

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
EMPLOYEE¹) OEA Matter No.: 1601-0215-11R18R20C21
)
v.) Date of Issuance: December 17, 2021
)
D.C. PUBLIC SCHOOLS,)
 Agency)
)

OPINION AND ORDER

This matter was previously before the Board. Employee worked as a School Psychologist with D.C. Public Schools (“Agency”). On July 15, 2011, Employee was notified that he would be terminated because he received a final IMPACT rating of “Minimally Effective” for the 2009-2010 and 2010-2011 school years.² The effective date of his termination was August 12, 2011.³

The OEA Administrative Judge (“AJ”) issued an Initial Decision on May 20, 2014, dismissing Employee’s appeal for lack of jurisdiction. The matter was appealed to the OEA Board on June 26, 2014, and on February 16, 2016, Employee’s Petition for Review was denied.⁴ Employee subsequently filed an appeal with the Superior Court for the District of Columbia. The

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² IMPACT is the effectiveness assessment system Agency uses to rate the performance of school-based personnel.

³ *Petition for Appeal* (September 9, 2011).

⁴ *Opinion and Order on Petition for Review* (February 16, 2016).

Court denied his petition and upheld the Board's ruling.⁵ Thereafter, Employee appealed the Superior Court's ruling to the District of Columbia Court of Appeals. In its August 9, 2018 order, the Court vacated the Initial Decision on the matter of jurisdiction. Consequently, the case was remanded to OEA for consideration on the merits of Employee's appeal.⁶

The AJ issued an Initial Decision on Remand on June 14, 2019. He held that Agency's termination action under the IMPACT system was conducted in accordance with all applicable rules, laws, and regulations.⁷ Employee then filed a second Petition for Review with the OEA Board. On May 19, 2020, the Board issued an Opinion and Order on Remand. It held that the promulgation of the District of Columbia Omnibus Authorization Act, P.L. 109-356, and the enactment of D.C. Code § 1-617.18, authorized Agency to implement its own process for evaluating employees. The Board further concluded that the Initial Decision on Remand was not based on substantial evidence because Employee raised genuine issues of material facts which could not be decided on the record alone. Therefore, the matter was remanded to the AJ for the purpose of conducting an evidentiary hearing.⁸ After conducting a hearing, the AJ issued a Second Initial Decision on Remand. He reversed Agency's action of terminating Employee for receiving a "Minimally Effective" IMPACT rating for the 2009-2010 school year but upheld Employee's "Minimally Effective" IMPACT score for the 2010-2011 school year. Consequently, Agency was ordered to reinstate Employee to his last position of record and reimburse him all backpay and benefits lost as a result of the termination action, less any retirement benefits Employee received.⁹

Agency and Employee subsequently filed Petitions for Review, and on February 4, 2021,

⁵ *Johnson v. District of Columbia Public Schools, et al.*, Case No. 2016 CA 001551 (D.C. Super. Ct. February 21, 2017).

⁶ 17 CV-03-01 (D.C. August 31, 2018).

⁷ *Initial Decision on Remand* (June 14, 2019).

⁸ *Opinion and Order on Remand* (May 19, 2020).

⁹ *Second Initial Decision on Remand* (October 15, 2020).

the OEA Board held that Agency failed to establish cause for Employee's termination. Thus, the AJ's Second Initial Decision on Remand was sustained, and Agency was again ordered to reinstate Employee with backpay and benefits.¹⁰ On February 29, 2021, Agency requested a hearing on the issue of mitigation and backpay. On March 9, 2021 and March 24, 2021, Employee filed Motions for Compliance requesting that the OEA Board direct Agency to comply with the AJ's order.¹¹

The AJ issued an Addendum Decision on Compliance on September 29, 2021. The issues addressed were whether Agency met its burden of proof in establishing that Employee failed to make reasonable efforts to mitigate his backpay damages following Agency's termination action and, if so, what was the proper amount of backpay damages to be awarded to Employee. The AJ explained that under District Personnel Manual ("DPM") Chapter 11B, Part II, Subpart 8, § 8.11, an employee "who has been separated from his...position by an unwarranted or unjustified personnel action" must sufficiently attempt to mitigate his damages by seeking other employment. He provided that Employee's duty to mitigate included using reasonable diligence to obtain substantially equivalent employment. However, citing the holding in *Wisconsin Avenue Nursing Home v. District of Columbia Commission on Human Rights*,¹² the AJ noted that once the employee establishes the amount of back pay he is entitled to receive, the burden shifts to the employer to prove what the employee could have earned by the exercise of reasonable diligence.

Based on Employee's courtroom demeanor, inconsistency of testimony, and documentary evidence, the AJ did not find Employee to be credible in establishing that his job search efforts were adequate. Additionally, the AJ reasoned that Employee failed to exercise reasonable and sufficient diligence in attempting to find substantially equivalent employment in his field from the

¹⁰ *Second Opinion and Order on Remand* (February 4, 2021).

¹¹ Employee accepted Agency's job offer in December of 2020 as a school psychologist, which took effect on January 4, 2021. See *Agency's Response to Employee's Petition for Review of the Addendum Decision on Compliance*.

¹² 527 A.2d 282 at 292. See *Addendum Decision on Compliance* (September 29, 2021).

time of his unwarranted separation in August of 2011. As a result, the AJ determined that Agency met its burden of proof in establishing that Employee failed to adequately mitigate his damages.¹³

As it related to what amounts Employee would have earned had he tried to find equivalent employment for that period, the AJ calculated the following based on the evidence presented at the hearing: \$90,690 for 2011; \$90,020 for 2012; \$95,040 for 2013; \$94,780 for 2014; \$105,260 for 2015; \$109,150 for 2016; \$113,890 for 2017; \$113,890 for 2018; \$105,120 for 2018; \$114,150 for 2019; and \$115,060 for 2020. Thus, while Employee was required to be made whole by Agency for the entire period of his unemployment because he was subject to an improper removal, the AJ determined that his backpay should be reduced by any amounts already paid by Agency, Employee's actual interim earnings, and the amounts Employee could have earned from August 2011 through the date he began working again for Agency.¹⁴

Employee then filed a Petition for Review of the Addendum Decision on Compliance on or around October 28, 2021. He argues that the AJ misinterpreted the term "erroneous payment" as it relates to Chapter 6B, Section 1149.12 of the D.C. Municipal Regulations ("DCMR"). Employee states that the hearing testimony of Agency's primary witness Debbie Moreau ("Moreau") should have been disqualified because she was not a licensed vocational counselor in the District of Columbia; Moreau was biased; and there was no evidence presented to support a finding that she had any personal knowledge of the matter. According to Employee, the AJ failed to consider all of his testimony related to his efforts in obtaining employment following Agency's termination action. Employee also takes issue with several of the AJ's findings of fact in the Addendum Decision on Compliance. Moreover, he opines that the AJ should not have granted Agency an evidentiary hearing on the backpay issue. He notes that Agency failed to comply with

¹³ *Id.*

¹⁴ *Id.*

the AJ's orders because he was only reinstated for ninety days before Agency allegedly falsely claimed that he submitted a letter of resignation. As a result, Employee contends that the Addendum Decision on Compliance is not based on substantial evidence.¹⁵

Agency filed its response on November 12, 2021. It asserts that OEA lacks jurisdiction to review the Addendum Decision on Compliance because there is no procedural avenue within this Office's rules providing for such. It submits that the AJ's decision was based on substantial evidence in the record and that its request for an evidentiary hearing on the issue of backpay was proper. According to Agency, the AJ was correct in allowing Moreau to testify as an expert witness. Lastly, it suggests that the AJ properly considered Employee's evidence presented at the backpay/mitigation hearing. Therefore, it asks that Employee's petition be dismissed on jurisdictional grounds. In the alternative, Agency requests that Employee's petition be denied if jurisdiction is established.¹⁶

