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**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
American Federation of)	
Government Employees, Local 2978,)	
)	PERB Case No. 08-U-47
Complainant,)	
)	Opinion No. 1454
v.)	
)	
District of Columbia)	
Department of Health,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, Local 2978 ("Union" or "AFGE") filed an Unfair Labor Practice Complaint ("Complaint") against Respondent District of Columbia Department of Health ("Agency" or "DOH") for alleged violations of sections 1-617.04(a)(1), (3), and (5) of the Comprehensive Merit Personnel Act ("CMPA") by converting AFGE President Robert Mayfield from career status to term status, and subsequently terminating his employment. The matter was submitted to an unfair labor practice hearing, and in Slip Op. No. 1256, the Board adopted the Hearing Examiner's conclusion that the Agency committed an unfair labor practice, and ordered the Agency to reinstate Mr. Mayfield. (Slip Op. No. 1256 at p. 11-12). Additionally, the Board instructed the Union to submit "a verified statement as to the appropriate amount for a make whole remedy, i.e. back pay." *Id.* at 12. The Agency was instructed to provide a response to the verified statement, at which point the Board would issue a supplemental order ruling on the appropriate remedy. *Id.*

In subsequent exchanges between the parties, the Union and Agency disagreed over interest on the back pay award, and the manner in which annual leave hours must be restored to Mr. Mayfield. On October 31, 2013, the Board issued Slip Op. No. 1443, ordering the parties to brief the following issues: (1) whether the Agency must pay interest on Mr. Mayfield's back pay award, and if so, at what rate; and (2) whether Mr. Mayfield's accrued annual leave must be restored via "restored hours" or as a lump sum payout? Pursuant to the briefing schedule outlined in Slip Op. No. 1443, the Union's brief ("Union Brief") was filed on November 27, 2013, and the Agency's Amended Reply Brief ("Amended Agency Brief") was filed on December 30, 2013.

II. Discussion

A. Interest on the back pay award

a. Union's position

In its brief, AFGE asserts that Mr. Mayfield is entitled to interest on his back pay award at a rate of 4% per annum on a biweekly basis.¹ (Union Brief at 5-6). In support of this contention, AFGE cites to *University of the District of Columbia Faculty Ass'n/NEA v. University of the District of Columbia*, 39 D.C. Reg. 8594, Slip Op. No. 285, PERB Case No. 86-U-16 (1992), in which the Board held: "The D.C. Superior Court has held that an 'award requiring [that]... employee[s] be given back pay for a specific period of time establishes... a liquidated debt' and therefore is subject to the provisions of D.C. Code Sec. 15-108, which provides for prejudgment interest on liquidated debts at the rate of four percent (4%) per annum." (Union Brief at 5). AFGE alleges that an order directing back pay "expressly and specifically includes 'prejudgment interest' as part of [the Board's] make-whole remedy." (Union Brief at 5; citing *Washington Teachers' Union, Local 6 v. District of Columbia Public Schools*, 59 D.C. Reg. 3463, Slip Op. No. 848, PERB Case No. 05-U-18 (2006)).

Additionally, AFGE states that the Agency "apparently takes the position that Mr. Mayfield is not entitled to interest because the [Board's] decision and order of March 27, 2012, did not explicitly require interest," and calls this position "wholly without merit." (Union Brief at 6). The Union contends that the Board routinely orders interest on back pay awards, and that awarding interest upholds "the spirit and the letter" of the Board's order in Slip Op. No. 1256. *Id.*

b. Agency's position

The Agency contends that the language of the Board's order in Slip Op. No. 1256 precludes the payment of interest on the back pay award because it specifically referenced "a make whole remedy, i.e. back pay." (Amended Agency Brief at 2). The Agency asserts that the phrase "i.e.," defined as "that is," is a "limiting phrase and necessitates that whatever language is included with this phrase means precisely that and nothing more." *Id.* Further, the Agency

¹ The Union utilized the following formula to calculate simple interest on the back pay award, minus offsets: (principal) x (annual rate) x (years since payment due), totaling \$16,385.34. (Union Brief at 6).

argues that if the Board had intended for interest to be paid on this back pay, it would have specifically provided for it in Slip Op. No. 1256. (Amended Agency Brief at 3).

Should the Board choose to award interest on the back pay award, the Agency disputes the Union's calculation of the interest on a biweekly, instead of per annum, basis. (Amended Agency Brief at 3). The Agency cites to D.C. Code § 28-3302(b), which states: "Interest, when authorized by law, on judgments or decrees against the District of Columbia, or its officers, or its employees acting within the scope of their employment, is at the rate of not exceeding 4% per annum." (Amended Agency Brief at 3). Thus, the Agency contends that any interest on Mr. Mayfield's back pay award should be calculated on a per annum basis at 4% for the years 2008, 2009, 2010, 2011, and 2012, totaling \$6,675.62. (Amended Agency Brief at 3-4).

