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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
EMPLOYEE,)	
Employee)	OEA Matter No. 1601-0015-20
)	
v.)	Date of Issuance: September 13, 2023
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	ERIC T. ROBINSON, ESQ.
)	SENIOR ADMINISTRATIVE JUDGE
_____)	
John Cook, Esq., Employee Representative)	
Lynette Collins, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee was hired by District of Columbia Public Schools (“DCPS” or the “Agency”) as a teacher on or about June 29, 2002. Thereafter, on or about August 15, 2009, Employee was separated from the Agency based on performance related issues. In response to his termination the Washington Teachers Union (Hereinafter “WTU”) filed a grievance on his behalf. The grievance went to arbitration. On or about July 18, 2018, the Arbitrator issued his opinion reversing the termination and ordering DCPS to reinstate the Employee. The Employee was reinstated on or about April 10, 2019. However, prior to reinstatement, the Employee was required to complete the Agency’s mandatory onboarding process, which included completing a background check, drug and alcohol testing, Tuberculous Test (Hereinafter “TB”) and submitting proof of licensure to teach. Thereafter, the Agency sought to appeal the Arbitrator’s decision reversing the Employee’s termination.¹ Despite filing the Appeal, the Agency began requesting that the Employee start with the onboarding process.

On October 18, 2019, DCPS issued a Notice of Termination. Specifically, the Notice outlined that the Employee was found ineligible for employment based on his failure to comply

¹ The grievance and its dictate is not under consideration or review in the instant matter.

with onboarding and licensure requirements. The Notice further outlined that the termination would become effective November 4, 2019. In response, on or about December 3, 2019, the Employee filed an appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the Agency’s final decision terminating him. Thereafter, OEA requested a response and Agency submitted its response. After an unsuccessful attempt at mediation, this matter was first assigned to Administrative Judge (“AJ”) Arien Cannon. AJ Cannon then left OEA’s employ, and this matter was then reassigned to the Undersigned on March 5, 2020. Several prehearing conferences were held over a three-year period because the Employee had multiple attorneys and the holding of an Evidentiary Hearing in this matter was further delayed due to constraints imposed by the District of Columbia State of Emergency caused by the Coronavirus Covid-19 pandemic. Finally, an evidentiary hearing was held on March 6, 2023. The parties have since submitted their written closing arguments. After thoughtful consideration, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

The burden of proof for 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 631.2 id. States:

For appeals filed under §604.1, 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.

ISSUES

Whether the Agency’s adverse action was taken for cause. If so, whether the penalty was appropriate given the circumstances.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The following findings of fact, analysis, and conclusions of law are based on the testimonial and documentary evidence presented by the parties during the course of Employee’s appeal process with OEA.

Summary of Relevant Testimony

Donnielle Powe (“Powe”) Tr. pp 23 – 65

Powe testified in relevant part that she was employed by DCPS from 2016 to 2021. She was first hired as a manager for the Labor Management and Employee Relations office. Eventually Powe was promoted to Deputy Chief of Labor Management and Employee Relations (“LMER”) Some of her on the job responsibilities included negotiating the collective bargaining agreements between DCPS and each of the employee unions. She was also responsible for issuing adverse actions including terminations, suspensions, and written reprimands *inter alia*.² Powe was familiar with Employee’s fractured tenure with DCPS where he was removed from service through a RIF that was eventually invalidated through arbitration years later. Powe identified for the record Joint Exhibit 2. This exhibit was a notice of termination given to Employee. Powe indicated that the notice of termination was given to Employee because he failed to obtain required clearances and complete certain onboarding requirements in a timely manner. Of note, Powe indicated that employee failed to undergo fingerprinting for a required criminal background check, he did not complete drug testing, and he did not procure a provisional license to teach. She elaborated that even though Employee was in the process of being reinstated, all these items were required to be completed before DCPS could complete his onboarding. Powe noted that all these measures are mandatory because the safety of the children that they are entrusted with serving is of paramount importance.³ Powe further elaborated that Employee was unable to use sick leave because he was not fully reinstated due to his inability to complete the onboarding process.⁴

On cross examination, Powe testified that the decision to terminate Employee was discussed with her former supervisor, Kaitlyn Girard. Girard left DCPS employment and Powe was then promoted to her position. Powe indicated that she was aware that Employee was engaged in settlement talks with the Office of Labor Relations and Collective Bargaining (“OLRCB”) and DCPS regarding the arbitrators’ award. She also noted that her predecessor, Girard, was her office’s point of contact and that E. Lindsay Maxwell, then Executive Director of the OLRCB, was also involved in the settlement discussions. Powe did not actively participate in this discussion, so she was unable to relate what was discussed. However, Powe indicated she personally authorized and executed Employee’s notice of termination.⁵ Powe noted that due to his then anticipated pending reinstatement, Employee had approximately ten years of accrued sick leave. She recalled that Employee was given a deadline to complete his onboarding, but she was unaware of what the exact deadline was. Powe was also unaware of the existence of any statutory or regulatory requirement relating to time limitations in onboarding.⁶

² Tr. pp. 24 – 25.

³ Tr. pp. 25 – 28.

⁴ Tr. pp. 30 – 32.

⁵ Tr. pp. 37 – 41.

⁶ Tr. pp. 41 – 43.

During redirect, Powe clarified that Employee could have completed certain aspects of the onboarding process without coming to DCPS' Central Office including drug testing and procuring his provisional license to teach. Powe also elaborated that she has successfully onboarded several employees and that the process normally takes approximately three weeks. Employee was afforded six months to complete onboarding before DCPS initiated the present separation action.⁷ During recross, Powe reviewed Employee Exhibit no. 22 which is an X-ray of Employee. She noted that it states "no acute cardiopulmonary disease" but further elaborated that she is not a medical professional therefore she could not make an accurate determination on what that meant.⁸ Prior to her promotion, Powe was aware that her predecessor Girard asked Employee to provide an X-ray in response to his possible TB exposure.⁹

Rosa Rodriguez ("Rodriguez") Tr. pp. 65 – 82

Rodriguez testified in relevant part that for approximately six years she has worked for DCPS' LMER office as a Specialist with its Drug and Alcohol team. During the period in question, the LMER drug testing protocol involved sending an online link to the prospective hire whereby that person would schedule his/her drug testing with one of LMER's outside vendors. Rodriguez examined Agency Exhibit No. 1 and noted that it was an email that was sent to a prospective employee alerting them to the drug testing requirement and providing an internet link to the drug testing vendor with instruction to schedule the drug test within 15 days of receipt of the email.¹⁰ She further explained that the prospective incumbent was solely responsible for scheduling his/her drug testing appointment. LMER's responsibility was to facilitate the scheduling by sending the scheduling link via email.¹¹ Rodriguez noted that any extension of time for drug testing would have to be approved by one her superiors. She further noted that Employee did not take the drug test.¹² During cross examination, Rodriguez admitted that once the 15-day window for scheduling a drug test passed, a prospective incumbent had no independent ability to schedule or reschedule his/her required drug test.¹³ The authority to reset the drug testing link rested with the either the managers or the Deputy Chief.¹⁴

Kaitlyn Girard ("Girard") Tr. pp. 83 – 198

Girard testified that she worked for DCPS LMER from May 2017 through October 2019 as Deputy Chief of LMER. Gerard 's duties included, but was not limited to collective bargaining grievance processing, Union engagement, Equal Employment Opportunity compliance, and Americans with Disabilities compliance. Girard became familiar with Employee in her role as Deputy Chief and as Agency's representative in his ongoing litigation. Employee prevailed in prior litigation and was ostensibly awarded, *inter alia*, significant back pay and was ordered to be

⁷ Tr. pp. 60 – 63.

⁸ Id.

⁹ Id.

¹⁰ Tr. pp. 66 – 69.

¹¹ Id.

¹² Tr. 69 – 71.

¹³ Id.

¹⁴ During the period in question, LMER's Deputy Chief was Kaitlyn Girard.

reinstated *status quo ante* to his former position.¹⁵ DCPS in its attempt to comply with this order informed Employee about its onboarding requirements including taking drug and alcohol testing; providing a current certification to teach; and tuberculosis testing.¹⁶ Typically, a prospective incumbent is afforded two weeks to complete this process. Girard noted that the two-week time period was decided upon by DCPS and that it does not have a legal or regulatory root mandating its usage.¹⁷ However, she noted that completing the onboarding requirements was mandatory for everyone including new hires and those, like Employee herein, who have been reinstated through judicial fiat. Girard examined Agency's Exhibit No. 2 and recognized page 12 of this exhibit as an email that she sent August 2019. It detailed an incident that occurred at DCPS' Central Office when Employee appeared to be fingerprinted as part of the onboarding process and informed the front office staff and he was "under treatment ... for active tuberculosis."¹⁸ This revelation caused serious concern because of the health-related mandate that all persons working for DCPS must be tuberculosis free in order to report for duty or be on DCPS grounds. Upon being alerted that Employee was being treated for TB, she directed Employee to immediately leave the building and she alerted the WTU about this development. Girard further informed the WTU that Employee was forbidden from coming onto DCPS property until he was able to provide "confirmation of negative tuberculosis."¹⁹ During direct examination, Girard examined Agency Exhibit No. 3, which was correspondence between herself and Charles Moore (then WTU representative) that contained some documentation from Employee's medical provider. Girard did not interpret this submission as being responsive to her prior instruction that Employee submit medical documentation showing a negative TB diagnosis.²⁰ Girard also examined Agency Exhibit No. 4, which contained a chest X-ray (completed at Washington Medstar hospital) of Employee. Upon review, it was determined by DCPS that this submission did not conclusively prove that Employee was TB free and safe to be in or around DCPS property.²¹ Of note, Girard testified that Employee was unable to use accrued sick leave because he had not been fully reinstated at the time of the initial TB disclosure.²² She juxtaposed his reinstatement with the initial payment of backpay as being two separate and distinct acts.²³

During cross examination, Girard first examined Employee Exhibit No. 10, which contained the Arbitration Decision that reversed Agency's removal action.²⁴ This decision was issued on July 9, 2018. Girard admitted that Employee was afforded additional time to complete onboarding, but she did not recall issuing a written directive to that effect. Girard did not recall ever ordering Rodriguez to issue another drug testing email link. Girard could not recall the exact

¹⁵ Tr. p. 86.

¹⁶ Tr. pp 86 – 89.

¹⁷ Id.

¹⁸ Tr. p. 93.

¹⁹ Tr. p. 94.

²⁰ Tr. pp. 96 – 98.

²¹ Tr. pp. 99 – 102.

²² Tr. pp. 106 – 108.

²³ Tr. pp. 111 – 118.

²⁴ It bears noting that the Arbitration decision is not under review in this matter.

timing of when she first learned about Employee's possible TB exposure.²⁵ While she was generally aware that other agencies within the DC government were participating in settlement talks with Employee and the WTU regarding the Arbitration Award, she could not recall any specifics regarding those discussions.²⁶ Girard recalled that Employee presented himself on August 27, 2019 at DCPS Central Office in order to be fingerprinted but she turned Employee away due to the uncertainty surrounding his TB diagnosis.²⁷ Girard reviewed Employee Exhibit No. 17, which was a letter that she sent to Mr. Moore (Union Representative), wherein the document provides that Employee must submit to DCPS "documentation of [Employee] negative tuberculosis status..., **either** a negative TB test **or** chest X-ray."²⁸ Girard then reviewed Employee Exhibit No. 22, which was an email sent to her with a link to a diagnostic radiology report and chest X-ray of Employee performed at Medstar Washington Hospital Center. This report notes that no cardiopulmonary disease was present.²⁹ In response to reviewing these exhibits, Girard acknowledged that she was/is not a medical doctor.³⁰ Girard reviewed, Employee Exhibit No. 20, which was an email dated August 20, 2019, from Alice, Hwang, then attorney for the WTU, wherein the Union requested more time for Employee to complete his onboarding requirements and attached a copy of the chest X-ray and diagnostic report for Employee.³¹ Girard acknowledged that she did not have a medical doctor review the aforementioned diagnostic radiology report in order to ascertain Employee's current TB status.³² Girard asserted that it was mere coincidence that her last official day with DCPS (October 17, 2019) was the same day that Employee was terminated.³³ Girard acknowledged that DCPS, through her, asked for a chest X-ray but was unable to directly verify its findings without employing a medical doctor to evaluate it. Girard also acknowledged that she sent Employee Exhibit No. 14, which was an email dated May 7, 2019, to Charles Moore (WTU Representative) along with Employee, Alice Hwang, Michale Levi and Lee Jackson. It was further noted that she and at least two other recipients were licensed attorneys. In this email, Girard stated that "[Employee] has been reinstated for over a month."³⁴

Margaret Browne ("Browne") Tr. pp. 198 – 231

Browne testified that during the 2018 – 2019 school year she was employed by DCPS as its Director of Employee Communications and Training within the DCPS Human Resources Department. The following is a pertinent excerpt from her testimony:

Q: And do you recall what the Agency's policy was on TB testing during that school year?

²⁵ Tr. pp 143 – 148.

²⁶ Id.

²⁷ Tr. pp. 155 – 158.

²⁸ Tr. p. 160. Emphasis added.

²⁹ Tr. pp. 162 – 164.

³⁰ Id.

³¹ Tr. pp. 174 – 176.

³² Tr. pp. 177 – 180.

³³ Tr. pp. 180 – 183.

³⁴ Tr. p. 188.

A: One had to provide a negative skin or blood test or chest X-ray indicating that you are free and clear from the tuberculosis virus and were not a communicable concern to students and staff.³⁵

She then testified as follows regarding teacher licensure:

Q: And what about licensure? How did during that school year, what was the policy for licensure?

A: Sure, so there is a D.C. Code that indicates that individuals have to apply for obtain and maintain an active license through the Office of the State Superintendent of Education, or OSSE, in their teaching content area. And the expectation was in the first 30 days of employment that you submitted an application through OSSE's online portal to begin that process.³⁶

Browne further explained that Employee's onboarding consisted of multiple requirements including the requirement for him to obtain a license to teach from OSSE. She further elaborated that given the instant circumstances, Employee could have initially applied to obtain a provisional license to teach from OSSE, which would have been effective for two years. LMER would have been notified by OSSE that Employee has applied for a provisional license and would have otherwise abided by OSSEs' processing timeline (which was approximately 6 – 8 weeks) if they had been notified that he had applied.³⁷ Browne also explained that in or around May 2019, LMER took over the entire onboarding process for DCPS of Employee due to WTU involvement in the matter.³⁸

Randi Weingarten ("Weingarten") Tr. pp. 231 – 247

Weingarten testified in pertinent part that she is the President of the American Federation of Teachers, a labor union that represents approximately 1.7 million people working in various fields primarily in education and healthcare. Starting around 2009, she remembers collaborating with the WTU to contest some of the alleged unfair and discriminatory terminations of a number of teachers, including Employee, by then DCPS Chancellor Michelle Rhee.³⁹ Weingarten worked extensively with the WTU and Employee in order to procure the Arbitration Award that he was due.⁴⁰ She did not participate in any DCPS discussions regarding Employee.⁴¹

³⁵ Tr. pp. 199 – 200.

³⁶ Tr. pp. 200 – 201.

³⁷ Tr. pp. 207 – 209.

³⁸ Tr. pp. 225 – 226.

³⁹ Tr. pp. 232 – 237.

⁴⁰ Id.

⁴¹ Tr. pp. 242 – 243.

Alice Hwang (“Hwang”) Tr. pp. 246 – 268

Hwang testified that she was one of the attorneys working for WTU while it represented Employee as part of his termination. She was aware of the Arbitration award that provided for Employee’s reinstatement and substantial backpay award. She further noted that Employee received a letter on March 15, 2019, where he was informed that he was being reinstated as a school system employee.⁴² Hwang was also privy to another letter sent on Employee’s behalf requesting more time for him to complete his onboarding requirements.⁴³ Hwang also reflected on Employee Exhibit No. 22, and attributed the phrase “no acute cardiopulmonary disease” to mean that no disease was present.⁴⁴ During cross examination, she clarified that she was not a medical doctor.⁴⁵

Employee Tr. pp. 268 – 309

Employee testified in relevant part that he was first terminated by DCPS in 1991 and in response the WTU filed a grievance against DCPS. Ultimately, after two Arbitration decisions in his favor, Employee prevailed and DCPS was required to give him back pay and to reinstate him to his former position *status quo ante*.⁴⁶ Employee was asked about his onboarding process and he asserted that he attempted to fulfill all of the requirements but DCPS put up multiple “roadblocks” making it impossible for him accomplish those requirements.⁴⁷ In or around May 2019, Employee failed a TB skin test. Coupled with a persistent cough and that he had been living in homeless shelters at the time, he informed DCPS Central Office staff of his concerns when he reported to be fingerprinted. Afterwards, DCPS informed him that they would not directly talk to him but would only collaborate with his WTU representatives regarding his matter.⁴⁸ He was not allowed to partake in the required onboarding activities including fingerprinting or drug testing.⁴⁹

Employee reviewed Joint Exhibit No. 3 and noted that certain onboarding requirements were listed that needed to be completed before his reinstatement could be fully effectuated. Employee and WTU disagreed with the 15-day deadline contained therein and on multiple occasions requested an extension of time.

Yara Tanner (“Tanner”) Tr. pp. 308 - 326

Tanner was called as a rebuttal witness by DCPS in this matter and testified in relevant part that she is the Director of HRIS and Records Management for DCPS. She is responsible for managing all the personnel records in DCPS from hire to termination and managing records regarding leave pay and time policies for DCPS. Regarding the pay that

⁴² Tr. pp. 249 – 254.

⁴³ Id.

⁴⁴ Tr. pp. 254 – 256.

⁴⁵ Tr. p. 258.

⁴⁶ Tr. pp. 268 – 272.

⁴⁷ Id.

⁴⁸ Tr. pp. 273 – 277.

⁴⁹ Tr. pp. 277 – 283.

Employee received, Tanner noted that Employee was receiving pay under the code of administrative leave with pay in attempted compliance with his back pay award in 2019.⁵⁰ During cross examination, Tanner clarified that from April through November 2019, Employee received both a lump sum payment of approximately \$987,000, before taxes and he received regular biweekly paychecks commensurate with his salary. The following excerpt from her testimony is relevant to this matter.

Q: All right. My question was how much money he received from April of 2019 until November of 2019.

A: He received his regular earnings, so it was ...

Q: Like a thousand bucks a week

A: Yes, between, somewhere between like \$1500 to \$2200 every two weeks.

Q: All right. And what was the reason that those regular biweekly checks were stopped by your office in November 2019?

A: Because he was terminated from the system.

Q: Terminated from what system?

A: He was, that's when he was terminated from DCPS.

Q: He was terminated from his employment, right?

A: Correct.

Q: Yes. So, he was getting paychecks from April until November of 2019, and then he was terminated from the system because he was no longer an employee, correct?

A: Correct.⁵¹

Analysis

DCPS argues that Employee herein was not officially an employee as contemplated under D.C. Official Code § 1-603.01(7)⁵². In the instant case, the Agency's position remains that any payments made to the Employee was backpay not a salary. DCPS further contends that Employee failed to adequately and efficiently complete the necessary onboarding requirements so that he could resume his duties as a teacher as mandated by the Arbitration award. In

⁵⁰ Tr. pp. 310 – 313.

⁵¹ Tr. pp. 322-323.

⁵² This code defines an employee/government employee as "an individual who performs a function of the District government **and** who receives compensation for the performance of such services."

particular, Agency maintains that Employee failed to procure a teaching license (provisional or full) form OSSE; failed to be fingerprinted; failed to be drug tested; and he failed to obtain appropriate documentation that he was not presently suffering from TB.

Employee counters that he was reinstated to his former position of record and that DCPS had required him to complete certain onboarding tasks before being assigned to a classroom. This was evidenced by the fact that OEA exercised jurisdiction over this matter; the Arbitrators award; DCPS' Reinstatement Letter; and the fact that he received biweekly paychecks from April through November 2019. Employee further notes that he was unable to complete the onboarding requirements due to confusion and built in procedural roadblocks in the onboarding paperwork as it was presented to him. This was further exacerbated by DCPS' requirement that all communication and requests first go through his WTU representative. This created a situation whereby he was unable to efficiently complete the onboarding requests within the time allotted. Taken together, Employee asserts that Agency's newest termination action should be reversed.

It is uncontroverted that according to the Reinstatement letter, Employee was required to produce a negative TB test, drug test, submit college transcripts, submit employment verification, provide proof of his licensure status, and clear a criminal background check (fingerprinting). The letter further outlined that "all hiring requirements must be completed within 15 days of receiving this message. If you fail to do so, your hiring request may be canceled." What is at issue was the processes and procedures made available to Employee so that he could attempt to comply with these directives.

The record is clear in establishing that Employee was first terminated over a decade ago under the order of then DCPS Chancellor Michelle Rhee. Thereafter, DCPS' original removal action was challenged by Employee and the WTU. Through a protracted arbitration process, Employee prevailed and was awarded, *inter alia*, reinstatement, back pay and benefits *status quo ante*. The District government and DCPS reluctantly attempted to comply with this award but Employee had suffered extreme financial hardship while the Arbitration was pending leading to circumspect living conditions that may have exposed him to TB. These living conditions also made other services that gainfully employed and housed persons normally take for granted unusually difficult for Employee to utilize; including but not limited to shelter, a working computer, working telephone, or reliable internet access. When he attempted to go into DCPS' Central Office to be fingerprinted, he was turned away when he alerted the front office staff about TB exposure. Employee was also forbidden from coming onto DCPS grounds while his TB status remained uncertain. Employee was then directed by Girard to provide a negative TB test or a chest X-ray to regain access to DCPS property.

What is particularly bothersome is that Girard along with a coterie of DCPS officials unartfully requested a chest X-ray that Employee then provided. Girard then noted that she was not a medical doctor and could not interpret the X-ray that Employee provided to DCPS in order to show that he was not, at that time, suffering from TB. Upon further review, the X-ray that Employee provided was responsive to her request. But DCPS, upon further review, wanted other medically appropriate assurances that he was not suffering from TB. The primary pressure point of this request is that this submission by Employee to DCPS indicated that no respiratory issues were present. This lends credence to Employee's other tangential argument that DCPS (and the

District government) did not want to comply with the Arbitrator's award, particularly the rehiring requirement. Put another way, in a comprehensive request, DCPS asked Employee to provide medical assurance that he did not have TB. DCPS outlined two distinct ways, in the alternative, in which Employee could provide medical verification. Employee complied by providing a chest X-ray. DCPS then rejected that format for the alleged reason that it did not put into words what it was looking for. This is juxtaposed with the extended deadline that DCPS provided ostensibly due to its magnanimous patience. I find that Employee complied with DCPS's request for a chest X-ray and that, in of itself, was enough to satisfy DCPS question as to Employee's health. Due to Employee's inability to step onto DCPS grounds he was unable to be fingerprinted as part of the onboarding process. This inefficient process was exacerbated by DCPS when it denied Employee entry onto its grounds for certain onboarding requirements, and it continued through its recalcitrance in not reversing course once it received Employee's chest X-ray. DCPS neglects to realize that it had control on how to facilitate onboarding and it failed to communicate to Employee a well thought out plan when certain aspects of the process had to pivot to accommodate the peculiar situation presented by Employee's TB scare. The Undersigned notes that all the processes for onboarding were within DCPS control or they had intimate knowledge of the outside processes and failed to communicate to Employee or his representative how to accomplish this given his TB concerns. The Undersigned posits that Employee herein was not the first DCPS employee to have TB concerns. Given that, Agency should have had a considered plan on how to adjust and accommodate those concerns while onboarding.⁵³ To ask for a specific medical document, then receive that specific medical document and then claim to not know how to interpret it is incomprehensible.⁵⁴ I find that Employee submitted the requested medical documentation to DCPS. I further find that DCPS prevented Employee from efficiently completing its criminal background check and fingerprinting request.

License to Teach

Regarding, Employee's provisional teaching license, it was noted that a separate DC government entity issues that license. More specifically, this role is under the domain of the Office of the State Superintendent of Education ("OSSE"). What was neglected is that the paperwork necessary for licensure had already been submitted when Employee was newly minted within DCPS well over a decade ago. Taking a step back, DCPS, in its Reinstatement letter required a license to teach. OSSE has the authority to provide either a provisional or full license to teach. For purpose of the Reinstatement letter, either would suffice, but notably the provisional license is much easier to obtain for someone who had never taught or who had not taught for an extended period. Given the time that Employee's Arbitration took to mature, his former full license to teach had lapsed. When a brand-new teacher to DCPS is onboarded, paperwork including degrees and other certifications must be shared *for the first time* in order to qualify for the provisional license to teach which can last in upwards of a year. This allows a prospective new hire, time to complete course specific test(s) to demonstrate mastery over certain subject areas of interest and value. Employee is an amalgam because he had already submitted his paperwork years ago (otherwise

⁵³ Possibly, as a result of this decision, Agency will research and adopt a well thought out strategy in case similar circumstances presents itself in the future.

⁵⁴ report noted "no acute cardiopulmonary disease" and included a link to the actual x-ray image. (Emp. Ex. 21, 22).

he would have been terminated 12 years ago for failure to maintain a required licensure). The paperwork submission required by the Reinstatement letter would have simply required a search of his former personnel file to find all the original documentation necessary. I also take note, that licensure is something that DCPS has, in the past for other employees, exercised discretion over. It was credibly noted during the hearing that other teachers within DCPS had been allowed to teach (for a time) without an appropriate license. Further, given the communication issues that Employee encountered when he inquired with DCPS LMER coupled with LMER's knowledge of his then housing issues, a continuing grace period should have been extended to Employee regarding licensure. I also note that licensure is a component for being assigned to a school and a classroom not for simply being employed by DCPS while his admittedly complicate situation resolved itself. This is particularly true since Employee was carried on Administrative Leave with Pay for several months before he was removed from service for a second time.⁵⁵

Drug Test

With respect to his failure to submit for a drug test, Employee noted that he was unable to schedule the test on his own. I further note that Rodriguez credibly testified that an incumbent cannot schedule a drug test without LMER authorizing it first. She went on to note that Powe would have had to order her to reopen the drug testing window, otherwise it would remain closed to Employee. Employee first tried to undergo testing, but he was unsure of his TB status possibly exposing others by going to a testing site was a valid concern that he shared with LMER. It is uncontroverted that LMER was the gatekeeper for accessing this test, *inter alia*, and I find that LMER refused to communicate directly with Employee. To Employee's eventual detriment, he shared his suspected TB status with LMER and with that his ability to complete DCPS onboarding was impeded by DCPS. I find that DCPS prevented Employee from efficiently completing his drug testing.

Reinstatement

Per DPM § 1266.2, Administrative Leave with Pay in excess of ten (10) consecutive workdays may be granted only with the approval of the personnel authority. DPM § 1266 *et al* deals exclusively with leave granted to employees of the District government. From April through November 2019, Employee and his representative were under the distinct impression that he had been reinstated to DCPS and that the onboarding steps noted by DCPS in its Reinstatement letter were solely for the purpose of being assigned to a school and classroom. What is most relevant to this question is that Tanner (DCPS' own rebuttal witness) corroborated that Employee was in an Administrative Leave with Pay status when he was removed from service in November 2019. The undersigned can find no precedent where administrative leave with pay is provided to someone who is not employed by the District government. This is particularly telling given that Employee was left in this status for several months before the instant removal action was initiated. Pursuant to the Reinstatement letter and Arbitrators award, I find that Employee had been reinstated to DCPS in April 2019 when he started receiving a biweekly paycheck and was placed in Administrative Leave with pay status. Given this finding, I find that whether DCPS intended to bring Employee herein back onto its roster is of no moment. Furthermore, since he was then

⁵⁵ Tr. p. 51.

considered a DCPS employee (awaiting duty station assignment), Employee should have been able to access his accrued sick leave⁵⁶ while his TB status was under review.⁵⁷

Usually, Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the undersigned.⁵⁸ This Office may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.⁵⁹ When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.⁶⁰ In the matter at hand, I find that Agency failed to meet its burden of proof in this matter. Therefore, I further find that Employee's removal action must be overturned.

CONCLUSION

As noted above, I CONCLUDE that DCPS did not meet its burden of proof in this matter. Considering as much, I further CONCLUDE that Employee was improperly removed from service.⁶¹

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 his 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:

/s/ Eric T. Robinson
ERIC T. ROBINSON, Esq.
Senior Administrative Judge

⁵⁶ Employee has accrued more than 12 years of unused sick leave as part of the Arbitrators award.

⁵⁷ This assumes that in hindsight, DCPS still wanted to discontinue Employee's Administrative Leave with Pay status.

⁵⁸ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

⁵⁹ See *Id.*

⁶⁰ See *Id.*

⁶¹ 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").