THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
Kia Folsom Employee	OEA Matter No. 1601-0003-11C14
v.	Date of Issuance: July 10, 2015
D.C. Public Schools Agency	Joseph E. Lim, Esq. Senior Administrative Judge

Kia Folsom, Employee *pro se*
Carl Turpin, Esq., Agency Representative[1]

2nd ADDENDUM DECISION ON COMPLIANCE[2]

PROCEDURAL BACKGROUND

On October 4, 2010, Kia Folsom ("Employee"), a former teacher at D.C. Public Schools ("Agency" or "DCPS") McKinley Technology High School, filed a Petition for Appeal, challenging the termination of her employment due to excessing. After the parties submitted their legal briefs, I issued an Initial Decision ("ID") on October 15, 2012, ordering Agency to reinstate Employee to her position after ascertaining that Employee had passed her probationary status at the time of removal and that Employee was removed without cause.

Either party to the proceeding had thirty-five (35) days from the issuance of the Initial Decision to file a petition for review with this Office's Board. *See* OEA Rule 632.1, 59 DCR 2129 (2012). Alternatively, either party may appeal a final decision to the District of Columbia Superior Court in accordance with the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-601.01, *et seq*. (2006 Repl. & 2011 Supp.)). *See* OEA Rule 633.12, 59 DCR 2129 (2012). Neither party filed a Petition for Review of the ID. Thus, the Initial Decision became a final decision of this Office. Agency had thirty (30) calendar days from the date the decision became final on November 19, 2012 to comply with the decision of this Office. *See* OEA Rule 635.1, *Id*.

On April 7, 2014, Employee filed a Motion for Compliance, stating that Agency had not complied with the terms of the final decision. On April 8, and June 13, 2014, I ordered Agency

1 Sara White was the original agency representative until she left in the summer of 2015.
2 This Decision further elaborates and clarifies the one issued on June 26, 2015.

to respond. Agency submitted a Status Report on June 16, 2014. On October 21, 2014, I issued an order for the parties to address Agency's allegations regarding Employee's eligibility for reinstatement. For months before and after October 21, 2014, I held a series of telephone status conferences as the parties tried to settle the matter. The talks broke down when Agency balked at paying back pay to Employee. The record was closed on June 22, 2015, after the parties made their final submissions.

JURISDICTION

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

ISSUES

Whether this Motion for Compliance should be certified to the General Counsel for enforcement.

FINDINGS OF FACT

The following facts are undisputed:

1. On August 19, 2008, Employee was hired as an ET-15 Teacher for Agency.

2. Employee is a member of the the Washington Teachers' Union, Local #6 of the American Federation of Teachers, American Federation of Labor and Congress of Industrial Organizations ("AFL–CIO").

3. Annually, it is necessary for DCPS to align staffing levels at each school with student enrollment at each school, a process known as "equalization."

4. On June 18, 2010, while still in a probationary status, Employee was informed by letter that as a result of equalization, her position at McKinley Technology High School had been removed from the staffing plan effective June 22, 2010.

5. According to the Collective Bargaining Agreement ("CBA") between the Washington Teachers' Union, Local #6 of the American Federation of Teachers, AFL-CIO, and the Agency, 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 student 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.'" *See* CBA Article 4.5.1.1.

6. That same June 18, 2010, letter instructed Employee that, in order to stay employed with Agency, she would need to interview to secure another position in a DCPS school in her area of certification.

7. On August 16, 2010, Agency sent Employee a letter advising that if she did not secure a position prior to August 21, 2010, she would be separated from service effective August 22, 2010.

8. On August 23, 2010, Agency sent Employee a letter advising her that her position was terminated because her position had been excessed after the 2009-2010 school year. Moreover, the letter indicated that she failed to find a position with DCPS within sixty (60) days of her excess on June 23, 2010, and that she was not a permanent status employee at the time of the excess. This letter did not inform Employee of any appeal rights. Agency Response to Employee's Brief, Exhibit 3.

9. Agency does not allege that Employee was terminated for cause.

10. On October 4, 2010, Employee filed a Petition for Appeal, challenging the termination of her employment due to excessing.

11. On October 15, 2012, I issued an Initial Decision ("ID") ordering Agency to reinstate Employee to her position after ascertaining that Employee had passed her probationary status at the time of removal and that Employee was removed without cause.

12. The ID ordered Agency to reinstate Employee to her last position of record to be provided with the options available to excessed permanent employees; and to immediately reimburse Employee all back-pay and benefits lost as a result of Agency's action.

13. As no appeals were filed, the ID became final on November 19, 2012.

14. On April 7, 2014, Employee filed a Motion for Compliance in which she stated that Agency had not yet complied with any of the terms of the final decision.

15. In response to my Order for Agency's response, the parties engaged in months of discussions in an attempt to settle the matter.

16. On June 19, 2015, Agency submitted its final position statement indicating that although they were willing to comply with part of the Initial Decision, they were unwilling to comply with the rest of it. In summary, they were willing to offer Employee the options available to her as an excessed employee of either a buyout of $25,000 or a year of guaranteed employment to secure a new placement. However, Agency was unwilling to pay any back pay to Employee for Agency's almost three year delay in complying with the Initial Decision.

