

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
Sara White,) OEA Matter No. 1601-0086-15
Employee)
) Date of Issuance: February 8, 2018
v.)
) Joseph E. Lim, Esq.
D.C. Public Schools,) Senior Administrative Judge
Agency)

Sara White, Esq., Employee *pro se* ¹
Ryan Donaldson, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

Sara White (“Employee”) was a Trial Attorney for the D.C. Public Schools (“Agency”). Employee appealed her May 29, 2015, termination with the Office of Employee Appeals (“OEA” or “the Office”) on June 9, 2015. Agency filed its Answer and a Motion to Dismiss for lack of jurisdiction on July 16, 2015, alleging that because Employee was a member of the Legal Service and was not a union member, she was an at-will employee and thus had no right of appeal.

This matter was initially assigned to Administrative Judge Lois Hochhauser on June 19, 2015, until Judge Hochhauser ordered that this matter be reassigned to another judge due to Employee’s request. The matter was then assigned to Administrative Judge Sommer Murphy on August 31, 2015. When Judge Murphy transferred to the Office of General Counsel, this matter was then assigned to the Undersigned on January 11, 2017.

I held a status conference on February 1, 2017, and ordered briefs on the issue of jurisdiction. The parties submitted stipulations of facts, disputed facts, and their briefs. Based on these submissions, I scheduled an evidentiary hearing for February 5, 2018, after requests for postponements by the parties. On January 30, and again on February 1, 2018, Employee emailed her withdrawal of her appeal. The record is now closed.

JURISDICTION

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

1 Betty Grdina, Esq., was the Employee Representative until her withdrawal in October 18, 2017.

ISSUE

Whether this appeal should be dismissed.

FINDINGS OF FACT²

1. Employee (also known as Sara Moskowitz but referred to here as Sara White, her name when the OEA appeal was filed) was employed by the District of Columbia as a non-supervisory trial attorney for ten years from May 11, 2005 to May 29, 2015.
2. Employee was hired by the District of Columbia on May 11, 2005 as an attorney for the D.C. Public Schools (DCPS).
3. Employee was transferred on October 14, 2007 from DCPS to the D.C. Office of the Attorney General (OAG).
4. Employee was transferred from the D.C. OAG to DCPS on October 5, 2014.
5. Employee was terminated from her position at DCPS on May 29, 2015, based on allegations that she failed to carry out assigned duties and responsibilities as an attorney for Agency.
6. Employee's Form SF 50s (Joint Exhibits 1, 2 and 3) indicate that she was classified by the District of Columbia in its personnel records as a bargaining unit member from October 14, 2007, until the date of her separation on May 29, 2015. This fact is evidenced in Box 37 of the Form SF 50s, which denote "Union Code/Barg Unit" which states "BQA/C33." The reference in SF 50 to "BQA" refers to AFGE Local 1403. The reference in SF 50 to "C33" refers to Compensation Unit 33.
7. At all times during her employment, regardless of whether she worked for the DCPS OGC or the D.C. OAG, Employee was assigned to perform services for DCPS.
8. AFGE Local 1403 is the certified collective bargaining representative of approximately three hundred non-supervisory attorneys employed in the D.C. Office of Attorney General ("OAG"), and in several District of Columbia agencies which

² Derived from the parties' Joint Stipulations of Fact submitted April 21, 2017, and other undisputed assertions of facts.

- come within the personnel authority of the Mayor, including the DCPS Office of General Counsel (“DCPS OGC”).
9. Attorneys employed by the District of Columbia working for agencies such as DCPS which fall within the personnel authority of the Mayor are referred to as “Agency Counsels.”
 10. AFGE Local 1403 and OAG were parties to a collective bargaining agreement (CBA) covering Working Conditions, dated October 1, 2013, through September 30, 2017.³
 11. D.C. Code §1-617.09(b) provides that an appropriate bargaining unit shall not be established if it includes the following: “Any management official or supervisor; A confidential employee; An employee engaged in personnel work in other than a purely clerical capacity; An employee engaged in administering the provisions of D.C. Code § 1-617.01 et. seq.; Both professional and nonprofessional employees, unless a majority of the professional employees vote or petition for inclusion in the unit; Employees of the Council of the District of Columbia; or Employees within the Educational Service in the District of Columbia Public Schools and the Office of the State Superintendent of Education who serve without tenure pursuant to [§ 1-608.01a].”
 12. On or around the time the Attorney General became an elected position in the District of Columbia, the D.C. government created the Mayor’s Office of Legal Counsel (MOLC) to exercise authority over the attorneys formerly employed by the Office of Attorney General (OAG) who had been assigned to agencies such as DCPS which fell within the personnel authority of the Mayor, (the Agency Counsels).
 13. The CBA between the OAG and AFGE Local 1403 anticipated that some employees would be transferred out of OAG upon the creation of the MOLC and provided at Article I, Section 2, that: “In the event that any attorney positions within Local 1403’s bargaining unit that are currently assigned to the Office of the Attorney General are subsequently assigned to other agencies within the District of Columbia Government, the parties agree that Local 1403 will open negotiations, within thirty (30) days of the effective date of the transfer of positions, to establish an agreement governing the working conditions of the bargaining unit employees within those positions.”

