THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GROVER MASSENBURG,	)	
Employee	)	OEA Matter No. 1601-0004-13
	)	
v.	)	Date of Issuance: February 10, 2015
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge

Lorraine C. Davis, Esq., Employee Representative
Carl K. Turpin, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Grover Massenburg ("Employee") was a Teacher at Wilson Senior High School ("Wilson"). On March 30, 2012, he observed a student displaying a handgun while in Wilson. Employee held a conversation with the student. During this conversation the student, *inter alia*, expressed a desire to harm himself. DCPS alleges that Employee did not confiscate the weapon and he allowed the student to leave Wilson's premises. On the day of the incident, District of Columbia Public Schools ("DCPS" or "the Agency") authorities investigated the incident and took witness statements from all of the participants, one of whom was an Assistant Principal at Wilson.[1] DCPS alleges that Employee failed to promptly report this incident to school administrators and that Employee failed to confiscate the gun. Employee explained that he received no training on how to handle suicidal student or individuals with weapons and that such training was not required of him by DCPS.[2] After a five month review of the facts of this matter, DCPS decided to remove Employee from service based on a charge of Neglect of Duty. Employee received his notice of termination from his position as a Teacher at Wilson on August 21, 2012.

[1] Wilson's Principal Peter Cahall was made aware of this incident on the date that it occurred.
[2] *See* Employee's Prehearing Statement dated February 28, 2014 at 3.

Employee filed his petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") on October 2, 2012. I was assigned this matter on or about January 21, 2014. I convened a prehearing conference in this matter and after considering the parties' positions as presented during this conference; I decided that an evidentiary hearing was unwarranted. Accordingly, I ordered the parties to submit final legal briefs in this matter. Both parties have complied. The record is closed.

JURISDICTION

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

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.

ISSUE

Whether Agency's action of removing the Employee from service was done in accordance with applicable law, rule, or regulation.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

Usually, the OEA does not handle matters that fall under the purview of a Collective Bargaining Agreement. However, in *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the District of Columbia Court of Appeals held that the OEA is not jurisdictionally barred from considering claims that a termination violated the express terms of an applicable collective bargaining agreement. The court explained that the Comprehensive Merit Personnel Act ("CMPA") gives

this Office broad authority to decide and hear cases involving adverse actions that result in removal, including "matters covered under subchapter [D.C. Code §1-616] that also fall within the coverage of a negotiated grievance procedure."[3] In this matter, Employee was a member of the Washington Teachers Union ("WTU") when he was terminated and was governed by Agency's Collective Bargaining Agreement ("CBA") with WTU. It is uncontroverted that the CBA was in full effect during all relevant times in this matter. Based on the holding in *Watts*, I find that this Office may interpret the relevant provisions of the CBA between WTU and DCPS, as it relates to the adverse action in question in this matter.

The following excerpt from the CBA between DCPS and the WTU is relevant to the instant matter:

> The initiation of the disciplinary action shall be taken no later than thirty (30) school days after the Supervisor's knowledge of the alleged infraction. In cases requiring an investigation, any investigation conducted by or on behalf of DCPS into the alleged infraction shall be completed, with any investigation report provided to the employee involved and to the WTU within thirty (30) days after the Supervisor's knowledge of the alleged infraction. This time limit may be extended by mutual consent, but if not so extended, must be strictly adhered to. CBA, Article 7.8.3

Employee argues that DCPS violated the terms of the Collective Bargaining Agreement entered into by and between DCPS and the Washington Teachers Union ("WTU") when it took longer than thirty (30) days to institute the instant adverse action. Employee asserts that DCPS' violation is dispositive of this matter and that the undersigned should rule in its favor. DCPS asserts that it did not violate the terms of the CBA as argued by Employee and that I should uphold its removal decision.

Employee contends that DCPS violated this section of the CBA when it did not obtain consent from him and the WTU in order to take additional time (longer than thirty days) after his Supervisor was aware of the alleged infraction in order to conduct its investigation. Employee further contends that since DCPS failed to obtain consent for an extension of time, it also violated this agreement by instituting the instant adverse action well beyond the thirty (30) day timeframe described therein. DCPS contends that it gave notice to the WTU when it informed via letter that it needed additional time to investigate a number of matters, including the matter at hand.

Employee counters by arguing that the CBA requires that DCPS get consent from both WTU and the accused employee and that in the instant matter it did neither. Employee makes the distinction that giving notice is not obtaining consent. Employee further argues that DCPS never obtained consent from him to extend the time in which it could investigate the underlying facts of this matter. Further, Employee asserts that merely providing notice to the WTU is not obtaining consent for an extension of time. Employee notes that DCPS never informed him that

[3] Pursuant to D.C. Code § 1-616.52(d), "[a]ny system of grievance resolution or review of adverse actions negotiated between the District and a labor organization *shall take precedence* over the procedures of this subchapter for employees in a bargaining unit represented by the labor organization" (emphasis added).

it would need additional time in order to investigate this matter. DCPS argues that the past practice between it and the WTU, that the aforementioned time limit and mutual consent requirement were routinely waived by WTU noting that the investigations into matters such as these generally require more time than CBA Article 7.8.3 mandates.

Agency makes the following arguments:

1. That the adverse action was completed within the timeline set by the CBA in accordance with past practice of DCPS and WTU; explaining that DCPS and WTU have mutually agreed and have a long practice of not following the timeline outlined in Article 7.8.3;[4]

2. Based on the review of its chart of investigative reports, there have been extremely few cases that were completed within thirty (30) days;[5]

3. Although it routinely takes more than thirty (30) days to complete misconduct investigations, WTU has never arbitrated the issue that the discipline and termination of an employee should be reversed due to the length of time DCPS took to complete the investigation or provide a copy of the investigative report to the employee or WTU;

4. It has been understood by both DCPS and WTU that the circumstances are such that it would be unreasonable to require strict compliance with the time limit specified in CBA Article 7.8.3;[6]

5) Agency argues that it has been generally held that even were an agreement expressly requires time limit waivers to be in writing, it has been held that the parties' action may constitute a waiver without it being in writing.[7]

I find that Agency's arguments are without merit. Agency has not provided this Office with any credible evidence to support its assertion that Agency and WTU have mutually agreed to not follow the terms of CBA Article 7.8.3. Further, while Agency argues that the WTU has consistently waived the time limit requirement in Article 7.8.3, Agency has failed to present any credible evidence in support of this argument except for the fact that it has completed very few cases within the required thirty (30) days. DCPS proffers the affidavits of Erin K. Pitts ("Pitts") and Danielle Reich ("Reich") both of whom work in DCPS' Labor Management and Employee Relations. They both allege that DCPS has a long history of receiving consent from the WTU to

[4] DCPS did not provide any statue, case law or other mandatory authority to buttress this assertion. DCPS referenced Richard Mittenthal "Past Practice and the Administration of Collective Bargaining Agreements, 59 Michigan Law Review (1991); and Elkouri and Elkouri, How Arbitration Works, pp. 606-08 (6th Ed. 2003). However, its analysis failed to even note which pages or section of this law review article pertains to this matter. More importantly, DCPS did not provide **any** analysis regarding how past practice can be established herein to support its arguments.
[5] *See* Agency's response dated April 29, 2014 at Exhibit 8.
[6] DCPS did not provide any statue, case law or other mandatory authority to buttress this assertion.
[7] DCPS did not provide any statue, case law or other mandatory authority to buttress this assertion.

complete its investigations. I find this assertion unpersuasive. For a seminal matter such as this, if there were an actual agreement to routinely provide consent for investigatory delays then DCPS and the WTU would have provided something in writing delineating this agreement, for example, a memorandum of understanding.

I also disagree with Agency's argument that both parties understood that it would be unreasonable to require strict compliance with the time limit specified in CBA Article 7.8.3. This provision clearly states that, "[t]his time limit may be extended by mutual consent but if not so extended, *must be strictly adhered to.*" *(*Emphasis added). If the parties did not intend for this provision to be complied with, it should not have been included in the CBA or in the alternative, they should have amended the CBA to reflect what they considered reasonable.

I find that DCPS failed to initiate the instant adverse action within thirty (30) days of Employee's supervisor knowledge of the alleged infraction.[8] I further find that DCPS failed to obtain consent from the WTU in order to extend the time in which it could investigate the facts of this matter. I further find that DCPS failed to obtain consent from Employee in order to extend the time in which it could investigate the facts of this matter. I conclude that Agency utterly failed to adhere to CBA Article 7.8.3 and that this failure requires that the instant adverse action should be reversed.

CBA Article 7.8.2 of the CBA provides that:

> Within five (5) days of the receipt of the notice [of disciplinary discharge], the WTU and/or the employee has the right to review all documents related to the charges, meet with representatives from the Office of the Chancellor before implementation of the proposed . . .discharge, and to provide a written reply along with supporting documents against the charges. The decision shall go into effect unless upon consideration of all relevant facts . . . the action is to be modified. . . . The disciplinary action or disciplinary discharge shall not take effect until the requirements of this article are satisfied.

Employee asserts that he was not permitted to review the documents related to the aforementioned charge within five days of his receipt of the notice of disciplinary discharge. Employee further asserts that DCPS failed to respond, or even acknowledge, this argument in its brief even though Employee had initially raised this issue in his Prehearing Statement and that DCPS was required to address the merits of this argument pursuant to the Order issued by the Undersigned.[9] Employee argues that DCPS failure to respond to this argument constitutes a waiver of its right to oppose it and provides tacit agreement. I agree. DCPS had every opportunity to provide counter arguments relative to its failure to abide by Article 7.8.2 of the CBA. DCPS' failure to respond will be considered an admission by the Undersigned. I

[8] DCPS initiated the adverse action approximately five months after Wilson's Principal, Peter Cahall, Employee's supervisor, was made aware of the facts that underlie this matter.
[9] *See* Employee's Brief dated May 28, 2014, at 5 – 6. *See also* Employee's Prehearing Statement at 8 – 9.

conclude that Agency failed to adhere to the requirements of Article 7.8.2 and that this failure presents another reason why the instant adverse action should be reversed.[10]

ORDER

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

1. Agency's action of removing Employee from service is **REVERSED**; and
2. The Agency shall reimburse Employee all back-pay and benefits lost as a result of his removal from service; and
3. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____
ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[10] Since this matter is being decided based on DCPS' procedural errors, I am unable to address the factual merits, if any, of this matter.