Discussion

OEA Rule 633.1 states that "any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision (emphasis added)." Therefore, a party is permitted to file a Petition for Review of an Initial Decision. As Agency correctly contends, the OEA Board is not permitted to consider a Petition for Review of an Addendum Decision on Compliance. Section 635 of the OEA rules, related to compliance and enforcement, provides no procedural avenue for an employee to appeal an Addendum Decision on Compliance to the OEA Board.¹⁷ There is no mention of the OEA

¹⁵ *Petition for Review of Addendum Decision on Compliance* (October 28, 2021).

¹⁶ *Response to Employee's Petition for Review of Addendum Decision on Compliance* (November 12, 2021).

¹⁷ OEA Rules 635.1 through 635.11 provide the following:

635.1 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.

Board within any of the provisions of OEA Rule 635. Additionally, this Board has previously held that compliance decisions are not reviewable.¹⁸ Consequently, this matter is improperly before the Board and must also be denied on this basis.¹⁹

Conclusion

Based on the foregoing, this Board finds that it lacks the authority to review an Addendum Decision on Compliance. Consequently, Employee's petition must be denied.

635.2 If any agency fails to comply with the final decision of the Office within the time period specified in § 635.3, the employee may file a motion to enforce the final decision. The motion shall be directed to the Administrative Judge who decided the appeal.

635.3 An agency must file an answer within twenty (20) calendar days of receipt of the employee's motion.

635.4 The employee, with specificity, shall explain in the motion how the agency has failed to comply with the Office's decision. The agency shall include in its answer a statement which admits or denies each allegation in the employee's motion.

635.5 The parties shall serve the motion and answer on each other.

635.6 Failure by the agency to file an answer to the motion for enforcement shall be construed as an admission of the employee's allegations.

635.7 The Administrative Judge shall take all necessary action to determine whether the final decision is being complied with and shall issue a written opinion on the matter.

635.8 The Administrative Judge may, for good cause shown, allow the agency additional time to submit proof of compliance with the initial decision.

635.9 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.).

635.10 No additional filings are permitted once the General Counsel certifies the final decision. 635.11 If the agency fails to comply with the order, the General Counsel may take such actions as are necessary to secure compliance with the order.

¹⁸ See *Employee v. D.C. Child and Family Services*, OEA Matter No. 1601-0058-01C07, *Opinion and Order on Petition for Review* (January 25, 2010); *Employee v. Department of Mental Health*, OEA Matter No. 1601-0046-12C16, *Opinion and Order on Compliance* (December 3, 2019); *Employee*, OEA Matter No. 2401-0020-10R17C19, *Opinion and Order on Petition for Review* (June 30, 2020); and *Employee v. Department of Small and Local Business Development*, OEA Matter No. J-0009-18R20, *Opinion and Order on Petition for Review* (June 17, 2021).

¹⁹ Assuming *arguendo* this Board retains the authority to review Employee's submission, we nonetheless find that the Addendum Decision on Compliance is based on substantial evidence. The AJ, who was the finder of fact in this matter, was in the best position to evaluate the veracity and reliability of the documentary and testimonial evidence regarding Employee's job search efforts following his termination. Thus, he was permitted to rely on the testimony of Moreau in reaching his conclusions regarding the job market during the relevant time period as well as the amounts Employee could have earned had he exercised reasonable efforts in obtaining substantially equivalent employment following his termination. Employee's additional assertions constitute mere disagreements with the AJ's findings and the method in which he chooses to rule on motions. This is not a valid basis for appeal. Therefore, Employee's petition may be denied on this basis as well.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review of Addendum Decision on Compliance is **DENIED**.

FOR THE BOARD:

Clarence Labor, Jr., Chair

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.