THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
GROVER MASSENBURG, Employee	
v.	OEA Matter No.: 1601-0004-13
D.C. PUBLIC SCHOOLS, Agency	Date of Issuance: June 21, 2016

OPINION AND ORDER
ON
PETITION FOR REVIEW

Grover Massenburg ("Employee") worked as a Teacher at Wilson High School. On August 21, 2012, Agency notified Employee that he was being terminated based on a charge of "willful nonperformance/inexcusable neglect of duty, in accordance with Chapter 5E, Section 1401.2(d) of the D.C. Municipal Regulations ("DCMR")." Specifically, Agency alleged that he failed to report a conversation on May 30, 2012, wherein a student discussed with Employee his desire to harm himself and displayed a handgun. The effective date of Employee's termination was September 6, 2012.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 2, 2012. In his appeal, he argued that Agency failed to indicate, with specificity, which

[1] *Petition for Appeal* (October 2, 2012).

policy or rule that was violated by failing to confiscate the handgun from the student.[2] Employee contended that Agency did not provide evidence to support its claim that his conduct warranted a charge of inexcusable neglect of duty of willful nonperformance.[3] Employee claimed that he initially believed that the weapon was a toy and that a real handgun should have been detected by the metal detectors. Additionally, Employee stated that he fully intended to report the incident after realizing the severity of the situation. He also argued that Agency committed a procedural error by failing to provide him with a written or verbal reprimand prior to removing him. Finally, he asserted that he was not placed on administrative leave pending an investigation into the incident.[4] Employee, therefore, requested that he be reinstated with back pay and benefits.

Agency filed its Answer to the Petition for Appeal on November 5, 2012. It argued that all school-based employees received training with respect to emergency procedures and that all classrooms are equipped with the "District of Colombia School Emergency Procedures Guide."[5] According to Agency, the D.C. Public Schools' Office of School Security ("OSS") investigated the matter and determined that Employee admitted to knowing that a student possessed a handgun on school property. Moreover, it argued that Employee's actions and/or inaction caused a potentially dangerous situation. Agency conceded that Employee was not placed on administrative leave at the time of the incident and did not receive a verbal or written reprimand. However, it submitted that it exercised the proper managerial discretion in terminating Employee based on the seriousness of the offense.[6]

An OEA Administrative Judge ("AJ") was assigned to this matter on January 21, 2014. On January 24, 2014, the AJ issued an order convening a prehearing conference for the purpose

[2] *Id*., Attachment # 1.
[3] *Id*.
[4] *Id*.
[5] *Answer to Petition for Appeal* (November 5, 2012).
[6] *Id*.

of assessing the parties' arguments.[7] During the conference, Employee argued that Agency committed several procedural errors in conducting its termination action. The parties were subsequently ordered to submit written briefs addressing whether Agency terminated Employee in accordance with all applicable statutes, laws, and regulations.[8]

In his brief, Employee asserted that Agency violated Article 7.8.3 of the Collective Bargaining Agreement ("CBA") between Agency and the Washington Teacher's Union ("WTU") because it failed to initiate the adverse action against within thirty days after his supervisor became aware of the incident. Employee also submitted that Agency violated 7.8.2 of the CBA.[9] This provision provides that employees and/or their union representatives have the right to review all documents related to the charges against them within five days of the receipt of the notice.[10] In its brief, Agency explained that it had a long history of receiving consent from the WTU to extend the time from for conducting investigations.[11] Therefore, Agency posited that it did not violate Article 7.8.3.[12]

The AJ issued his Initial Decision on February 10, 2015. He first determined that OEA was not jurisdictionally barred from considering Employee's claim that his termination violated the express terms of the CBA.[13] In determining whether Agency violated the CBA, the AJ cited to Article 7.8.3, which provides that "initiation of the disciplinary action shall be taken no later than thirty (30) school 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

[7] *Order Convening a Prehearing Conference* (January 24, 2014).
[8] *Id.*
[9] *Employee Brief* (May 28, 2014).
[10] *Id.*
[11] *Agency Brief,* p. 3 (April 29, 2014).
[12] *Id.* As will be discussed herein, Agency did not address whether it violated Article 7.8.2. of the CBA.
[13] *Initial Decision,* p. 2 (February 10, 2015). *See also Brown v. Watts*, 933 A.2d. 529 (April 15, 2010).

to."[14] Based on a review of the record, he concluded that Agency failed to initiate the instant adverse action within thirty days of Employee's supervisor becoming aware of the alleged infraction. He further held that there was no credible evidence in the record to support the assertion that Agency and the WTU have mutually agreed to not follow the terms of Article 7.8.3. The AJ noted that Employee and his union representative did not expressly agree to waive the time limit requirement for the purpose of allowing additional time to investigate the incident.[15] Lastly, he found that Agency violated Article 7.8.2 of the CBA, which gave Employee and/or the WTU with 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…."[16] Accordingly, the AJ reversed Agency's removal action and reinstated Employee with back pay and benefits.

