THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
CRECYNTHIA CRAWLEY, Employee	
v.	OEA Matter No. J-0006-16
DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Agency	Date of Issuance: July 8, 2016 MICHELLE R. HARRIS, Esq. Administrative Judge

Johnnie Landon, Esq., Employee Representative
Lynette Collins, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 9, 2015, Crecynthia Crawley ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") decision to remove her from her position pursuant to a "Excess." The effective date of the termination was August 8, 2015. On November 16, 2015, Agency filed its Answer to Employee's appeal. On December 2, 2015, I issued an order requesting that Employee address whether OEA should dismiss this appeal for lack of jurisdiction because the appeal was untimely.

On December 16, 2015, Employee submitted her brief citing that the Agency failed to provide timely notice regarding the termination and asserts that OEA has jurisdiction over this matter because Employee has a "constitutionally protected property interest in continued employment under the Fifth Amendment to the U.S. Constitution."[1] Agency submitted its response to Employee's brief on December 18, 2015. Because Agency did not address the timeliness issue in its December 18, 2015, response as requested; I issued a subsequent Order on January 12, 2016, requiring Agency to address the issue with the Final Agency Notice in this matter. On January 22, 2016, Agency submitted its response. Agency conceded that the September 2, 2015, Notice to Employee was sent after the August 8, 2015, effective date of termination. Further, Agency noted that they are not challenging the timeliness of Employee's right to appeal.

[1] Employee's Brief on Jurisdiction (December 16, 2015).

On March 2, 2016, I issued an Order finding that Agency's failure to provide notice in a timely manner did not afford Employee adequate notice of her opportunity to respond within the thirty (30) days of the effective date as required by OEA Rule 604.2, 59 DCR 2129 (March 16, 2012). Because I found that Employee's Petition was timely, I set a briefing schedule requiring the parties to address whether Agency conducted the instant excess, adequately followed all applicable statutes, regulations and laws. Agency brief was due March 25, 2016, and Employee's brief was due April 18, 2016.

On April 5, 2016, Agency filed a Motion for an Extension of time to File Brief, in which Agency indicated that they did not receive the March 2, 2016 Order until April 4, 2016. Agency further noted that Employee's representative had also not received a copy of the Order. On April 5, 2016, I granted Agency's request. Agency's brief was now due on April 19, 2016, and Employee's brief was due on May 3, 2016. Both parties submitted their briefs in accordance with the proscribed deadline. After considering the parties' arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

This Office 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 via 'excess' 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

Employee worked at Agency as a Guidance Counselor for 25 years. In a letter dated September 2, 2015, Employee was given notice that "consistent with the procedures in the Collective Bargaining Agreement ("CBA") between the District of Columbia Public Schools ("DCPS") and the Washington Teachers' Union ("WTU"), to which she was a member, that her position was terminated at the close of business on Friday, August 8, 2015." [2]

Employee's Position

Employee was subject to an "excess" at the close of the 2013-2014 school year. Employee had an IMPACT rating of Effective or higher and was subject to three options in accordance with the CBA. One of these options was the 'Extra Year' choice in which Employee would remain a DCPS Employee for an additional year with the requirement that Employee would have to secure a budgeted mutual consent placement for the 2015-2016 year. Employee elected the Extra Year option and was placed at the Youth Service Center for Incarcerated Youth.[3] In June 2015, Employee indicates that she received another excess letter indicating that they no longer needed a counselor. [4] Employee also argues that she was excessed because of her age and because she does not speak Spanish. Employee asserts that the personnel actions with regard to her termination were not processed in a manner to afford her a "pre-termination hearing."[5] Employee argues that a pre-termination hearing is a constitutional right and cannot be waived by a CBA.[6]

Further, Employee indicates that she received a notice in June 2015, which led her to believe that another excess had occurred. As such, Employee asserts that she was granted an additional year of employment that DCPS failed to honor. Employee submitted an affidavit wherein she indicates that Ms.[sic] Soncyree Lee handed her a document and then said to her that "they were (1) making changes in our staff; (2) it was a pleasure having you here and (3) you have years of experience and good skills, and you should have no problem being picked up by another school."[7] Employee says that this exchange led her "to believe that her excess process had started over."[8] Employee also indicates that she did not receive retirement information in a time period that would have allowed her to respond. Employee notes that she received a notice of termination in an "untimely manner" and did not receive a termination letter in May of 2015.[9] Employee contends that throughout this process she was not given appropriate notice.

Agency's Position

Agency asserts that the instant excess was done in accordance with all applicable, laws and statutes, namely the CBA, under which the excess was administered. Agency argues that they followed all protocols for excessed employees pursuant to the provisions outlined in Article 4 of the

[2] Employee Petition for Appeal (October 9, 2015).
[3] *Id.*
[4] *Id.*
[5] Employee's Response to Agency's Legal Brief at Page 3 (May 9, 2016).
[6] *Id.* at Page 4.
[7] *Id.* at Affidavit.
[8] *Id.*
[9] Employee Petition for Appeal (October 9, 2015).

CBA between WTU and DCPS. Agency argues that in the instant matter, Agency provided Employee with notice via letter on or around May 19, 2014 "that as a result of equalization [excess], her position at Houston Elementary School had been removed from the staffing plan effective June 23, 2014."[10] Agency asserts that consistent with Article 4.5.3.1 of the CBA, "the Agency provided the Employee with the notice of the excess ten (10) school days prior to the effective date of the excess."[11] Further, Agency provides that this letter informed Employee that pursuant to CBA Article 4.5.5.2, she had sixty days to secure another placement. Agency asserts that in accordance with the CBA Article 4.5.5.3.3.1, "if a permanent employee is unable to secure a position within the sixty days that they are able to select from three options."[12] "The three options are: (1) a buyout, (2) early retirement; or (3) an extra year placement." Agency argues that Employee was notified of these three options and that Employee selected the third option for an extra year of placement.

Agency asserts that Employee was placed at the Youth Services Center which was effective from September 22, 2014 until August 7, 2015.[13] Agency cites that at the end of Employee's one year placement at the Youth Services Center, "Employee failed to secure a budgeted position."[14] Agency argues that CBA Article 4.5.5.3.3.5 "gives the Agency the right, at the conclusion of the extra year to separate all excessed permanent status employees who are unable to secure a new placement." Agency contends that because Employee failed to secure a placement by August 7, 2015, on September 2, 2015, Agency issued a Notice of Termination to Employee. Agency maintains that all procedures and policies were consistent with the guidelines for excessed employees in accordance with the CBA.

Analysis

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,[15] this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting: (a) a performance rating resulting in removal; 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 at termination violated the express terms of an applicable collective bargaining agreement."[16] 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

[10] Agency's Brief (April 18, 2016).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See also*, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.
[16] *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).

matters covered under subchapter [D.C. Code § 1-616] that also fall within the coverage of a negotiated grievance procedure."[17] 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.

Article 4 of the 2007-2012[18] CBA between Agency and WTU outlines in pertinent part, the excess process as follows:

> 4.4.1.1: 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 'abolishment.'
>
> 4.5.3.1: DCPS shall provide written notification to all Teachers who are to be excessed at least (10) school days prior to the effective date of the excess.
>
> 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.
>
> 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[19], shall have the right to select Option 3: An Extra Year to Secure a New Position (hereafter referred to as the "Extra Year.")
>
> 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.
>
> 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 the instant matter, Employee was notified in a correspondence dated May 15, 2014, that as a result of an excess, her position was removed from the staffing plan at Houston Elementary

---

[17] *Id.*
[18] Agency cites to the 2007-2010 CBA in its legal brief, but provided the 2007-2012 version as an attachment to its brief. The undersigned finds that the 2007-2012 CBA is the appropriate authority to cite in this matter.
[19] Under Article 4.5.5.3 of the CBA, an excessed Teacher whose most recent evaluations reflect 'Effective' or higher may elect a 1) buyout and receive $25,000 and be separated from DCPS and not be eligible for employment with DCPS again for three (3) years; 2) early retirement if the Teacher has had 20 or more years of credible service; and 3) an additional year of service to secure permanent placement.

School.[20] The effective date of this excess was June 23, 2014. Employee had 60 days to secure a permanent placement, but was unsuccessful. Accordingly, because Employee was an excessed permanent employee, in accordance with the CBA, Employee was then allowed to choose from the options of (1) taking a buyout, (2) early retirement or (3) an extra year placement.[21] In this case, Employee selected the extra year option. Employee received a temporary placement at the Youth Services Center, effective September 22, 2014 through August 7, 2015.[22] Employee worked at the Youth Services Center, but did not obtain a permanent placement by the end of the extra year. Accordingly, pursuant to Article 4.5.5.3.3.5, Agency terminated Employee from service effective August 8, 2015.[23] Employee argues that she was provided a letter in June of 2015 that she believed started another excess process.[24] However, the letter that Employee provided to support that argument contains no information that identifies her as the intended recipient, nor does it provide a date caption or any other identifying information. As such, the undersigned questions the authenticity of the document. There is no other information in the record that would support a finding that another excess started in June 2015. As a result, the undersigned finds that the excess in question is the one that started with the notice dated May 15, 2014.

Additionally, Employee argues in her brief that the CBA "appears to permit Employee's termination without a "pre-termination hearing" which is a constitutionally protected due process right that cannot be waived by a CBA.[25] While Employee may disagree with the CBA provisions in this regard, I find that a 'pre-termination' hearing was not required by the express provisions of the CBA, and therefore Agency was not required to hold such a hearing in administering the excess.

Pursuant to the holding in *Brown v. Watts*, supra, I find that there is no evidence in the record to support a finding that this excess violated the express terms of the CBA between WTU and DCPS. Here, Employee was notified in the May 15, 2014, letter that her excess would be effective June 23, 2014. That is more than the ten (10) days notice required by the CBA. Following this notice and after being presented with options, Employee elected to take the extra year option to secure permanent placement. Employee was placed at the Youth Services center effective September 22, 2014, through August 7, 2015. Unfortunately, Employee was unable to secure a permanent placement via mutual consent prior to the August 7, 2015 deadline as required by the CBA. As such, Agency elected to terminate Employee in accordance with Article 4.5.5.3.3.5 of the CBA. While the undersigned finds that the timing of Agency's final notice of termination left much to be desired, given the letter was provided after the effective date of separation, the undersigned does find that Agency, in conducting excess, did so in accordance with the provisions of the CBA.

Employee's other arguments that she was targeted to be removed because of her inability to speak Spanish and because of her age are best characterized as grievances. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Complaints classified as unlawful

[20] Agency's Answer to Employee's Petition for Appeal at Tab 2 (November 16, 2015).
[21] Under Article 4.5.5.3 of the CBA, an excessed Teacher whose most recent evaluations reflect 'Effective' or higher may elect a 1) buyout and receive $25,000 and be separated from DCPS and not be eligible for employment with DCPS again for three (3) years; 2) early retirement if the Teacher has had 20 or more years of credible service; and 3) an additional year of service to secure permanent placement.
[22] Agency's Answer to Employee's Petition for Appeal (November 16, 2015).
[23] Agency's final notice was dated September 2, 2015, which was after the effective date. Agency conceded to this error.
[24] Employee's Reply Brief at Affidavit (May 9, 2016).
[25] *Id.* at Page 4. (May 9, 2016)

discrimination are described in the District of Columbia Human Rights Act.[26] Moreover, it is a matter of established public law that OEA no longer has jurisdiction over grievance appeals.[27] Therefore, I find that these arguments are outside of the jurisdiction of this Office. This is not to say that Employee may not press these grievance claims elsewhere, but rather that OEA lacks the jurisdiction to address these issues at this time. While the undersigned is sympathetic to Employee's circumstances, for the above mentioned reasons, I find that Employee's petition must be denied, and Agency's termination action should be upheld.

ORDER

It is hereby **ORDERED** that Agency's action of terminating Employee is **UPHELD**.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

[26] D.C. Code §§ 1-2501 *et seq.*
[27] *Robbins v. District of Columbia Public Schools*, OEA Matter No. 1601-0213-11 (June 16, 2014).; *See also* the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.