THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DEVARNITA WILLIAMS,	)	
Employee	)	OEA Matter No. 1601-0171-13
	)	
v.	)	
	)	Date of Issuance: June 21, 2016
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Devarnita Williams ("Employee") worked as a Teacher with D.C. Public Schools ("Agency"). On July 29, 2013, Employee received a notice from Agency that she would be terminated from her position for discourteous treatment of the public, supervisor, or other employees. Agency alleged that Employee referred to students in her elementary school class as "whores" and "bitches." Additionally, it claimed that Employee admitted to calling her students "thieving ass kids."[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 30, 2013. She argued that Agency relied on hearsay to remove her, and it failed to conduct a complete investigation. Therefore, she requested that she be reinstated to her position

[1] *Petition for Appeal,* p. 6 (September 30, 2013).

and made whole.[2]

Before issuing her Initial Decision, the OEA Administrative Judge ("AJ") ordered both parties to submit Pre-hearing Statements.[3] Employee asserted that Agency violated Article 7 of the Collective Bargaining Agreement ("CBA") between Agency and the Washington Teacher's Union ("WTU"). She argued that Agency failed to provide her with an advance written notice ten days prior to the effective date of discipline. Additionally, Employee claimed that Agency did not provide a written complaint of the allegations within seventy-two hours of the incident or offer her an opportunity to respond. Moreover, in accordance with the CBA, it was Employee's position that Agency did not take disciplinary action within thirty days of her supervisor becoming aware of the alleged infraction. Finally, Employee explained that Agency did not consider both aggravating and mitigating circumstances when deciding the penalty imposed against her. [4]

Agency's Pre-hearing Statement provided that it determined that Employee violated 5-E D.C. Municipal Regulations ("DCMR") § 1401.2(n).[5] In a subsequent filing, Agency further explained that it provided adequate notice to Employee in accordance with 5-E DCMR §§ 1401.3 and 1401.4. As for Employee's argument regarding disciplinary action being taken within thirty days, Agency asserted that although this language is within the CBA, it and the WTU had a long-held practice and mutual agreement to waive the thirty-day requirement.[6]

The AJ issued her Initial Decision on February 6, 2015. She held that both parties agreed that Agency failed to comply with the thirty-day deadline when removing Employee; Agency

[2] *Id.* at 2. Agency filed its Answer to Employee's Petition for Appeal on November 15, 2011. It denied each of Employee's allegations and requested an evidentiary hearing.
[3] *Order to Submit Pre-hearing Statements* (October 31, 2014).
[4] *Appellant's Pre-hearing Submission,* p. 17-21 (November 24, 2014).
[5] *District of Columbia Public Schools' Pre-hearing Statement* (November 24, 2014).
[6] *District of Columbia Public Schools' Response to Employee's Dispositive Motion,* p. 11-16 (December 22, 2014).

took approximately ninety days to initiate disciplinary action against Employee. The AJ noted that the intent of mandatory language like that provided in the CBA, is to alleviate the prolonged uncertainty that Employee may have regarding disciplinary action.[7]

The AJ also ruled that Agency failed to comply with the notice requirements provided in 5-E DCMR §§ 1401.3 and 1401.4. She reasoned that the grounds for removal provided in Employee's notice was not sufficiently detailed to reasonably inform Employee of the specific grounds of the cause taken against her. The AJ found that Agency's notice failed to provide the date of the alleged incident or the names of the witnesses who lodged the complaint. Consequently, she reversed Agency's action against Employee and ordered that Agency reinstate Employee to her position with back pay and benefits.[8]

On March 13, 2015, Agency filed a Petition for Review with the OEA Board. It contends that the AJ failed to consider the past practices regarding the time limit waiver that existed between it and the WTU. Agency claims that the AJ failed to consider the affidavit provided by Erin Pitts, as well as the arbitration decisions it submitted. It also asserts that the AJ ignored that it provided Employee with notice and an opportunity to be heard. Agency opines that the notice sufficiently explained the charges against Employee. However, if the notice did not offer an adequate description of the charges, then the notice could have been read in conjunction with other documents provided to amount to sufficient notice. Therefore, it requested that this Board reverse the Initial Decision and remand the case to the AJ for an evidentiary hearing.[9]

Employee filed her response to Employee's Petition for Review on April 20, 2015. She posits that the AJ properly considered and interpreted the terms outlined in the CBA. Additionally, Employee explains that the AJ correctly held that Agency failed to provide

[7] *Initial Decision,* p. 6-8 (February 6, 2015).
[8] *Id.*, 9-10.
[9] *District of Columbia Public Schools' Petition for Review,* p. 7-13 (March 13, 2015).

adequate notice of the charges taken against her, as provided in the DCMR and CBA. Employee contends that Agency's inadequate notice deprived her of her due process rights. She argues that in addition to not complying with the thirty-day deadline, Agency also failed to provide her with the investigation report, as provided in the CBA. Employee alleges that she was not provided with the investigation report until after she was terminated from her position. Finally, she asserts that Agency introduced grievance decisions on Petition for Review that were not presented to the AJ. Thus, she requested that Agency's petition be denied.[10]

Thirty-day Deadline

The Court in *Brown v. Watts,* 933 A.2d 529 (D.C. 2010) provided that "[w]hile OEA may assess an applicable CBA violation to help determine whether Agency had cause to institute an adverse action, it cannot singularly assess whether Agency violated provisions of its CBA." Thus, our purpose in this case is to determine if Agency properly removed Employee for cause in the adverse action taken. Before we can even address the merits of the adverse action, we must determine if Agency adhered to the adverse action procedure. Based on our reading of the plain language of the CBA, Agency clearly violated Article 7.8.3.

Article 7.8.3 of the CBA provides the following:

> The initiation of the disciplinary action shall be taken no later than thirty (30) days after the Supervisor's knowledge of the alleged infraction. In cases requiring an investigation, any investigation conducted by or on behalf of DCPS into the alleged infraction shall be completed, with any investigation report provided to the employee involved and to the WTU within thirty (30) days after the Supervisor's knowledge of the alleged infraction. This time limit may be extended by mutual consent but if not so extended, must be strictly adhered to.

The Principal was made aware of the allegations against Employee on April 29, 2013.[11]

[10] *Appellant's Opposition to Petition for Review,* p. 8-26 (April 20, 2015).
[11] *District of Columbia Public Schools' Petition for Review,* p. 1 and Exhibit #4 (March 13, 2015) and *District of*

Therefore, Agency should have initiated disciplinary action against Employee and provided an investigation report by May 29, 2013. The AJ correctly held that this did not occur. Agency even concedes that it did not comply with Article 7.8.3 of the CBA.[12] Thus, there is substantial evidence to support the AJ's decision that Agency violated the mandatory terms of Article 7.8.3[13]

However, Agency claims that it did not adhere to Article 7.8.3 due to its past practice with the WTU of waiving the requirement.[14] In its Petition for Review, Agency relies heavily on arbitration decisions on grievances to convince this Board that we should consider its past policy instead of the plain language in the CBA pertaining to the adverse action procedure. All of the decisions submitted by Agency pre-date the 2010 collective bargaining agreement. Hence, Agency cannot rely on them to prove past practices as it relates to the 2010 CBA terms. The one decision that was issued after 2010, specifically addressed waiving the deadline in grievance matters. As the AJ found, OEA is not bound by decisions issued regarding grievances. Therefore, the arbitration cases provided by Agency are meritless as it relates to this Office's jurisdiction over adverse action matters.[15]

Agency also claims that if the Board does not reverse the AJ's decision, the decision

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Columbia Public Schools' Response to Employee's Dispositive Motion, p. 2-3 (December 22, 2014).

[12] *District of Columbia Public Schools' Response to Employee's Dispositive Motion,* p. 12-15 (December 22, 2014).

[13] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then they must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

[14] *District of Columbia Public Schools' Response to Employee's Dispositive Motion,* p. 12-15 (December 22, 2014).