Agency disagreed with the Initial Decision and filed a Petition for Review with this Board. It argues that the AJ failed to contribute greater weight to the facts most favorable to Agency, the non-moving party.[17] It further asserts that he failed to consider past practice and customs between the WTU and Agency regarding waving the time limit requirement found in Article 7.8.3 of the CBA.[18] In support thereof, Agency cites to the affidavit of Erin Pitts, who serves as the Director of DCPS' Labor Management and Employee Relations division. In addition, Agency believes that the AJ's conclusion that it violated Article 7.8.2 of the CBA is not based on substantial evidence.[19] In the alternative, it asserts that even if Employee was not provided with the proper advance notice the adverse action, he did not prove that he was

[14] *Id*. at 3.
[15] *Id*. at 4.
[16] *Id*. at 5.
[17] *Petition for Review*, p. 6 (March 17, 2015).
[18] *Id*. at 7.
[19] *Id*. at

prejudiced in prosecuting his case before OEA.[20] Therefore, it requests that this Board reverse the Initial Decision and remand the case to the AJ for an evidentiary hearing.[21]

Employee filed a Response to Agency's Petition for Review on April 20, 2014. He argues that Agency's Petition for Review should be denied because, if the Initial Decision were reversed, there would be nothing to prevent it from taking an indefinite amount of time to complete internal investigative and disciplinary actions against employees.[22] He also submits that the AJ was correct in concluding that Agency failed to comply with the requirements of Article 7.8.2 of the CBA. Of note, Employee reiterates that Agency failed to respond to his argument in any pleadings before the OEA; therefore, resulting in a waiver and admission that it failed to comply with the requirement of Article 7.8.2.[23] Employee, therefore, asks this Board to not consider any arguments that Agency has raised for the first time on appeal. Accordingly, he asks that the Initial Decision be upheld and that Agency's Petition for Review be denied.[24]

Thirty-day Deadline

The Court in *Brown v. Watts,* 933 A.2d 529 (D.C. 2010) held that "[w]hile OEA may assess an applicable CBA violation to help determine whether Agency had cause to institute an adverse action, it cannot singularly assess whether Agency violated provisions of its CBA." Thus, this Board's purpose in this case is to determine if Agency properly removed Employee for cause in the adverse action taken. Before we can even address the merits of the adverse action, we must determine if Agency adhered to the adverse action procedure. Based on our reading of the plain language of the CBA, Agency clearly violated Article 7.8.3.

[20] *Id*. at 12.
[21] *Id*. at 14.
[22] *Answer to Petition for Review*, p. 12-13 (April 20, 2015).
[23] *Id*. at 15.
[24] *Id*. at 36.

Article 7.8.3 of the CBA provides the following:

> The initiation of the disciplinary action shall be taken no later than thirty (30) 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.

In this case, the incident forming the basis of this appeal occurred on March 30, 2012. The incident was reported to Assistant Principal, Charlotte Butler, and Principal, Peter Cahall, the same day.[25] Thus, Agency should have initiated disciplinary action against Employee within thirty days of March 30, 2012. The AJ, therefore, was correct in concluding that Agency violated Article 7.8.3 of the CBA by not issuing its notice of adverse action until August 21 2012, nearly five months after the incident. It should further be noted that Agency does not dispute that it did not comply with the terms of the CBA regarding the time limit for initiating adverse actions against employees. Accordingly, there is substantial evidence in the record to show that Agency violated Article 7.8.3 of the CBA.

However, Agency contends that it did not adhere to this Article 7.8.3 due to its past practice with WTU of waiving the requirement.[26] In its Petition for Review, Agency primarily relies on several arbitration decisions on grievances in an attempt to convince this Board that we should consider its past policy instead of the plain language pertaining to the adverse action procedure as outlined in the CBA. It is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law

[25] Investigative Report, *Agency Answer to Petition for Appeal* (Tab 2).
[26] *Agency Answer to Employee's Petition for Appeal,* p. 7-11 (March 17, 2015).

12-124, OEA no longer has jurisdiction over grievance appeals. Therefore, the arbitration cases provided by Agency are meritless as they relate to this Office's jurisdiction over adverse action matters.