Finally, the Agency alleges that "there is a sizeable period of time for which Complainant has included payments to Mr. Mayfield for both outside work and unemployment benefits at the same time." (Amended Agency Brief at 4). Specifically, the Agency points to calculations submitted by the Union in its Brief which contain simultaneous entries for payments to Mr. Mayfield for both W-2 Offsets and Unemployment Compensation Offsets. (Amended Agency Brief at 4; citing Union Brief Exhibit 1, pp. 3-6). According to the Agency, the simultaneous payments "further skews whatever calculations Complainant has arrived at with respect to any interest it believes should be paid to Mr. Mayfield for his back pay award." (Amended Agency Brief at 4). The Agency further notes that it is an "open question" as to whether Mr. Mayfield simultaneously claimed unemployment insurance benefits while employed full time, which would be "improper and, possibly, a crime." *Id.* at fn. 4.

c. Analysis

The CMPA confers upon the Board the remedial authority to "reinstate, with or without back pay, or otherwise make whole, the employment or tenure of any employee, who the Board finds has suffered adverse economic effects" in violation of the Labor-Management Relations subchapter of the CMPA. *See* D.C. Code § 1-617.13(a). In considering whether the Board may award interest as a part of its authority to "make whole" employees who have suffered adverse economic effects, the Board adheres to D.C. Superior Court precedent stating that "an award requiring...employee[s] to be given back pay for a specific period of time establishes...a liquidated debt," and therefore is subject to the provisions of D.C. Code § 15-108, which provides for prejudgment interest on liquidated debts at the rate of 4% per annum. *University of the District of Columbia Faculty Ass'n/NEA*, Slip Op. No. 285 at p. 17 (citing *American Federation of Government Employees, Local 3721 v. District of Columbia Fire Dep't*, 36 D.C. Reg. 7857, Slip Op. No. 202, PERB Case No. 88-U-25 (1989) and *American Federation of State, County and Municipal Employees v. District of Columbia Board of Education*, D.C. Superior Court Misc. Nos. 65-86 and 93-86, decided Aug. 22, 1986, reported at 114 Wash. Law Reporter 2113 (Oct. 15, 1986)). Additionally, D.C. Code § 28-3302(b) provides: "Interest, when authorized by law, on judgments or decrees acting against the District of Columbia, or its officers, or its employees acting within the scope of their employment, is at a rate of not exceeding 4% per annum." *See D.C. Dep't of Corrections v. Fraternal Order of Police/Dep't of Corrections Labor Committee*, 59 D.C. Reg. 6493, Slip Op. No. 1105, PERB Case No. 07-E-02

(2011)². Further, orders directing back pay “expressly and specifically” include prejudgment interest as a part of the Board’s make whole remedy. *University of the District of Columbia Faculty Ass’n/NEA v. University of the District of Columbia*, 41 D.C. Reg. 1914, Slip Op. No. 307 at p. 2, PERB Case No. 86-U-16 (1992); *see also American Federation of Government Employees, Local 2725 v. D.C. Dep’t of Health*, 59 D.C. Reg. 4627, Slip Op. No. 945 at p. 4, PERB Case No. 08-U-08 (2009). Accordingly, the Board finds no merit to the Agency’s allegations that the back pay award in Slip Op. No. 1256 should not include interest.

Regarding the Agency’s concerns related to the legitimacy of Mr. Mayfield’s offsets, the Board lacks jurisdiction over allegations that criminal activity has occurred, and thus will not address the Agency’s allegation that “[t]here is an open question as to whether or not Mr. Mayfield was simultaneously claiming unemployment insurance benefits while employed full-time.” (Amended Agency Brief at 4, fn. 7).

The Agency will submit a memorandum to the D.C. Office of Pay and Retirement Services, requesting the calculation and payment of interest on Mr. Mayfield’s back pay award.

B. Restored annual leave

a. Union’s position

AFGE asserts that Mr. Mayfield accrued 679 hours of annual leave during the period he was unemployed due to the Agency’s unlawful actions, were restored to his annual leave account as accrued leave. (Union Brief at 7). The District maintains a “use or lose” policy, which provides that any annual leave hours in excess of 240 hours that have not been used by the end of a year are forfeit. *Id.*; citing D.C. Personnel Manual §§ 1238.1 and 1238.2. AFGE contends that it would “obviously be impossible” for Mr. Mayfield to use the accrued leave during the course of one year, particularly as he will be accruing additional hours of leave during that year. (Union Brief at 7). Instead, the Union requests that the accrued leave be paid out via a lump-sum payment, which it calculates as a cash value of \$22,976.15. (Union Brief at 8). The Union cites *Doctors’ Council of D.C. v. D.C. Dep’t of Youth Rehabilitation Services*, 59 D.C. Reg. 3554, Slip Op. No. 884, PERB Case No. 07-U-19 (2007) in support of its argument that a lump-sum payment has been sanctioned by the Board as part of a make-whole remedy. (Union Brief at 7).

b. Agency’s position

The Agency contends that a lump-sum payout is not appropriate in this case because Mr. Mayfield has had “ample opportunity to utilize his restored leave.” (Amended Agency Brief at

² D.C. Code § 28-3302 pertains to commercial transactions, but the D.C. Court of Appeals has found that the statute is not limited to commercial instruments and transactions. *See American Federation of Government Employees, Local 3721 v. D.C. Fire Dep’t*, 36 D.C. Reg. 434, Slip Op. No. 202 at p. 3, PERB Case No. 88-U-25 (Noting that the statute has previously been applied to a negligence suit against the District of Columbia, *District of Columbia v. Mitchell*, 533 A.2d 629 (D.C. Ct. App. 1987); a tax refund action, *Andrews v. District of Columbia*, 443 A.2d 566, 570-71 (D.C. Ct. App. 1982); and an employment discrimination judgment (*King v. Palmer*, 641 F. Supp. 186, 188 (D.D.C. 1986)).

5). The Agency points to District Personnel Manual § 1239.2, which permits employees up to two years to use restored leave. *Id.* The Agency alleges that Mr. Mayfield has not attempted to use any of his restored leave:

He used no restored leave at all in 2013, the first two years he could do so, according to the [District Personnel Manual]. According to agency records, he used 214 hours of annual leave in calendar year 2013 from his regular annual leave bank, in addition to 171 hours of sick leave, for a total of 385 hours of leave in 2013. His current annual leave balance is 170 hours, therefore Mr. Mayfield could have used at least 70 hours of his restored leave in 2013 and still not have exceeded the maximum number of 240 hours of use-or lose leave. Moreover, the agency has made it clear at all material times that it was and is not opposed to him utilizing his restored leave.

(Amended Agency Brief at 6) (emphasis in original). The Agency asserts that Mr. Mayfield's failure to attempt to use his restored leave "should be construed as an effort to seek a payout without ever even attempting to use this leave before it expires," and is a "subterfuge which should not be rewarded." *Id.* at n. 8. The Agency distinguishes *Doctors' Council*, Slip Op. No. 884, from the instant case, arguing that in *Doctors' Council* there was an express agreement between the parties that the agency would pay the employee's accrued leave in a lump-sum payment, while no such agreement exists in the instant case. (Agency Brief at 6-7).

Additionally, the Agency disagrees with the method used by the Union to calculate Mr. Mayfield's total accrued leave: "[I]nstead of simply including the actual accrued leave that Mr. Mayfield lost over the time that he was terminated, the Union has added in the 240 hours that would go into Mr. Mayfield's use or lose account, thereby falsely inflating the overall total of accrual hours he would be paid by 240." (Amended Agency Brief at 7). Finally, the Agency asserts that the total number of annual leave hours restored was 676, not the 679 referred to in the Union's Brief. *Id.* at n. 10.

c. Analysis

In *Doctors' Council*, the parties entered into a settlement agreement that resolved a grievance filed by the union on behalf of a bargaining unit member. Slip Op. No. 884 at 1. Pursuant to the terms of the settlement agreement, the agency agreed to pay the grievant for 92 hours of accrued annual leave, "paid out in accordance with the District's personnel regulations." *Id.* at 2. When it determined that the agency had failed to comply with the terms of the settlement agreement, the Board ordered the agency to make the agreed-upon payments. *Id.* at 5. In the instant case, the requirement to restore Mr. Mayfield's annual leave comes not from a negotiated settlement agreement, but from the Board's order of a "make whole" remedy following an unfair labor practice hearing. Slip Op. No. 1256 at p. 11-12. The Union has cited no cases in which the Board has *sua sponte* ordered a lump-sum payout for restored annual leave hours, nor is the Board aware of such precedent.

In the chapter of the D.C. Municipal Regulations pertaining to back pay for District personnel, 6-B DCMR § 1149.2 provides:

An 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.

The definition of "pay" in 6-B DCMR § 1149.1 expressly includes annual leave. However, nothing in 6-B DCMR § 1149 requires that annual leave be restored as a lump-sum payout, rather than as restored leave. Absent any requirement to the contrary, the Board must deny the Union's request that Mr. Mayfield's accrued annual leave be restored as a lump-sum payout.

ORDER

IT IS HEREBY ORDERED THAT:

1. The D.C. Dep't of Health shall pay Mr. Robert Mayfield interest on his back pay award at a rate of four percent (4%) per annum.
2. Within ten (10) days from the issuance of this Decision and Order, the D.C. Dep't of Health will submit a memorandum to the D.C. Office of Pay and Retirement Services, requesting the calculation and payment of interest on Mr. Mayfield's back pay award.
3. The American Federation of Government Employees, Local 2978's request for a lump sum payout for Mr. Mayfield's accrued leave hours is denied.
4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

February 25, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-47 was transmitted via File & ServeXpress to the following parties on this the 25th day of February, 2014.

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