THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ESTELLE BOWERS,	)	
Employee	)	OEA Matter No. 1601-0084-18
	)	
v.	)	Date of Issuance: November 18, 2019
	)	
D.C. PUBLIC SCHOOLS,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	

Estelle Bowers, Employee, *Pro Se*
Nicole Dillard, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 24, 2018, Estelle Bowers ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting the District of Columbia Public Schools' ("Agency") decision to terminate her from her position as a Teacher, effective July 27, 2018. Employee was terminated for having an 'Ineffective' rating under the IMPACT, D.C. Public Schools' Effective Assessment System for School-Based Personnel ("IMPACT"), during the 2017-2018 school year. On September 13, 2018, Agency filed its Motion to Dismiss and Answer to Employee's Petition for Appeal.[1]

I was assigned this matter on October 3, 2018. A Status/Prehearing Conference was held on November 14, 2018, wherein, the Agency requested that the matter be referred to mediation.[2] On November 16, 2018, the undersigned issued an Order Convening a Prehearing Conference for January 8, 2019.[3] A mediation Conference was held on December 4, 2018. On December 21,

[1] Agency notes in its Motion to Dismiss and Answer to Employee's Petition for Appeal that OEA does not have jurisdiction over Ms. Bowers' Excessing claim as she had appealed the Excessing issue through the grievance process.

[2] A preliminary brief submission schedule was agreed upon by the parties during the Prehearing Conference, pending the outcome of the Mediation Conference.

[3] On January 7, 2018, Agency's representative informed the undersigned via email that the parties were still working on the terms of the settlement agreement. As such, the parties were notified by the undersigned via email that the Prehearing Conference scheduled for January 8, 2019, was cancelled. The undersigned also requested that the parties submit a status update by January 30, 2019.

2018, Agency notified the undersigned that a settlement agreement had been sent to Employee for her review and signature.[4] After numerous email communication between the undersigned and the parties regarding the status of the settlement agreement, and requests for more time to continue negotiations, the undersigned issued an Order on June 4, 2019, scheduling a Status/Prehearing Conference for June 24, 2019. Per the parties' email request, a telephonic conference was convened on June 21, 2019, with all parties present. As such, the June 24, 2019, Status/Prehearing Conference was cancelled. After the telephonic conference on June 21, 2019, Mr. Lee W. Jackson, filed a withdrawal of designation as Employee's representative. On July 1, 2019, the undersigned issued an Order scheduling a Prehearing Conference for July 22, 2019.

In an email dated July 18, 2019, the undersigned was informed by Mr. Hartnett that he had been retained by Employee. He also requested that the July 22, 2019, Prehearing Conference be continued. Since the request was made close in time to the scheduled Prehearing Conference, the parties were notified via email that the request to continue the Prehearing Conference was granted. The undersigned further informed Employee's representative that upon receipt of an official motion for a continuance, an order would be issued rescheduling the conference. On July 19, 2019, Mr. Hartnett filed an Entry of Appearance on behalf of Employee, along with his Motion to Reschedule Pre-Hearing Conference. On July 22, 2019, the undersigned issued an Order Convening a Prehearing Conference for August 12, 2019. Both parties were present for the scheduled conference. Subsequently, the undersigned issued an Order Convening Hearing for November 4, 2019. On October 28, 2019, Mr. Hartnett filed a Withdrawal of Counsel by Employee's Consent, noting that Employee was prepared to resume her representation *pro se*.

A telephonic conference was held on October 28, 2019, with Employee and Agency's representative, wherein, Agency noted that it would withdraw its opposition to Employee's Petition for Appeal. Agency was ordered to put its withdrawal in writing and file with OEA. On November 5, 2019, Agency filed its Motion for Withdrawal of its Opposition of IMPACT Termination Appeal. Agency noted that "[a]t this time, DCPS concedes liability in Ms. Bowers' IMPACT matter. As such, Ms. Bowers will be placed into a teaching position …." Agency reiterated in a footnote that "Ms. Bowers may note that she has grieved her Excess, however, that matter is not before the OEA. Ms. Bowers grieved her Excess through the grievance process outlined in the Collective Bargaining Agreement Article section 4.5…."[5] On November 8, 2019, Employee filed Employee's Partial Opposition to Agency's Motion to Withdraw its Opposition of IMPACT Termination Appeal.[6] Considering Agency's acceptance of liability with regards to Employee's IMPACT evaluation, I have decided that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is closed.

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[4] On January 11, 2019, the undersigned received a designation of Employee Representative, noting that Employee was now represented by Mr. Lee W. Jackson.

[5] See Agency's Motion for Withdrawal of its Opposition of IMPACT Termination Appeal (November 5, 2019).

[6] Employee highlights that Agency intends to reinstate her in a "Not to Exceed" position, instead of the position she occupied prior to her termination pursuant to IMPACT. I find that Employee's current argument is premature because it deals with a compliance issue. Upon issuance of the instant Initial Decision, Agency has 30 days from the date the decision becomes effective, to comply. If Agency fails to comply at that time, then Employee can file a Motion for Enforcement, and any concerns she has with regards to her reinstatement will be addressed.

JURISDICTION

OEA 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 pursuant to her 'Ineffective' IMPACT rating during the 2017-2018 school year 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.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

In its November 5, 2019, submission to this Office, Agency noted that "[a]t this time, DCPS concedes liability in Ms. Bowers' IMPACT matter. As such, Ms. Bowers will be placed into a teaching position …." Since Agency has conceded and noted that it does not oppose Employee's IMPACT termination appeal to this Office, I find that Employee was improperly terminated.

Motion to Dismiss

Agency asserted in its Motion to Dismiss and Answer to Employee's Petition for Appeal that OEA does not have jurisdiction over Ms. Bowers' Excessing claim as she had appealed the Excessing issue through the grievance process. Employee noted in her Petition for Appeal that DCPS failed to adhere to Article 4.5.4 of the Collective Bargaining Agreement in securing placement for her position as an Excessed teacher. However, Employee has not challenged Agency's assertion that she grieved her Excess through the grievance process. Employee actually noted on page 6 of her Prehearing Statement dated October 25, 2019, that on May 25, 2018, she filed a grievance alleging the Excess was improper and violated DCPS procedures because it was not issued and processed in a timely manner. Employee received the Excess Notice on May 16, 2018, and the effective date of the Excess was June 15, 2018. Employee was required to choose

an Excess option from one of the three options listed in the Excess notice by August 22, 2018, if she did not find a placement by August 17, 2018.

This Office's jurisdiction is conferred upon it by law and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting: (a) a performance rating resulting in removal; (b) an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or (c) a reduction-in-force; or (d) a placement on enforced leave for ten (10) days or more.

Accordingly, OEA usually does not review matters that are under the guidance of a Collective Bargaining Agreement. However, the Court of Appeals held in *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), that this Office is not "jurisdictionally barred from considering claims that a termination violated the express terms of an applicable collective bargaining agreement."[7] The Court went on to explain 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."[8] In the instant matter, Employee was a member of the Washington Teacher's Union ("WTU") at the time of her termination. Based on the holding in *Watts*, I find that this Office may interpret the relevant provisions of the CBA between Agency and the WTU, related to the adverse action at issue in this matter.

In the instant matter, the May 2018 Excess notice was issued pursuant to the CBA between the WTU and Agency. However, the current Employee was terminated because she received an 'Ineffective' IMPACT rating for the 2017-2018, school year and not based on the Excess notice she received in May of 2019. Because the Excess in this matter did not result in an adverse action of removal, reduction in grade, or suspension for 10 days or more; or a reduction-in-force; or a placement on enforced leave for ten (10) days or more, I find that it does not meet the standard of review set forth by the Court of Appeals in *Brown v. Watts*. Accordingly, I further find that because Employee's Excess is not related to an adverse action, this Office does not have jurisdiction over Employee's Excess issue.

Additionally, both parties acknowledged that Employee contested the Excess by filing a grievance with her union alleging the Excess was improper and violated DCPS procedures. Moreover, because Agency has conceded liability with regards to the adverse action of termination imposed on Employee, and noted in its November 5, 2019, submission that

[7] *Shands v. District of Columbia Public Schools*, OEA Matter No. 1601-0239-12 (May 7, 2014); See also *Robbins v District of Columbia Public Schools*, OEA Matter No. 1601-0213-11 (June 6, 2014).
[8] *Id*.

Employee would be placed into a teaching position, I conclude that Agency's Motion to Dismiss the Excess issue is moot.[9]

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of separating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee to her last position of record; or a comparable position; and
3. Agency shall reimburse Employee all back-pay and benefits lost as a result of the separation; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____
MONICA DOHNJI, Esq.
Senior Administrative Judge

[9] *Culver v. District of Columbia Fire Department*, OEA Matter No. 1601-0121-90, *Opinion and Order on Petition for Review* (January 16, 1991) wherein OEA's Board held that there is no requirement that this Office adjudicate a matter that is moot.