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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
DAVETTE BUTLER,	)	
Employee	)	OEA Matter No. 2401-0090-17C19
	)	
v.	)	Date of Issuance: April 30, 2020
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	MICHELLE R. HARRIS, ESQ.
Agency.	)	Administrative Judge
	)	
	)	
	)	
_____	)	
Dirk McClanahan, Esq., Employee Representative	)	
Nicole Dillard, Esq., Agency Representative	)	

**ADDENDUM DECISION ON COMPLIANCE<sup>1</sup>**

**INTRODUCTION AND PROCEDURAL HISTORY**

An Initial Decision was issued on August 27, 2018 (“August 27th Initial Decision”), which reversed the District of Columbia Public Schools’ (“Agency” or “DCPS”) decision to remove Davette Butler (“Employee”) from service. The Initial Decision ordered Agency to reinstate Employee and reimburse her all back-pay and benefits lost as a result of her removal. Agency was also ordered to file documents evidencing compliance with the terms of the Initial Decision within thirty (30) days from the date the Initial Decision became final. Because Agency elected not to file a Petition for Review with OEA’s Board or with the Superior Court for the District of Columbia, the August 27, 2018 Initial Decision, became the final decision of this Office. Accordingly, Agency had to comply with the Initial Decision pursuant to OEA Rule 635.1. An Addendum Decision on Attorney Fees was issued in this matter on February 27, 2019.

The procedural background regarding the compliance issues in this matter is as follows:

1. On July 12, 2019, Employee filed a Motion for Enforcement and Compliance with Initial

<sup>1</sup> This Initial Decision was issued during the District of Columbia’s COVID-19 State of Emergency.

Decision. Employee asserted therein that she was reinstated as a registrar on January 7, 2019, but on May 2, 2019, received a Reduction-In-Force (“RIF”) letter and was terminated effective June 21, 2019.<sup>2</sup>

2. Employee argued that Agency’s failure to place her in a full-time position was in violation of the Initial Decision. Employee noted further delays in the receipt of back pay and attorney fees. Employee also asserted that the position in which she was placed was an unfunded temporary position and not permanent. Employee also cited that she was submitting a Motion for Attorney fees as a result of the need to file the motion for compliance.
3. On July 22, 2019, the undersigned Administrative Judge issued an Order scheduling a Status Conference to address Employee’s Motion. The conference was scheduled for August 14, 2019. On July 24, 2019, Agency filed a Response to the undersigned’s Order indicating therein that they had reinstated Employee to a full-time Registrar position at Moten Elementary School and that her benefits and salary would be restored to the date prior to separation.
4. Following the Status Conference on August 14, 2019, it was determined that the position was available at that time; however, Employee was out on maternity leave and was not able to return to work. The parties agreed to work on a settlement in order to finalize the terms of the reinstatement and otherwise.
5. In the following months, the parties worked toward settling the terms of the agreement and reinstatement. However, in an email follow-up with the parties, the undersigned Administrative Judge was informed that the parties had an issue with matter. Specifically, Employee asserted that Agency’s reinstatement placement was not a comparable position and not in compliance with the Initial Decision. As a result, I scheduled a telephonic status conference with the parties on November 26, 2019. During the conference, Agency cited that a position was available for Employee in August; however, due to her maternity leave, she was unable to return until the spring and Agency did not have a registrar position available. As a result, Agency asserted that it would place Employee in a “comparable position placement,” to include her same salary and grade, despite the position not being a “registrar.” Employee argued that there was no comparable position to “registrar” and that Agency’s actions would not be in compliance with the Initial Decision regarding reinstatement. Employee also asserted that there was union language to suggest that this reinstatement would not be in compliance with union requirements.
6. Based on the parties’ assertions during this Telephonic Status Conference, on November 26, 2019, I issued an Order requiring the parties to submit briefs regarding the “comparable position placement” for reinstatement. Employee’s brief was due on or before December 23, 2019, and Agency’s brief was due on or before January 21, 2020. Both parties submitted their briefs as required. The record is now closed.