[15] Moreover, as provided by Employee, Agency failed to offer these arbitration decisions to the AJ. In accordance with OEA Rule 633.4, "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." The D.C. Court of Appeals held in *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172 (D.C. 2008) that "it is a well-established principle of appellate review that arguments not made at trial may not be raised for the first time on appeal." Additionally, the Courts ruled in *Brown v. Watts*, 993 A.2d 529 (D.C. 2010) and *Davidson v. D.C. Office of Employee Appeals*, 886 A.2d 70 (D.C. 2005) that any arguments are waived where a party never attempted to reopen the record to introduce any evidence supporting their argument before the issuance of an OEA Initial Decision.

could have a negative impact on its future labor relations.[16] As the Court ruled in *Brown*, OEA may assess an applicable CBA violation to help determine whether Agency had cause to institute an adverse action. Thus, the decisions made by OEA pertain only to adverse action matters over which our agency has jurisdiction and will not impact any grievance matters decided by arbitrators or other government agencies that decide labor disputes. As a result, Agency's concern that an OEA decision may impact its future labor relations is warrantless.

Investigation Report

In addition to failing to initiate disciplinary action by May 29, 2013, this Board must note that Agency attempted to shirk its requirement to provide the investigation report to Employee and the WTU, as required by Article 7.8.3. Agency admitted that it did not provide Employee with a copy of the report.[17] Consequently, it failed to adhere to another mandatory requirement.

As the AJ reasoned, if Agency considered the CBA terms prohibitive, it could have sought an amendment to those terms. If one cannot rely on plain language of the CBA, which clearly states the intent of both parties, then the purpose of the agreement is useless. If it was the past practice of both parties to waive the thirty-day time limit and the requirement for investigation reports, then the language should have been amended to reflect these practices.

Notice of Grounds

Agency's final argument is that its notice to Employee sufficiently explained the charges against her. 5-E DCMR §§ 1401.3 and 1401.4 provide the following:

> 1401.3 An employee who is the subject of an adverse action shall be given notice of the ground(s) on which the adverse action is based.
>
> 1401.4 The notice shall contain the reasons and basis for the ground(s) of the adverse action in sufficient detail to reasonably

[16] *District of Columbia Public Schools' Petition for Review,* p. 13 (March 13, 2015).
[17] *District of Columbia Public Schools' Response to Employee's Dispositive Motion,* p. 6 (December 22, 2014).

> inform the employee of the specific grounds and reasons for the adverse action.

Agency's notice provided a rather curt description of the grounds for removal. The notice simply states that "[m]ultiple witnesses state that you refer to students in your elementary school class as 'whore[s]' and 'bitches.' You admit to describing your students as '[t]hieving ass kids.'"[18] As the AJ reasoned, these two sentences neglect to provide any sufficient detail to reasonably inform Employee of the basis for the grounds of removal.

It appears that Agency knows that the notice was insufficient, which is why it presented the argument that the notice should be read in conjunction with other documents to provide sufficient notice. This Board is deeply troubled by this assertion. As Employee suggested, the purpose of 5-E DCMR §§ 1401.3 and 1401.4 is to provide her with the details needed to refute the adverse action. Employee's employment was at stake. The regulation was created to assist her in providing her due process to zealously dispute the claims against her. The regulation's use of the word "shall" denotes mandatory compliance. Agency's notice provided no sufficient detail, specific grounds, or reasons for the adverse action. Thus, it failed to provide the requisite notice to comply with 5-E DCMR §§ 1401.3 and 1401.4.

Conclusion

We find that the Administrative Judge's decision was based on substantial evidence. Agency clearly violated Article 7.8.3 of the CBA. Additionally, it failed to adhere to the regulations provided in 5-E DCMR §§ 1401.3 and 1401.4. As a result, we must deny Agency's Petition for Review.

[18] *District of Columbia Public Schools' Petition for Review,* Exhibit #1 (March 13, 2015).

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. Therefore, Agency shall reinstate Employee to her last position of record or a comparable position. Additionally, it must reimburse Employee all back-pay and benefits lost as a result of the termination action. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order

FOR THE BOARD:

_____
Sheree L. Price, Interim Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.