³ A true and accurate copy of the CBA was attached as Joint Exhibit 4.

14. On or around October 2014, the Agency Counsels were transferred out of the Office of the elected Attorney General and to the agencies where they were assigned, and are now under the authority of the MOLC. Employee's position fell within the Agency Counsel designation and was therefore transferred out of OAG on or around October, 2014.
15. Based on the CBA, attorneys who are union members may request a hearing before the OEA regarding suspensions of ten days or more, including demotions and terminations.⁴ The CBA also states that OEA's Initial Decision ("ID") will merely be an advisory opinion to be submitted to the D.C. Mayor for review.⁵ However, the CBA does not mandate that the Mayor consider the ID's opinion in his or her determination as to the appropriateness of the Agency's chosen penalty.
16. To date, a new CBA has not yet been negotiated for the Agency Counsels.
17. Prior to October 2014, the CBA expressly covered "Agency Counsels," that is, non-supervisory attorneys assigned to work exclusively for certain D.C. agencies such as DCPS, including Employee.
18. At all relevant times, Employee was considered to be an "Agency Counsel."
19. On April 4, 2015, DCPS OGC served Employee with a Ten Days Advance Notice of Proposed Removal, but did not serve the Union with a copy until April 8, 2015.
20. The Ten Day Advance Written Notice listed the following as bases for DCPS' decision to remove Employee from her position with the Agency: Employee's failure to carry out duties and responsibilities relating to the defense of personnel actions that she was responsible for defending on behalf of DCPS before the Office of Employee Appeals, Employee's failure, without reasonable cause, to comply with valid judicial orders issued by OEA Administrative Judges, and Employee's failure, without reasonable cause, to communicate and consult with DCPS regarding the status of personnel matters before OEA, including the ultimate outcome of those matters.
21. On May 7, 2015, Employee filed her response in opposition to the Ten Day Advance Written Notice of Proposed Removal.

⁴ Joint Exhibit 4, Article 30, Discipline and Discharge.

⁵ *Id.*

22. On May 28, 2015, DCPS issued its Final Written Administrative Decision, terminating Employee effective May 29, 2015.
23. In the Final Written Administrative Decision, DCPS stated that Employee had been “improperly coded by human resources as being within the collective bargaining unit” and that she was “by definition of her work, excluded from the Union” because she “performed substantive personnel work for DCPS” and therefore did “not enjoy the benefits of the CBA.”
24. By letter dated June, 3, 2015, Employee timely appealed DCPS’ Final Written Administrative Decision to Mayor Bowser.
25. On June 9, 2015, AFGE Local 1403 filed the Petition for Appeal with OEA on behalf of Employee.
26. AFGE Local 1403 filed an Unfair Labor Practice (“ULP”) Complaint with the Public Employee Review Board (PERB) on July 29, 2015 disputing DCPS’ assertion that Employee was not a bargaining unit member.⁶
27. AFGE Local 1403 filed a Notice of Dismissal with PERB on December 21, 2016.
28. On December 28, 2016, PERB dismissed the ULP Complaint of AFGE Local 1403 with prejudice.
29. On January 30, and again on February 1, 2018, Employee emailed her withdrawal of her appeal.

ANALYSIS AND CONCLUSION

Since Employee has voluntarily withdrawn her appeal, Employee's petition for appeal is dismissed with prejudice.

ORDER

It is hereby ORDERED that the petition in this matter is dismissed.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

⁶ *AFGE Local 1403 v. District of Columbia and DCPS*, Case No. 15-U-34.