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<sup>2</sup> Employee filed a Petition for Appeal with OEA and that matter is currently pending.

## JURISDICTION

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

## ISSUE

Whether Agency's placement of Employee in a "comparable position" is in compliance with the August 27, 2018 Initial Decision.

## ANALYSIS AND CONCLUSION

OEA Rule 635<sup>3</sup> addresses compliance and enforcement of Orders issued by this office. OEA Rule 635.1 provides that unless the Office's final decision is appealed to the Superior Court of the District of Columbia, the District agency shall comply with the Office's final decision within thirty (30) calendar days from the date the decision becomes final. Here, an Initial Decision was issued on August 27, 2018, which reversed Agency's decision to remove Employee and ordered that Employee be reinstated. Agency was also ordered to reimburse Employee all back pay, and benefits lost as a result of her removal. Agency elected not to file a Petition for Review with OEA's Board or with the Superior Court of the District of Columbia. As previously stated, on July 12, 2019, Employee filed a Motion for Enforcement citing that Agency had not complied with the August 2018 Initial Decision. As previously outlined, on July 22, 2019, the undersigned issued an Order scheduling a Status Conference for August 14, 2019. In the interim, Agency filed a response on July 24, 2019, indicating that it had reinstated Employee to a full-time registrar position at Moten Elementary School and that back pay, and benefit would also be restored. The parties engaged in settlement negotiations to figure out issues regarding this matter. During the August 14, 2019 telephonic status conference, the parties indicated that they were engaging in meaningful settlement negotiations. Agency indicated that Employee had been offered the position but was unable to return to work due to maternity leave. Agency indicated that Moten Elementary had an immediate need to fill the Registrar position. The parties indicated that they would be working to settle the terms of the settlement agreement and the restoration of benefits.

During the settlement negotiations, the parties indicated that they had one outstanding issue with Employee's placement and a "comparable position." Specifically, Employee asserts that the registrar position has no comparable position, and she should be held in a temporary registrar position until a permanent registrar position in a school budget is available.<sup>4</sup> Employee also argues that the "Union and DCPS have had protracted discussion on this issue and have concluded that there are not comparable position[s] for Registrar."<sup>5</sup> However, Employee cites that "other than an oral statement from a Union agent, they have not been able to find or track down any official minutes or written position statements from the Union/DCPS on the issue."<sup>6</sup> Further, Employee avers that the Family Medical Leave Act (FMLA/CMRA) defines "comparable position" to be a

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<sup>3</sup> 59 DCR 2129 (March 16, 2012).

<sup>4</sup> Employee's Brief (December 23, 2019).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

“position virtually identical to the employee’s original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status...[i]t must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority.”<sup>7</sup> Employee contends that there have not been any positions identified that have allowed her to evaluate what might be comparable. Employee also asserts that she is the victim and that if Agency was ordered to provide a temporary registrar position until a permanent position is available, that it could submit a petition to modify if it felt that this was truly burdensome. Accordingly, Employee requests that this Office require Agency to “hold the temporary Registrar placement at a school until a suitable permanent registrar position becomes available.

Agency asserts that “assuming [Employee] returns to work in April 2020, any temporary position [Employee] is placed in will only be until the end of the school year. At that time, Agency will place [Employee] in a permanent (school budgeted) position either as Registrar or in a comparable or equivalent position.”<sup>8</sup> Agency also relies on the definition of equivalent position as outlined in the FMLA. Agency also cites to a decision issued by the US District Court for the District of Columbia, regarding reinstatement to a comparable position following a reduction in force.<sup>9</sup> Agency avers that Employee’s position was reduced after a school-wide Reduction in Force (RIF). Further, Agency asserts that not all schools have registrar positions. There 116 schools within Agency, however, only 34 have registrar positions.<sup>10</sup> Agency notes that the Registrar position is administrative in nature and has duties which are easily transferable to other school office administrative positions. As a result, many schools have eliminated registrar positions for budgetary reasons.<sup>11</sup> Further, Agency cites that it forwarded possible comparable positions to Employee. Agency notes the following with regard to the job requirements for **Registrar**:

*“First, pursuant to the official job description, the Registrar position is on the grade EG-05 pay scale, is within the AFSCME union and the salary step ranges from step 1-5 (\$32,0[6]1 - \$36,095). The position requires, at minimum a High School diploma. The essential duties and responsibilities include, but are not limited to, coordinating assigned programs and or activities, such as student registration attendance issues, activities, substitutes, and travel/accommodations, for the purpose of delivering services in conformance to established guidelines; evaluates situations (e.g. involving staff, students, parents, the public etc.) for the purpose of taking appropriate action and/or direct to appropriate guidelines.”*

Agency asserts that it intends on reinstating Employee to a registrar position, but if that placement is not available, then it would place her in a comparable position. Agency provided the

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<sup>7</sup> *Id.* citing to 29 CFR§ 824.215- Equivalent Position.

<sup>8</sup> Agency Brief at Pages 1-2 (January 17, 2020).

<sup>9</sup> *Id.* at Page 3, (citing to *Glymph v. District of Columbia*, 374 F. Supp. 2d 219 (2005)... “[r]einstatement is the presumptive remedy to make a successful plaintiff whole, though courts have recognized that there are exception circumstances sufficient to rebut the presumption...Typically, an employer challenging reinstatement will argue either ...or claim that the successful plaintiff’s job was abolished for a legitimate nondiscriminatory reason. However, even in situations where a legitimate and neutral reduction in force eliminates a successful plaintiff’s job, that plaintiff cannot truly be made whole without reinstatement to a comparable position.”

<sup>10</sup> *Id.* at Page 3.

<sup>11</sup> *Id.*

following as possible comparable positions:<sup>12</sup>

- (1) **Assistant, Strategy & Logistics** – Pay Plan EG-07, Union AFSCME; Step/Salary 1-5 -\$39, 248 - \$44, 232. “Position requires minimum education of High School diploma. The duties include but are not limited to greeting and documenting all visitors, responding to concerns from students, families and colleagues, promptly and effectively managing phones, including answering calls, re-directing calls, taking messages, placing calls and creating school announcements etc.”
- (2) **Administrative Aide Administrative Assistant, Secretary** – Pay Plan EG-07, Union AFSCME; Step/Salary 1-5 \$39, 248 – \$44, 232. The minimum education requirement is a High School diploma. The duties of this position but are not limited to receiving, screening and assigning incoming calls to appropriate persons; maintain various files, such a general correspondence, records, reports and reference materials, screening incoming mail and distribute appropriately.
- (3) **Attendance Counselor** – EG-09, Teamsters Union, Step/Salary 1-10 \$41,391 -\$53, 289. A High School diploma is the minimum education requirement. The duties of the position include but are not limited to being responsible for the development and implementation of a comprehensive attendance guidance and counseling program designed to improve overall school attendance in concert with the local school attendance and committee; conducts school attendance in concert with the local school attendance and committee; conducts individual and group counseling session on school attendance with identified students; and seek to improve and find practical solutions to problems that are relevant to poor attendance.

Agency further asserts that all the possible comparable positions have earning potential with either just as much or more money than the Registrar position. Agency also argues that while there may be some variation in responsibilities and duties, that they are slight and all appear to be positions for which Employee would be qualified for based on her job history at Agency. Moreover, Agency argues that all the positions, with the exception of Attendance Counselor (which Agency also notes is the highest paying), are with the AFSCME union, just like the Registrar position. As a result, Agency argues that these positions satisfy the elements under the FMLA in 29 CFR §824.215 and that it should be permitted to place Employee in one of these positions should the Registrar position not be available.

OEA has held that with regard to reinstatement, the issue is “not whether employee’s new position is identical to her prior position, but rather, whether it is substantially similar.”<sup>13</sup> Further, this Office has held that “reinstatement offers (1) must be made in good faith (2) must be unequivocal...and (3) must encompass employment which is substantially the same as that previously held before discharge.”<sup>14</sup> Additionally, OEA has held (consistent with the Merit

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<sup>12</sup> *Id.* at Pages 4-6.