Furthermore, all of the decisions relied upon by Agency pre-date the 2010 Collective Bargaining Agreement. Thus, Agency cannot rely on these cases to prove past practices as it relates to the terms of the 2010 CBA.[27] The one decision that was issued after 2010, specifically addressed waiving the deadline in grievance matters. As previously stated, OEA does not have jurisdiction over grievances and is not bound by grievance decisions.

Agency also claims that if the Board does not reverse the AJ's decision, it could have a negative impact on its future labor relations.[28] As the Court ruled in *Brown*, OEA may assess an applicable CBA violation to help determine whether Agency had cause to institute an adverse action. The decisions made by OEA pertain only to adverse action matters over which our agency has jurisdiction and will not impact any grievance matters decided by arbitrators or other government agencies that decide labor disputes. Thus, Agency's concern that an OEA decision may impact its future labor relations is warrantless.

Article 7.8.2 of the CBA

Agency next claims that it did not violate Article 7.8.2 of the CBA, which states the following in pertinent part:

> 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

[27] The CBA was signed by DCPS and the WTU in March of 2010.
[28] *District of Columbia Public Schools' Petition for Review,* p. 13 (March 14, 2015).

> 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.

According to Agency, the AJ's March 13, 2014 Briefing Order made no mention of any other alleged CBA violation other than Article 7.8.3; thus, it did not waive its right to challenge Employee's argument that Agency failed to address this issue.[29] It states that the WTU received a copy of Employee's termination notice on August 27, 2012, and also received a copy of the Investigative Report on August 29, 2012. Agency further submits that the Petition for Appeal makes no mention of its alleged violation of Article 7.8.2. Moreover, Agency believes that even if it did violate the notification rights afforded provided for in Article 7.8.2, Employee has failed to show that he was prejudiced in advancing his case before OEA.[30]

The AJ issued a Briefing Order, stating the following:

> Employee maintains that there were several procedural defects with Employee's removal, inter alia, DCPS' failure to propose disciplinary action within thirty days as noted in § 7.8.3 of the Collective Bargaining Agreement between DCPS and Washington Teachers' Union, Local #6 of the American Federation of Teachers. Agency has the burden of proof by a preponderance of the evidence standard.
>
> The parties are hereby **ORDERED** to address whether the Agency, in conducting the termination of Employee, adequately followed all applicable District of Columbia statutes, regulations and laws.[31]

Thus, it is clear from the language of the AJ's order that Employee's allegation that Agency violated Article 7.8.3 of the CBA was simply one of numerous arguments challenging his removal. The order was clear on its face that Employee raised several procedural defects that were required to be addressed. Article 7.8.2 was implicitly included in the purview of the

[29] *Petition for Review*, p. 11 (March 17, 2015).
[30] *Id*. at 12.
[31] *Briefing Order* (March 13, 2014).

language of the order. While Employee did not specifically refer to the aforementioned CBA article in describing why he believed that he was wrongfully terminated, he did state in his Petition for Appeal that "…DCPS failed to…provide me with access to the adverse action file materials that relate to the grounds and reasons for the adverse action…."[32] In addition, Employee's counsel explicitly raised the argument that Agency violated Article 7.8.2 in his May 28, 2014 Brief in Response Regarding Procedural Defects in DCPS' Removal of Employee.[33]

This Board finds that Agency failed to respond to Employee's claims regarding its alleged violation of CBA Article 7.8.2. In accordance with OEA Rule 633.4, "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." The D.C. Court of Appeals held in *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172 (D.C. 2008), that "it is a well-established principle of appellate review that arguments not made at trial may not be raised for the first time on appeal." Additionally, the Courts ruled in *Brown v. Watts*, 993 A.2d 529 (D.C. 2010) and *Davidson v. D.C. Office of Employee Appeals*, 886 A.2d 70 (D.C. 2005), that any arguments are waived where a party never attempted to reopen the record to introduce any evidence supporting their argument before the issuance of an OEA Initial Decision.

Conclusion

Based on the foregoing, we find that the Initial Decision was based on substantial evidence. Agency violated Article 7.8.3 of the CBA when it failed to initiate disciplinary action within thirty days after Employee's supervisor became aware of the alleged infraction. We further find that Agency has waived its argument that it did not violate the terms of CBA Article 7.8.2. Accordingly, Agency's Petition for Review must be denied.

[32] *Petition for Appeal*, Continuation Sheet.
[33] *Employee Brief*, p. 2 (May 28, 2014).

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. Therefore, Agency shall reinstate Employee to his last position of record or a comparable position. Additionally, it must reimburse Employee all back-pay and benefits lost as a result of the termination action. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order

FOR THE BOARD:

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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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.