

Notice: This decision is subject to formal revision before publication in the District of Columbia Register. The parties are requested to notify the Office Manager of any formal errors in order that corrections may be made prior to publication. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
DWIGHT ROBBINS,)	
Employee)	OEA Matter No. 1601-0213-11
)	
v.)	Date of Issuance: June 16, 2014
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	Eric T. Robinson, Esq.
)	Senior Administrative Judge
)	

Dwight Robbins, Employee *Pro-Se*
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

During school year 2009-2010, Dwight Robbins (“Employee”) was an ET-15 teacher at Eastern Senior High School and a member of the Washington Teachers’ Union, Local #6 of the American Federation of Teachers, AFL-CIO (“WTU”). As a WTU member, Mr. Robbins was subject to the terms and conditions of the Collective Bargaining Agreement (“CBA”) between the Washington Teachers’ Union, Local #6 of the American Federation of Teachers, AFL-CIO, and the District of Columbia Public Schools (“DCPS” or ‘the Agency’). On or around June 14, 2010, Mr. Robbins was advised by letter that as a result of equalization, his position at Eastern had been removed from the staffing plan effective June 22, 2010. Pursuant to this process, on June 22, 2010, Employee became an “excessed” teacher. That same aforementioned letter instructed Employee that in order to stay employed with DCPS, he would need to interview, pursuant to the CBA, to secure another position in a DCPS school in his area of certification.

In August of 2010, Employee received a letter from DCPS advising that three employment options were open to him as an excessed, permanent teacher: buyout, early retirement, an additional year to secure a new placement. Employee selected the early retirement option on August 20, 2010. Following a review of his record, DCPS discovered that Employee was not eligible for early retirement; he did not have the requisite years of service. On or before December 21, 2010, Employee was advised that since he was not eligible for early retirement, he would need to choose one of the remaining two options: buyout or a year to secure a new

placement. Employee opted to work for the remainder of the school year. During this time, Employee was unable to secure a new position within DCPS. Therefore, On August 12, 2011, Employee was removed from service pursuant to the CBA's Excess process.

Employee filed his petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting his removal. The undersigned was assigned this matter on or about June 18, 2013. After several conferences were scheduled and rescheduled, the undersigned provided the parties with a briefing schedule. The parties have complied. After reviewing the documents of record, I have 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 628 *et al*, 59 DCR 2129 (March 16, 2012) states:

628.1 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 the 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.

628.2 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.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

Agency contends that Employee's excess was lawfully done and that the undersigned should uphold its removal action. Employee counters that DCPS failed to give him a full additional year in which to find an permanent placement; he should have been assigned to another school during his excess year; Employee should have been allowed to retire during the excess process; and that he should have been interviewed and retained somewhere within DCPS in his area of certification.

Usually, the OEA does not handle matters that fall under the purview of a Collective Bargaining Agreement. However, in *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the Court of Appeals held that the OEA is not jurisdictionally barred from considering claims that a termination violated the express terms of an applicable collective bargaining agreement. The court explained that the Comprehensive Merit Personnel Act ("CMPA") gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including "matters covered under subchapter [D.C. Code §1-616] that also fall within the coverage of a negotiated grievance

procedure.”¹

According to the CBA, 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.’” See CBA Article 4.5.1.1.

Additionally, the CBA provides in pertinent part as follows:

Article 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.

Article 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, shall have the right to select Option 3: An Extra Year to Secure a New Position (hereafter referred to as the “Extra Year.”)

Article 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.

Article 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.

According to the documents of record, attached to the December 21, 2010, letter was an Additional Year Selection Form (“AYSF”). The December 21, 2010, letter and attached AYSF explicitly stated that Employee had until June 22, 2011, to secure a mutual consent position with DCPS and that if he were not able to secure a mutual consent placement by that date, he would

¹ Pursuant to D.C. Code § 1-616.52(d), “[a]ny system of grievance resolution or review of adverse actions negotiated between the District and a labor organization *shall take precedence* over the procedures of this subchapter for employees in a bargaining unit represented by the labor organization” (emphasis added).

be separated from DCPS. Employee signed the AYSF on December 27, 2010.

Employee signed the AYSF on December 27, 2010. Regrettably, Employee was unable to secure a mutual consent position with DCPS during the Extra Year and was ultimately removed from service. I also make note that Employee was adequately notified of his then pending Excess and the multiple options available to him. Moreover, despite Employee's contention to the contrary, I find that he was provided with a full additional year to find permanent placement from the date that he was notified of the Excess, June 14, 2010, to the date of his removal, August 12, 2011. After reviewing the entire record, the undersigned finds that DCPS acted within the letter of the CBA when it effectuated Employee's removal via excess. Moreover, Employee acquiesced to the Excess removal by opting to work an additional year². It is unfortunate that Employee did not find a new placement within DCPS. However, I find that nothing within the record would credibly undermine the Agency's actions with respect to Employee's removal.

Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the Excess was improperly conducted and implemented. Employee's other ancillary arguments, particularly with respect to his inability to retire during the excess; where he was assigned during the excess year; and his lack of job interviews and job retention are best characterized as grievances and outside of the OEA's jurisdiction to adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims.

ORDER

Based on the foregoing, it is hereby ORDERED that Agency's action of removing the Employee from service is UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

² See DCPS Answer at Tab 3 (October 12, 2011).