<sup>13</sup> *Veronica Butler v DC Department on Aging*, OEA Matter No. 1601-0132-14C19 (November 25, 2019) (*citing to Gorny v. Department of Interior*, 115 M.S.P.R. 520, 4 (2011)).

<sup>14</sup> *Id.* (*citing to Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984)).

Systems Protection Board) that “if an agency does not return the employee to [her] former position, it must show first that it has a strong overriding interest or compelling reason requiring reassignment to a different position, and second, that it has reassigned the employee to a position that is substantially similar to the former position.”<sup>15</sup> In the instant matter, Employee was subject to a RIF that was reversed in the August 27, 2018 Initial Decision. As a result, Employee was to be reinstated and receive restoration of all back pay and benefits. Employee was offered a Registrar position at Moten Elementary<sup>16</sup> which had an immediate need for placement. However, due to her leave status, Employee was unable to assume the position at that time. As a result, a Registrar position was no longer available for Employee to assume upon her anticipated return to work in April 2020. Employee asserts that she should be held in a temporary Registrar position until a permanent position becomes available because there are no comparable positions. Agency avers that it intends to place Employee in a Registrar position should one become available, but that her position was eliminated and that there are very limited offerings of Registrar positions within the Agency, and as a result, it proffered three (3) positions that Employee could be placed.

The undersigned disagrees with Employee’s assertions. As previously outlined this Office has held that reinstatement does not have to be a placement that is the exact position, but that Agency must show that they are substantially similar. Agency has provided other job opportunities that are within the same pay scale and grade, and afford the same step and salary opportunities, except for one position (Attendance Counselor) which has a higher pay scale and grade. Additionally, upon review and evaluation of the possible comparable position duties in comparison with the duties of Registrar, the undersigned finds that all are substantially similar. The Registrar position has a minimum education requirement of a high school diploma, which all of the other alternative positions require as well. Further, the job duties and requirements all involve similar administrative tasks, including communication with students, families and the public as needed in the functions of the positions. OEA has also held that if an employee’s position was abolished, “placement in a different position necessarily involves the performance of different duties.”<sup>17</sup> Likewise, in the instant matter, Employee may expect to perform some different duties than her previous position should a Registrar position not be available.

As a result, I find that while the possible comparable positions proffered by Agency are not identical to Employee’s past position and may involve some performance of different duties, the majority of the skills required to complete all the tasks listed are substantially similar to those of her previously held Registrar position. Additionally, I find that Agency has shown a compelling reason for its potential inability to place Employee in a Registrar position. Agency has 116 school in its district, however there are only 34 Registrar positions that are available. As a result, the undersigned finds that it may be difficult for this identical placement given the limited number of positions that exist. As a result, I find that upon Employee’s return to work in April 2020, Agency should endeavor to place her in a Registrar position should it be available; however, the undersigned also finds that the positions of Assistant, Strategy & Logistics, Administrative Aide/Administrative Assistant/Secretary, and Attendance Counselor are comparable and

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<sup>15</sup> *Id.* (citing to *Gorny v. Department of Interior*, 115 M.S.P.R. 520, 4 (2011)).

<sup>16</sup> This occurred following subsequent temporary placement which subjected Employee to another RIF wherein Employee filed a subsequent Petition for Appeal which is pending before this Office.

<sup>17</sup> *Veronica Butler v DC Department on Aging*, OEA Matter No. 1601-0132-14C19 (November 25, 2019) (citing to *Gorny v. Department of Interior*, 115 M.S.P.R. 520, 4 (2011)).

substantially similar in nature to the Registrar position. Accordingly, I find that Agency's placement of Employee in one of those positions would be in compliance with the August 27, 2018 Initial Decision.

**ORDER**

Accordingly, it is hereby **ORDERED** that Employee's Motion for Enforcement is hereby **DISMISSED**.

FOR THE OFFICE:

**/s/ Michelle R. Harris**  
Michelle R. Harris, Esq.  
Administrative Judge