THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0239-12
ELNORA LYNN PERRY SHANDS,	)	
Employee	)	
	)	Date of Issuance: May 7, 2014
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

Elnora Lynn Perry Shands, Employee, *Pro Se*
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 7, 2012, Elnora Lynn Perry Shands ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") final decision to remove her from her position as an Elementary School Teacher at Brookland Elementary School. Employee was removed as a result of a process referred to as "Equalization" or "Excessing." The effective date of Employee's termination was August 10, 2012.

I was assigned this matter in December of 2013. On December 11, 2013, I issued an Order scheduling a Prehearing/Status Conference for the purpose of assessing the parties' arguments. During the conference, it was determined that there were no material issues of fact that would warrant and evidentiary hearing. On February 6, 2014, I ordered the parties to submit written briefs addressing whether Agency's action of terminating Employee should be upheld. Both parties submitted responses to the order. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's action of separating Employee from service via "Equalization" was done in accordance with all applicable laws, rules, or regulations.

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.

Employee's Position

Employee argues that the terms of the Collective Bargaining Agreement ("CBA") between the Washington Teacher's Union ("WTU") and DCPS was not fair, and that she did vote in favor of the terms of the contract. Moreover, Employee states that her termination has affected her economically, emotionally, and physically.

Agency's Position

Agency argues that Articles 4.5.5.1 through 4.5.5.3.5 of the CBA between the WTU and the District of Columbia School System governs the instant appeal. According to Agency, In June of 2011, Employee became an "excessed" Teacher as a result of a process called "equalization." Equalization is a tool utilized by DCPS which seeks to align staffing levels with the student enrollment at each school. Employee was informed that pursuant to the CBA, she had the option to remain a temporary DCPS employee for an additional year after being excessed. Agency submits that Employee's temporary assignment ended at the end of the 2011-2012 school year; however, she was unable to secure a mutual-consent placement on or before June 20, 2012 in order to continue employment with DCPS. It is Agency's position that Employee was properly terminated based on the terms of the CBA because she failed to obtain a permanent position with DCPS prior to the prescribed June 20, 2012 deadline. Agency argues that it separated Employee in accordance with all applicable District rules, laws, and regulations.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3(a) states:

> "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee…an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more…or a reduction in force…."

Thus, §101(d) restricted this Office's jurisdiction to employee appeals from the following personnel actions only: a performance rating that results in removal; a final agency decision affecting an adverse action for cause that results in removal, a reduction in grade, a suspension of 10 days or more, or a reduction-in-force.

According to Agency, "it is necessary for the District of Columbia Public Schools…to align staffing levels at each school with student enrollment at each school, a process known as 'equalization.'"[1] On July 15, 2011, Employee received a letter from Agency stating that she had been excessed at the end of the 2010-2011 school year, but had yet to secure another placement by mutual consent at another school. Employee was informed that she was: 1) a permanent status employee at the time of the excess; and 2) had a final IMPACT evaluation that was neither Ineffective nor Minimally Effective.[2] On October 11, 2011, Employee received notice that she was being placed in a temporary assignment as a Teacher for the 2011-2012 school year at River Terrace Elementary School.[3] On July 2, 2012, Employee received a letter notifying her that consistent with the procedures in the CBA between DCPS and the Washington Teacher's Union, her position with Agency was being terminated at the close of business on Friday, August 12, 2012. The notice further stated that:

> At the close of the 2010-2011 school year you were an excessed permanent status employee with an IMPACT rating of Effective or higher. As a result of not being able to secure a placement for the 2011-2012 school year, you were given your choice of one of three options provided in the WTU Agreement. You elected the Extra Year Option, which allowed you to remain a DCPS employee for an additional year with the requirement that you would work to secure a budgeted, mutual consent placement for the 2012-2013 school year. The WTU Agreement specifically states that "DCPS" shall have the right, at the conclusion of the Extra Year, to separate from DCPS all excessed permanent status Teachers who are unable to secure a new placement within the school system under mutual consent during the year." You were advised when you selected this option that you would have until June 20, 2012 to secure a permanent position, and that failure to do so would result in your separation from DCPS. As a result of your failure to secure a mutual consent placement by June 20, 2012, your employment with DCPS is being terminated as of August 10, 2012.

[1] Agency Brief, pg. 1 (April 4, 2014).
[2] Agency Answer to Petition for Appeal, Tab 5 (October 11, 2012).
[3] *Id*. at Tab 4.

The notice further advised Employee that she had the option to either file a grievance with her union, or to file an appeal with OEA. Employee elected to file an appeal with OEA.

Agency notes that because Employee was a member of Washington Teachers' Union, Local #6 ("WTU") when she was terminated, the CBA between Agency and WTU applies to this matter and as such, OEA has limited jurisdiction over the instant appeal. In *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the Court of Appeals held that 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."[4] In this case, Employee was a member of the Washington Teachers Union ("WTU") when she was terminated. 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.

Article 4 of the CBA between WTU and Agency provides in pertinent part as follows:

> 4.5.1.1: An excess is an elimination of a Teacher's position at a particular school due to a decline in student enrollment, a reduction in the local school budget, a closing or consolidation, a restructuring, or a change in the local school program, when such an elimination is not a 'reduction in force' RIF) or 'abolishment'
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> 4.5.2.2: When DCPS determines an excess is necessary, the Local School Restructuring Team (LSRT) shall make a recommendation as to the area(s) of certification to be affected.
>
> 4.5.2.3: The Personnel Committee shall make a recommendation to the supervisor as to the Teacher(s) to be affected. The Teachers in the affected area may provide evidence to the Personnel Committee for their consideration.
>
> 4.5.3.1: DCPS shall provide written notification to all Teachers who are to be excessed at least (10) school days prior to the effective date of the excess.
>
> 4.5.4.1: The placement of excessed teachers shall be subject to the mutual consent policies outlined in [the CBA].

[4] 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).

> 4.5.5.1: Excessed permanent status Teachers shall have sixty (60) calendar days following the effective date of the excess to secure another placement in DCPS under mutual consent.
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> 4.5.5.2: An excessed permanent status Teacher who is unable to secure a new placement within the sixty (60) calendar days following the effective date of the excess shall have five (5) calendar days immediately following expiration of the sixty (60) calendar day period to select (1) of the following options.[5] Any Teacher who does not make a selection shall be subject to separation from DCPS on the 66th calendar day following the effective date of the excess.
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> 4.5.5.3.3.5: DCPS shall have the right, at the conclusion of the Extra Year, to separate from DCPS al excessed permanent status teachers who are unable to secure a new placement within the school system under mutual consent during the year.

Employee concedes that she was a member of the Washington Teachers Union at the time she was terminated; however, Employee's primary argument is that the terms of the CBA between the WTU and DCPS was not fair, and that she did not vote in favor of the contract. Specifically, Employee states that:

> Yearly, D.C. Public School come[s] up with some kind of process to get rid of teachers. Yet D.C. Public Schools continue to hire new teachers, despite excessing/terminating teachers with effective ratings on evaluations designed to identify high-performance educators and remove weak ones. I am unemployed despite meeting standards the District says are more rigorous than ever. I lost my job through a process known as "excessing"…another term for fired/terminated. Reasons for excessing vary from school to school, with principals making the final decision….

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision of selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[6]

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[5] Under Section 4.5.5.3 of the CBA, an excessed Teacher may elect: 1) A 'buyout' and receive $25,00, resulting in separation from DCPS; 2) Early retirement if the Teacher has (20) or more years of creditable service; or 3) A year of service to secure a new placement.

[6] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).

Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised.[7] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[8]

In this case, the Undersigned most certainly empathizes with Employee's position that she has dedicated countless years to serving DCPS in an effort to educate our community's youth and to prepare them to become future leaders and productive members of society. Employee's performance evaluations further support her assertion that she was an effective teacher during her tenure with DCPS. The issue; however, is whether Agency adhered to the relevant provisions of the CBA pertaining to the "equalization" or "excessing" process. Employee does not contest that she was wrongfully excessed, nor does she assert that she was unable to obtain a permanent teaching position by mutual consent after opting to take a one-year temporary assignment at River Terrace Elementary School.

Pursuant to the holding in *Brown v. Watts*, supra there is no evidence in the record to support a finding that Employee's termination violated the express terms of the collective bargaining agreement between the WTU and DCPS. Accordingly, I find that Agency adhered to the relevant provisions of Article 4 of the CBA. Employee was given notice that she was being excessed. Employee opted to take a one year position with another school in lieu of the "buyout" option. Unfortunately, Employee was unable to secure continued employment via mutual consent with another school prior to the June 20, 2012 deadline, and was therefore terminated. While Employee may disagree with the content and terms of the CBA, OEA does not retain jurisdiction to alter or circumvent the terms of a fully executed contract. Based on the foregoing, I must deny Employee's appeal.

ORDER

It is hereby **ORDERED** that Agency's action of terminating Employee is **UPHELD**.

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

[7] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).1601-0417-10
[8] *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).