency informed Employee about the correction to his IMPACT score and its decision to restate Employee with compensation for all wages lost, and benefits. Employee, on the other hand argues that Employee’s back pay should not be limited to the January 3, 2014 date.

A review of the case file highlights that, in a letter dated January 3, 2014, Agency informed Employee of the adjustment of his IMPACT score and the decision to “*offer you reinstatement with back pay to your position as a Teacher with DCPS.* (Emphasis added). If you are interested in discussing reinstatement or the implications of this rating change, please contact Erin Pitts, Director, Labor Management & Employee Relations, by Monday, January 13, 2014.”¹⁷ There is no evidence in the record to show that Employee contacted Ms. Pitts before the January 13, 2014, deadline. Instead,

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Agency’s Notice that Employee has returned to work as a Teacher (August 31, 2015).

¹⁶ *Id.* See also Agency’s Response to May 19, 2015 Post Status Conference Order, *supra*, at pg. 2.

¹⁷ Brief of Employee on Jurisdiction at Exhibit 1 (March 13, 2015).

Employee and his union representative separately contacted Agency via email on January 17, 2014; way past the January 13, 2014, deadline.¹⁸ Employee noted in his email to Ms. Pitts that "... my major goal at this point in my life and career is to be able to retire at 56 1/2 Full Retirement Pension...without any penalties for service shortage, if there are any... and/or be able to work the remaining years in DCPS outside of the classroom. Ms. Pitts, in all honesty, I'm very skeptical about returning to the classroom. In my opinion, I think that would be a big mistake! DCPS will only come after me again..."¹⁹ I find that this email is neither an acceptance nor refusal of Agency's offer as stated in the January 3, 2014, but rather can be qualified as a counter offer to Agency's initial offer.²⁰

Further, Employee noted that Agency never gave him a detailed offer of reinstatement dealing with all the issues both parties knew must be resolved for him to resume his employment as a teacher with Agency. Rather, Agency merely invited Employee to commence negotiations over the terms he would resume employment with Agency. I disagree with Employee's assertion. The January 3, 2014, letter clearly noted that in light of the adjustment to Employee's IMPACT rating, Agency would like to "*offer you reinstatement with back pay to your position as a Teacher with DCPS*" (emphasis added). These are the same remedies that Employee would have been entitled to had he won his appeal to this Office on the merits of the case. Therefore, I conclude that Employee had all the information he needed to make an informed decision about Agency's offer by the January 13, 2014, deadline stated in the January 3, 2014, letter. Moreover, Agency granted Employee up until February 20, 2014, to provide a response to its offer. I find that January 3, 2014 to February 20, 2014, is a reasonable amount of time for Employee to seek advice with regards to Agency's offer. And the record shows that Employee in fact sought assistance from his union on or around January 17, 2014, after he received the reinstatement letter, and they were working with him to resolve this matter. However, as of March 31, 2014, Employee had not expressly accepted or rejected Agency's offer. Instead, on January 27, 2014, he decided to file a grievance against Agency, which any reasonable person will consider as a rejection of an offer.²¹ I further find that by not accepting Agency's offer, Employee failed to mitigate his damages. Employee had from January 4, 2014, when

¹⁸According to the general principles of contract law, in making an offer, the offeror may state a time period within which the offer will remain open or will be available. If the offeree fails to accept the offer during the specified time period, the offer is deemed terminated. Here, Agency specifically stated in the January 3, 2014, letter that Employee should contact Ms. Pitts by January 13, 2014, if he was interested in its offer of reinstatement. The record shows that Employee contacted Agency on January 17, 2014, which is past the specified time period. See Sir Anson W. Reynell, & Aldrich, O.W., *Principles of the Law of Contract* (1880). See also Zarrokh Ehsan, *Practical concepts in Contract Law*, (2008), available at <http://mpr.ub.uni-muenchen.de/10077/>

¹⁹ Employee's Brief, *supra*, at Exhibit 3.

²⁰ Under contract law, an acceptance of an offer is defined as the final and unqualified acceptance of the terms of the offer. For the contract to become binding, the acceptance must match the offer. That is, the offeree must accept all the terms of the offer, as it is written. Anything outside of that may be considered a conditional acceptance and/or a counter offer which is not binding. The original offer is terminated and the counter offer becomes the offer and is only binding if the other party, in this case, Agency, accepts or rejects the new offer. The only exception to this contract principle is when the offeree makes it clear in the counter-offer that he is not rejecting the original offer but merely bargaining for different terms, or where the original offer itself leaves some room for negotiation. Consequently, in the current matter, I find that Employee's January 17, 2014, email to Ms. Pitts was a counter offer, as Employee did not state that he was not rejecting the offer. As such, his email is considered a rejection of the original offer from Agency, and it cannot later be accepted by Employee. See *Principles of the Law of Contract*; and *Practical concepts in Contract Law*, *supra*.

²¹ A rejection of an offer under contract law principles may be manifested in several ways to include rejection by conduct. In this case, Employee's conduct of filing a grievance against Agency after he received Agency's offer to settle the matter is sufficient justification for a reasonable person to conclude that Employee had no intention of accepting Agency's January 3, 2014, offer. *Id.*

he received the letter from Agency, to February 20, 2014, to try to mitigate his damages by returning to work and earning income, but failed to do so. Accordingly, I conclude that by filing a grievance against Agency, despite the fact that Agency had offered to reinstate Employee with back pay, Employee successfully rejected Agency's offer of reinstatement on January 27, 2014.

For this reason, I find that Employee's conduct of filing a grievance against Agency on January 27, 2014 was a rejection of Agency's initial offer of reinstatement and the parties were no longer engaged in the negotiations of the initial offer. However, because Ms. Pitts stated to Employee's then representative, in an email dated March 31, 2014, that "I consider DCPS' back pay obligation to have concluded numerous weeks ago when we met to discuss Mr. Abdullah's counter to DCPS' reinstatement offer, on February 20th", I find that Agency is liable for back pay from when Employee was terminated to February 20, 2014.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency shall reimburse Employee all back-pay and benefits lost from the period of August 10, 2013 to February 20, 2014, as a result of the separation; and
2. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge