THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DWIGHT ROBBINS,	)	OEA Matter No. 1601-0213-11
Employee	)	
	)	
v.	)	Date of Issuance: February 16, 2016
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Dwight Robbins ("Employee") worked as a teacher with the D.C. Public Schools ("Agency" or "DCPS"). At the close of the 2009-2010 school year, Employee was classified as an excessed employee with an "Effective" rating under IMPACT, Agency's performance assessment system. As a result, he was informed that he had to secure placement for the 2010-2011 school year. Employee did not secure employment and was, therefore, given the choice to accept a buyout; take an early retirement; or take an additional year to secure a new placement. Employee selected to take an additional year to secure placement for the 2011-2012 school year. In accordance with the Washington Teacher's Union ("WTU") agreement with DCPS, Agency had the right to separate any excessed teachers who were unable to secure a new placement. Thus, on July 15, 2011, Agency issued a notice to Employee informing him that he would be

terminated effective August 12, 2011, based on his failure to secure a new position.[1] Employee challenged the termination by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 9, 2011. He argued that Agency violated Chapter 8 of the D.C. Personnel Regulations when the principal at Jefferson Middle School refused to interview him for the Health and Physical Education position. Employee also stated that the principal retaliated against him for challenging ". . . the equalization process of homeroom."[2] Lastly, he contended that Agency violated his civil rights because the Health and Physical Education position was given to a younger, white female. Therefore, Employee requested to be placed in a full-time position at Jefferson Middle School.[3]

In its Answer to the Petition for Appeal, Agency denied that it violated any D.C. Personnel Regulations. It asserted that Employee was terminated because he failed to secure another position within the required timeframe pursuant to the WTU agreement. It explained that Employee ". . . had a duty to obtain a position by mutual consent by June 22, 2011, in accordance with Article 4.5.5.3.3.5 of the Collective Bargaining Agreement ("CBA")."[4] In addition, Agency argued that the principal of Jefferson Middle School was not obligated to interview him.[5] Agency further stated that it did not retaliate against Employee or violate his civil rights. Thus, Agency believed that the termination was proper.[6]

The Administrative Judge ("AJ") subsequently scheduled a Pre-hearing Conference for January 29, 2014 and ordered the parties to submit Pre-hearing Statements.[7] Neither party

[1] *Petition for Appeal*, p. 6 (September 9, 2011).
[2] *Id.* at 18.
[3] *Id.* at 3.
[4] *District of Columbia Public Schools' Answer to the Petition for Review,* p. 3 (October 12, 2011).
[5] Moreover, Agency asserted that Employee's resume submission to the principal was untimely.
[6] Thereafter, Employee filed a response to Agency's Answer which provided that he was under the old CBA, which required Agency to place him in a position. *Employee's Response to Agency's Answer to the Petition for Appeal* (April 17, 2012).
[7] *Order Convening a Pre-hearing Conference* (June 28, 2013).

submitted a response to the order. The AJ subsequently scheduled a Status Conference and re-ordered the parties to submit Pre-hearing Statements.[8] In his submission, Employee asserted that Agency failed to follow the proper procedures as required by the CBA between the WTU and DCPS. He reasoned that Agency should have followed the procedures outlined in the 2004-2007 CBA instead of the 2007-2012 CBA. Moreover, Employee believed that Agency failed to provide him with a full, additional year to secure a permanent position.[9]

Agency did not attend the September 10, 2013 Status Conference. As a result, the AJ issued an Order for Statement of Good Cause to Agency for its failure to attend the conference. The AJ also ordered Agency to submit a Pre-hearing Statement.[10] Agency submitted its Good Cause Statement and Pre-hearing Statement on October 2, 2013. Counsel for Agency stated that it could not attend the Status Conference because of a death in the family.[11]

Thereafter, a second Status Conference was scheduled and Agency did not attend. The AJ subsequently issued another Order for Statement of Good Cause.[12] On November 13, 2013, Agency submitted a response stating that it did not receive the October 17, 2013 Order. Agency's counsel further provided that she was caring for her sick children. Therefore, Agency requested to reschedule the conference and for it to be conducted via telephone.[13]

The AJ scheduled a third Status Conference for March 11, 2014 and subsequently ordered the parties to submit briefs on whether Employee was terminated in accordance with all

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[8] *Order Scheduling Status Conference and Ordering the Parties to Submit Prehearing Statements* (August 15, 2013).
[9] *Prehearing Statement from Employee,* p. 3 (August 21, 2013).
[10] *Order for Statement of Good Cause* (September 20, 2013).
[11] Agency reiterated the previous arguments submitted in its Answer to the Petition for Appeal. *District of Columbia Public Schools' Good Cause Statement and Prehearing Statement* (October 2, 2013).
[12] *Order Convening Status Conference* (October 17, 2013) and *Order for Statement of Good Cause* (October 31, 2013).
[13] *District of Columbia Public Schools' Statement of Good Cause* (November 13, 2013).

applicable laws and regulations.[14] In its brief, Agency's reiterated its previous arguments regarding why Employee's termination was proper.[15] Employee's brief provided, *inter alia,* that he should have been eligible to retire from Agency. Employee also submitted that Agency was ". . . using collusion against [him] causing [him] to sign for the extra year which was not need[ed]."[16]

The AJ issued his Initial Decision ("ID") on June 16, 2014. He held that Employee received notice on December 21, 2010, advising him that he needed to secure a new teaching position by mutual consent on or before June 22, 2010. Employee signed an Additional Year Selection Form ("AYSF") on December 27, 2010; however, he was unable to secure a new position before the proscribed deadline. Accordingly, the AJ found that Employee's failure to secure a new teaching position on or before June 22, 2011 constituted cause for his termination and that Agency acted within the confinements of the CBA.[17]

Employee filed a Petition for Review on July 21, 2014. He argues that the Initial Decision was based on an erroneous interpretation of statute and that the AJ failed to consider his substantive arguments. Employee submits that he was not provided a full year to secure a position, in violation of the CBA. He further believes that Agency misled him with regard to retirement, and as a result, he had only six months to obtain a position.[18]

Employee later filed a Supplemental Brief in Support of his Petition for Review. He argues that Agency violated the terms of the CBA, and the AJ did not evaluate the termination under the correct CBA. He reiterates his claim that the 2004-2007 CBA, and not the 2007-2012

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[14] *Order Convening a Status Conference* (January 17, 2014) and *Order Requiring Briefs* (March 11, 2014).
[15] *District of Columbia Public Schools' Brief* (April 1, 2014).
[16] *Employee's Brief*, p. 3 (April 22, 2014). Thereafter, Employee submitted another brief which reiterated arguments made in his August 21, 2013 Pre-hearing Statement. *Employee's Brief* (May 1, 2014).
[17] The AJ held that OEA lacked jurisdiction to consider Employee's grievances concerning retirement, assignment, and lack of interviews. *Initial Decision,* p. 3-4 (June 16, 2014).
[18] *Petition for Review* (July 21, 2014).

CBA should have been used to evaluate Agency's actions. According to Employee, the 2007-2012 CBA did not become effective until June 29, 2010, and his notification of excess was dated June 11, 2010. Lastly, Employee submits that he ". . . was deprived of the opportunity to seek a new position until December 2011, when he was informed that [he] was not eligible for early retirement."[19] Employee requests that the Board reinstate him to his positon with back pay and benefits.[20]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
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> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
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> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
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> (c) The findings of the Administrative Judge are not based on substantial evidence; or
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> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

In general, D.C. Official Code §1-605.02, specifically reserves the resolution of unfair labor practice allegations and collective bargaining agreement violations to the District of Columbia Public Employee Relations Board ("PERB"). According to the aforementioned statute, PERB is responsible for determining whether agencies have engaged in unfair labor practices and/or violations of the CBA. However, in *Brown v. Watts*, the D.C. Court of Appeals held that OEA is not jurisdictionally barred from considering claims that an adverse action violated the

[19] *Employee's Supplemental Brief in Support of Petition for Review of Initial Decision*, p. 3-4 (August 11, 2014).
[20] *Id.* at 4.

express terms of an applicable CBA.[21] The Court explained that the Comprehensive Merit Personnel Act ("CMPA") gives this Office broad authority to decide and hear cases involving adverse actions, including "matters covered under [D.C. Code §1- 616.52(d)] that also falls within the coverage of a negotiated grievance procedure."[22]

The Applicable Collective Bargaining Agreement

Employee first argues that the AJ erred by not evaluating his claims under the applicable collective bargaining agreement. According to Employee, the 2004-2007 CBA should have been utilized in determining whether Agency adhered to the excessing process because the 2007-2012 CBA was not approved by D.C. City Council until June 29, 2010.[23] In support thereof, Employee cites to *International Board of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 1199 v. Pepsi-Cola General Bottlers, Inc*., wherein the U.S. Court of Appeals for the Sixth Circuit held that the employer's disputed conduct occurred prior to the effective date of the new collective bargaining agreement.[24] Under the 2004-2007 version of the CBA, excessed teachers are required to be given priority placement based on seniority. Excessed teachers are also entitled to bumping rights.[25]

However, the terms of the 2007-2010 CBA differ significantly with respect to the excessing process. Article 4 of the CBA provides the following in pertinent part:

> 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

[21] 933 A.2d 529 (D.C. 2010).
[22] *Id.*
[23] *Employee's Supplemental Brief in Support of Petition for Review of Initial Decision* at 2 (July 21, 2014).
[24] 958 F.2d 1131 (6th Cir. 1992).
[25] *Employee Pre-hearing Statement*, Exhibit 4 (August 21, 2013). *See also* Exhibit 6. According to a Washington Post article submitted by Employee, the WTU did not have a signed contract with DCPS between October 1, 2007 and June 2, 2010.

'abolishment.'

> 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.
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> 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.")
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> 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.
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> Article 4.5.5.3.3.5 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.

In this case, the AJ failed to address why the 2007-2012 CBA should govern this appeal. Article 42.1 of the 2007-2012 CBA states that "[t]his Agreement shall be effective as of the date of the D.C. Council approval, and shall remain in full force and effect until the 30th day of September 2012." The contract was signed and dated on March 19, 2010. However, the Initial Decision did not include an analysis regarding the date upon which the 2007-2012 agreement was ratified by the D.C. City Council. Evaluating Agency's excessing process under the two different bargaining agreements could conceivably result in different outcomes. Based on the foregoing, this matter must be remanded to the Administrative Judge for the purpose of determining which CBA applied to the instant matter and whether Agency followed the applicable excessing process as provided under the applicable agreement.

ORDER

Accordingly, we **GRANT** Employee's Petition for Review, and **REMAND** the matter to the Administrative Judge for further findings.

FOR THE BOARD:

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Sheree L. Price, Vice Chair

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Vera M. Abbott

_____
A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.