ANALYSIS AND CONCLUSIONS

In *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the 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]

According to the CBA, 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.'" *See* CBA Article 4.5.1.1.

Additionally, the CBA provides in pertinent part as follows:

Article 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 one (1) of the following options. 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.

Article 4.5.5.3.3.1:

> Excessed permanent status Teachers who have been unable to secure a new placement during the sixty (60) calendar days following the effective date of the excess, and who have not selected Option 1 or Option 2 above, shall have the right to select Option 3: An Extra Year to Secure a New Position (hereafter referred to as the "Extra Year.")

Article 4.5.5.3.3.2:

> The Extra Year shall begin on the effective date of the excess and shall conclude exactly one calendar year thereafter.

Article 4.5.5.3.3.5

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).

> 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.

Agency does not dispute that at the time of Employee's termination, Employee was an "excess" employee. Thus, Agency is willing to afford Employee one of the three options available to her as an excessed employee as stated in the CBA. However, Agency refuses to give any back pay and lost benefits to Employee. Instead, Agency offers to pay interest on the lost pay and benefits.

In its brief, Agency relies on *Athridge v. Iglesias*, 382 F.Supp. 2d 42 (2005), and D.C. Code Title 15 § 108, to support its contention that it is liable only for post-judgment interest for delayed payment of a judgment amount.

Agency's argument is misplaced. *Athridge* refers to a personal injury case involving damages awarded by a jury to the victim of a negligent, unlicensed driver and not to an administrative action wherein a D.C. Government agency was ordered to reinstate a wrongly terminated D.C. government employee. In addition, D.C. Code Title 15 § 108, Interest on Judgment for Liquidated Debt, pertains to "…an action in the United States District Court for the District of Columbia or the Superior Court of the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid."

Instead, an award of back pay is governed by Chapter 11B of the District Personnel Manual (DPM) ("Compensation"). Chapter 11B, Section 1149.1 ("Back Pay") provides in pertinent part as follows:

> 1149.1 **Back Pay**
>
> In this section, the following terms have the meaning ascribed:
>
> Appropriate authority-an entity having authority to correct or direct the correction of an unjustified or unwarranted personnel action, including but not limited to the following:
>
> (a) A court having jurisdiction;
> (b) The Office of the Corporation Counsel;
> (c) The head of the employing agency or an agency official to whom corrective action authority is delegated;
> (d) The pay authority;
> *(e) The Office of Employee Appeals;*
> (f) The Public Employee Relations Board;

(g) The Office of Human Rights;
(h) The Equal Employment Opportunity Commission;
(i) An arbitrator in a binding arbitration case; and
(j) Any other federal agency authorized to order remedial actions under any program providing federal financial assistance.

Unjustified or unwarranted personnel action-an act of commission (that is, an action taken under authority granted to an authorized official) or of omission (that is, non-exercise of proper authority by an authorized official) that is subsequently determined to have violated or improperly applied the requirements of a nondiscretionary provision, as defined herein, and thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay or benefits, as used herein, otherwise due an employee. The words "personnel action" include personnel actions and pay actions, alone or in combination.

1149.2 *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.*

1149.3 This section applies to the computation, payment, and restoration of pay and benefits for the *purpose of making an employee financially whole, when the employee, on the basis of an administrative determination, a timely appeal,* grievance, or claim against the District government, *is found to have undergone an unjustified or unwarranted personnel action.* (*Emphasis added.)*

Thus, the D.C. Code makes it clear that an employee is legally entitled to back pay as part of her damages when such employee was subjected to an unjustified or unwarranted personnel action. Indeed, years of case law since the beginning of this Office's existence have consistently awarded back pay to wronged employees. It is also clear that in its delay and continued intransigence, Agency deliberately chose to defy the law in refusing to timely implement all the terms of a final decision of this Office.

OEA Rule § 635.1, 59 D.C. Reg. at 2129 (2012) reads as follows:

636.1 Unless the Office's final decision is appealed to the District of Columbia Superior Court, the District agency shall comply with the Office's final decision within thirty (30) calendar days from the date the decision becomes final.

OEA Rule 635.9, *id.*, reads in pertinent part as follows:

> 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.).

In a compliance matter, the Administrative Judge's role is to determine whether or not the Agency has complied with the Office's final decision. Here, there is no question that Agency did not comply with the final decision within the thirty (30) day time frame, nor has it done so to date. Therefore, pursuant to OEA Rule 636.9, *supra*, this matter is certified to the Office's General Counsel for appropriate action.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency afford Employee the choice of one of the options available to excessed employees of either a buyout in the amount as spelled out in the CBA, or an extra year of employment to obtain all required teaching credentials and secure a new position;[4] and

2. Agency shall REIMBURSE Employee with all back-pay and benefits from the date of her separation, August 22, 2010, to the date Employee is offered the choice of one of the options available to excessed employees; and

3. 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; and

4. This matter is hereby certified to the Office of Employee Appeals General Counsel for enforcement of this Second Addendum Decision on Compliance.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

4 Both parties are in agreement that the third option of retirement is not available to Employee as she does not meet the requirements for retirement.