THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
KEITH DONALDSON	)	OEA Matter No. 1601-0150-06
Employee	)	
	)	Date of Issuance: April 30, 2008
v.	)	
	)	Sheryl Sears, Esq.
	)	Administrative Judge
D.C. PUBLIC SCHOOLS	)	
Agency	)	

Keith Donaldson, Employee, *Pro Se*
Harriet E. Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

In the spring of 2006, each school in the D.C. public school system projected student enrollment and allocated a budget for the 2006 – 2007 school year. Schools then determined staffing needs based upon the projections. At the beginning of the school year, each school conducted a count of student enrollees. Where student enrollment varied from the projections, the school made a budget adjustment. Agency refers to this process as "budget reconciliation," performed in accordance with the District of Columbia Board of Education's Resolution R07-04. That resolution provides as follows:

Employee was a Health/Physical Education Teacher at Luke C. Moore High School. He applied for and received authorization to transfer to the position of Industrial Arts Teacher at Garnett Patterson Middle School. However, before Employee started serving, Agency notified him that the position was being abolished and he would be separated from service. Employee was removed effective on August 25, 2006.

Employee filed an appeal with this Office challenging his separation. The parties convened for a pre-hearing conference. This appeal presented no factual disputes that required resolution by a hearing. Therefore, none was convened. This decision is based upon the record of documentary evidence and written legal arguments by the parties

JURISDICTION

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

ISSUE

Whether Employee was lawfully separated.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that "[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction." Pursuant to OEA Rule 629.1, *id.*, the applicable standard of proof is a "preponderance of the evidence." OEA Rule 629.1 defines a preponderance of the evidence as "[t]hat 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." Accordingly, Agency has the burden of proving, by a preponderance of the evidence, that the separation of Employee was legal.

FINDINGS OF FACT AND ANALYSIS AND CONCLUSION

In a letter dated August 18, 2006, Tony Demasi, Executive Director, stated as follows:

> It is necessary for the District of Columbia Public Schools (DCPS) to equalize the assignment of staff to be in alignment with student enrollment and/or budgetary constraints. This action is in accordance with the provisions of the collective bargaining agreement between the Board of Education and the Washington Teachers Union, which provides that excess teachers are entitled to bumping rights based on system-wide seniority in the area of their certification.
>
> If there are no available positions after completion of the system-wide seniority, then the remaining excess teachers are subject to termination. Based on that standard, you have been bumped from your placement as Teacher, Industrial Arts at Garnett Patterson MS and will be separated from service with the District of Columbia Public Schools, effective August 25, 2006.

> If you are in possession of a license in another area of certification, please contact the Department of Human Resources and we will work to place you if there are vacancies available.

According to Agency, the position of Industrial Arts Teacher was abolished due to "budgetary constraints and low student enrollment." Employee avers that the position was not immediately abolished but, instead, remained open for about a month after he was bumped. During that time, he asserts, Agency filled it with an employee who served for a month. Employee seeks payment of salary for the two months before he claims the position was finally abolished. Employee also argues that he should be appointed to the position permanently because, if he had encumbered it, it would not have been abolished based upon his seniority. Employee also contends that he was not afforded any round of lateral competition. He challenges Agency for failing to evaluate his seniority relative to other similarly situated employees to determine whether he should bump someone else.

However, Agency presented evidence that another Industrial Arts Teacher (E.D.), with greater seniority, bumped Employee out of the position. According to Agency records, the other employee's seniority date was September 30, 1987. Employee's was November 10, 1993. According to a letter from Veda C. Usilton, Principal of Garnett-Patterson Middle School, the teacher who bumped Employee reported for duty on August 22, 2006, and served until November 17, 2006, when the position was finally abolished. This Judge finds that the position of Industrial Arts Teacher was open for about two months after Employee was bumped from it. However, it was not Employee who encumbered the position for that time, and he is not entitled to compensation for that period.

Finally, Employee contends that, when he was removed from the position of Industrial Arts Teacher, Agency should have sent him back to the position of Physical Education Teacher. However, it is undisputed that Employee did not have full certification for that position. As a teacher without full licensing, Employee was an "at will" employee. Section 1601.1 of the District Personnel Manual (DPM) distinguishes career service employees from others by stating that "[e]xcept as otherwise required by law, an employee not covered by §1600.1 is an *at will employee* and may be subjected to any or all of the foregoing measures at the sole discretion of the appointing personnel authority." (Emphasis added). Accordingly, an at will employee does not have the right to the same protections as their career service counterparts. It is, in fact, well-established that at will employees may be terminated "for any reason at all." *Cottman v. D.C. Public Schools*, OEA Matter No. JT-0021-92, *Opinion and Order on Petition for Review* (July 10, 1995), ___ D.C. Reg. ___ ( ). Employee had no right to the position of Physical Education Teacher and no right to go back to it once he had been moved to the position of Industrial Arts Teacher.

While Employee's frustration with this situation is understandable, he has posited no argument that constitutes legal grounds for reversing Agency's action. Employee was

lawfully removed on August 25, 2006, and has no right to any relief, retroactive or otherwise, for that separation.

ORDER

It is hereby ORDERED that Agency's action removing Employee is SUSTAINED.

FOR THE OFFICE:

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SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE