THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ESTELLE BOWERS,	)	
Employee	)	OEA Matter No. 1601-0084-18C20
	)	
v.	)	Date of Issuance: July 2, 2020
	)	
D.C. PUBLIC SCHOOLS,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	

F. Douglas Hartnett, Esq., Employee Representative
Nicole Dillard, Esq., Agency Representative

ADDENDUM DECISION ON COMPLIANCE[1]

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 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.[2]

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.[3] On November 16, 2018, the undersigned issued an Order Convening a Prehearing Conference for January 8, 2019.[4] A mediation Conference was held on December 4, 2018. On December 21,

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.
[2] 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.
[3] A preliminary brief submission schedule was agreed upon by the parties during the Prehearing Conference, pending the outcome of the Mediation Conference.
[4] 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

2018, Agency notified the undersigned that a settlement agreement had been sent to Employee for her review and signature.[5] After numerous email communications 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 as counsel 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 file its withdrawal in writing 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…."[6] On November 8, 2019, Employee filed Employee's Partial Opposition to Agency's Motion to Withdraw its Opposition of IMPACT Termination Appeal.[7] Considering Agency's acceptance of liability with regards to Employee's IMPACT evaluation, on November 18, 2019, I issued an Initial Decision ("ID") reversing Agency's decision to terminate Employee, pursuant to IMPACT.

Prehearing Conference scheduled for January 8, 2019, was cancelled. The undersigned also requested that the parties submit a status update by January 30, 2019.

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

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

[7] Employee highlighted that Agency intended to reinstate her in a "Not to Exceed" position, instead of the position she occupied prior to her termination pursuant to IMPACT. I found that Employee's current argument was premature because it dealt with a compliance issue. I explained to Employee that upon issuance of the instant Initial Decision, Agency had 30 days from the date the decision became final to comply. If Agency failed to comply at that time, then Employee could file a Motion for Enforcement.

On February 10, 2020, Mr. Hartnett again entered his appearance and filed Employee's Petition for Enforcement. Employee noted that Agency has failed to fully comply with the November 18, 2019, ID. On February 24, 2020, Agency filed its Response to Employee's Petition for Enforcement and Motion for Leave. Thereafter, I issued an Order scheduling a Status Conference for April 27, 2020. Due to the COVID-19 Emergency, the Status Conference was converted to a Telephonic Status Conference. Both parties were present for the Telephonic Status Conference. During the Telephonic Status Conference, Employee requested time to submit a brief addressing the issues raised during the April 27, 2020, call. On May 22, 2020, Employee filed her Supplemental Petition for Enforcement. Thereafter, Agency filed a Response to Employee's supplemental brief to Petition for Enforcement. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency has fully complied with the November 18, 2019 ID.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

OEA Rule 635.9, provides that:

> 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.)

The parties have raised two (2) outstanding issues: (1) reinstatement to Employee's last position of record; or a comparable position; and (2) reimbursement of all back-pay and benefits lost as a result of the separation.

Employee's Position

In her Petition for Enforcement, Employee asserts that Agency has not fully complied with the November 18, 2019, ID. Specifically, Employee presented the following arguments:[8]

(1) The November 18, 2019, ID was not appealed, and it became final on December 23, 2019. Agency was required according to the ID to certify its compliance by January 22, 2020. However, as of the filing of Employee's Petition for Enforcement, Employee had not received service of any such certification.
(2) Agency has failed to pay Employee backpay. Employee submits that she has complied with all of Agency's requests for documents and information related to her backpay and benefits.

[8] Employee's Petition for Enforcement (February 10, 2020).

(3) Agency has failed to reinstate her to her last position of record. Employee explains that on December 20, 2019, she received a letter assigning her to a teaching position effective December 22, 2019. The letter also informed her that the assignment would expire at the conclusion of the 2019-2020 school year, unless Employee was hired into a school-based position on a permanent basis. Employee maintains that her position of record at the time of her termination was a permanent position with no expiration date. She additionally asserts that she has not received any document from the District of Columbia Department of Human Resources ("DCHR") verifying her appointment.

Employee further argues that Agency's decision to Excess her is superseded by her removal based on IMPACT. Employee explains that based on her Excess notice from Agency, she had until August 22, 2018, to select an Excess option. Whereas, her June 25, 2018, IMPACT termination notice was effective on July 27, 2018. Accordingly, Employee asserts that Agency's attempt to revive the Excess action and implement it retroactively is improper and unjustified because Agency took a superseding action before the Excess action took effect. Employee also notes that because excessing decisions are based on budget and resource decisions that are made on an annual basis and are in constant flux, it is impossible to reinstate the Excessing action in a fair and equitable manner especially since Agency had abandoned the action.

In her Supplemental Petition for Enforcement, Employee reiterated her position as stated in her Petition for Enforcement. She maintains that reinstating her to a temporary position is not in compliance with the ID. Employee stresses that Agency has failed to restore her to her last position of record; or a comparable position. Employee explains that "[f]aced with that proposed action[removal] by the Agency, she [Employee] elected to retire."[9] Employee further explains that [o]n August 13, 2018, DCPS processed Ms. Bowers' retirement application and issued an SF-50 with an effective date of July, 27, 2018."[10] Employee included a copy of the SF-50 to her Supplemental Petition for Enforcement in support of her position that she was a permanent employee at the time of her termination.[11]

Agency's Position

In its Response to Employee's Petition for Enforcement, Agency states that it issued a Return to Duty letter to Employee on December 20, 2019 placing her into a teaching position.[12] Agency maintains that Employee's position of record prior to her IMPACT separation was that of an Excessed employee. With regards to backpay, Agency asserts that it has been unable to pay Employee backpay because Employee only returned the financial documents required to calculate her backpay on February 9, 2020, one day prior to her filling her Petition for Enforcement. Agency further notes that the Excessing action is outside of OEA's jurisdiction.

[9] Employee's Supplemental Petition for Enforcement (May 22, 2020).
[10] *Id.*
[11] *Id.*
[12] Agency's Response to Employee's Petition for Enforcement and Leave (February 20, 2020).

Agency maintains that pursuant to the Excessing guidelines, Employee elected to be reinstated to employment for one (1) year.[13]

In its Response to Employee's Supplemental Petition for Enforcement, Agency notes that it complied with the November 18, 2019, ID when it reinstated Employee to an excessed "extra year" position.[14] Agency reiterated its arguments as stated in its Response to Employee's Petition for Enforcement and Leave. To clarify Employee's concerns regarding her SF-50, Agency explains that SF-50s are updated after each edit or change to the person's SF-50, such as a correction, a change of position, an update in salary, rehire, or a reinstatement.[15] Agency posits that the SF-50 that was issued on July 27, 2018, was triggered by Employee's separation pursuant to IMPACT. And the August 2018, SF-50 was created because Employee elected to retire in-lieu of termination. Agency maintains that Employee's SF-50 was correctly coded. Agency states that Employee's SF-50 argument is misapplied since he provided this Office with an outdated SF-50. Agency further argues that Employee misunderstood the excessing process and the election of one extra year.

Reinstatement[16]

On February 10, 2020, Employee filed a Petition for Enforcement of the November 18, 2019, ID. However, after a Telephonic Status Conference on April 27, 2020, Employee was asked to submit a supplemental brief addressing the issues that were raised during the conference. Employee filed her Supplemental Petition for Enforcement on May 22, 2020, along with her Standard Form 50 ("SF-50") in support of her assertion that she was a permanent Employee at the time of her removal. Agency also submitted a response to the supplemental brief. Upon review of the record, I find that by reinstating Employee to a teaching position for one year, Agency has complied with the November 18, 2019, ID. Prior to her removal from Agency on July 27, 2018 due to IMPACT, Employee had been notified that her position would be excessed effective August 22, 2020. Employee was provided with three options in her excess letter which included the opportunity to take an extra year placement, during which she would be placed at a DCPS school, while she continued to pursue a budgeted position. Based on the record, Employee chose the option to be placed at a DCPS school for an extra year. Employee argues that the excess was superseded by her IMPACT termination, thus, she was a permanent employee prior to her termination. Employee provided a copy of her SF-50 that was created as a result of her retirement in support of her assertion that she was a permanent employee.

I disagree with Employee's assertion that she should have been returned to a permanent position. In Agency's November 5, 2019, 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 pursuant to Article 4.5.5.3.3 of the Collective Bargaining Agreement between DC Public Schools and the

[13] *Id.*
[14] Agency's Response to Employee's Supplemental Petition for Enforcement (June 15, 2020).
[15] *Id.*
[16] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

Washington Teachers Union on or around December 12, 2019. Under the Excessing provision of the Collective Bargaining Agreement, should Ms. Bowers not find a permanent position with DCPS upon the conclusion of this school year, she will be separated from employment." I agree with Agency that Employee's position of record prior to her IMPACT termination was an excessed employee. Although Employee was a permanent employee prior to her removal due to IMPACT, Employee was also faced with an excess decision which would have been effective August 22, 2018, absent her removal through IMPACT. More importantly, the Notice of Ineffective IMPACT Rating issued to Employee on June 25, 2018, specifically stated that "[o]ur record indicates that your employment with DCPS was scheduled to end prior to this separation notice. *This separation notice does not change your status with DCPS*. If your other separation notice is reversed or modified, your separation from DCPS shall still stand as a result of this notice, effective July 27, 2018 (emphasis added)."[17] Thus, I find that Employee's employment status at DCPS was that of an excessed Employee, prior to the initiation of her removal pursuant to an Ineffective IMPACT rating. Agency's acceptance of liability to the IMPACT action did not change Employee's status as an excessed employee.

On December 20, 2019, Agency issued a letter to Employee, informing her that she had been placed at Ida Wells Middle School effective December 22, 2019. The letter further noted that the assignment will expire at the conclusion of the 2019-20 school year unless she is hired into a school-based position on a permanent basis. This is in compliance with the terms outlined in the May 2018 Excess notice. Thus, I find that she has been reinstated to a position in accordance with the May 2018 Excess Notice. Employee chose an extra year placement at a DC Public school, and she was reinstated effective December 22, 2019, for an extra one year. Therefore, I find that Agency has reinstated Employee to her last position of record or a comparable position in compliance with the November 18, 2019, ID.

Additionally, the SF-50 submitted by Employee which listed her position as a permanent employee was processed on August 13, 2018. This is about 10 days before the effective date of the Excess, presumably the reason why it still listed Employee's tenure as permanent. Moreover, this SF-50 was triggered by her retirement which became effective on the same date as the IMPACT removal, thus nullifying the removal.[18]

Back pay and benefits

Regarding the reimbursement of all of Employee's backpay and benefits, I find that Employee is entitled to a reimbursement of all of her back pay and benefits. Agency argued in its Response to Employee's Supplemental brief that Employee's back pay salary less outside earnings along with reinstatement of full benefits will be calculated from August 2019 of this

[17] *See* Petition for Appeal (August 24, 2018). *See also* its Agency's Motion to Dismiss and Answer to Employee's Petition for Appeal, *supra.*

[18] In *Ella Cuff v. Department of General Services*, OEA Matter No. 1601-0009-12, *Opinion and Order on Petition for Review* (March 29, 2016), the Board reasoned that when a retirement action is back dated to the effective date of Employee's termination action, it essentially nullifies the termination. OEA has previously held that retirements that occur after a removal action are valid. *See Hsiao Zen Lu v. Department of General Services*, OEA Matter No. J-0153-13 (November 25, 2013). If the information about Employee's retroactive retirement was disclosed to the undersigned prior to her issuance of the November 18, 2019, ID, the outcome of this matter may have been different as the retirement might have taken precedence over the removal.

academic year through December 2019, the date she was reinstated. This is a total of four (4) months' worth of back pay. I disagree with Agency's assertion. The record shows that the effective date of Employee's IMPACT termination was July 27, 2018. Employee was reinstated effective December 22, 2019. Consequently, I conclude that Employee is owed almost seventeen (17) months' worth of back pay. Agency explained however that, DCPS teachers work in the classroom on a contract year from August through June and not a calendar year. If this adjustment is made to Employee's back pay, I find that Employee's back pay date will span from August 2018, to June 2019; and from August 2019, to December 2019. Agency asserts that Employee only submitted the financial information necessary to calculate her back pay on February 9, 2020, one day before she filed her Petition for Enforcement. Nonetheless, I find that since Employee has not received her full back pay, Agency has not complied with the back-pay requirement as ordered in the November 18, 2019, ID.

ORDER

Based on the aforementioned, Agency has not paid out Employee's back pay. However, given Employee's delay in submitting the information required to calculate her backpay, and the current delay caused by the COVID-19 crisis, Agency is hereby **ORDERED** to pay out Employee's back pay covering the **period of July 27, 2019, through December 22, 2019**, within two (2) months from the issuance of this decision (emphasis added).

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Senior Administrative Judge