THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Karen Loeschner	)	OEA Matter No. 1601-0415-10
Employee	)	
	)	Date of Issuance: December 14, 2012
v.	)	
	)	Joseph E. Lim, Esq.
D.C. Public Schools	)	Senior Administrative Judge
Agency	)	
	)	

Karen Loeschner, Employee *pro se*
Sara White, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On September 10, 2010, Employee, a former Literacy Coach, pay grade ET-15, at Agency ("D.C. Public Schools" or "DCPS") McKinley Technology High School, filed a petition for appeal, challenging the termination of her employment due to excessing. The matter was assigned to me on July 18, 2012. I ordered a legal brief on jurisdiction and later ordered the parties to submit copies of relevant D.C. statutes and/or regulations. After the parties submitted their documents, I closed the record after ascertaining that there were no material issues of fact in dispute.

JURISDICTION

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

ISSUES

1. Whether this Office has jurisdiction over this appeal.
2. Whether Employee was removed without cause.

FINDINGS OF FACT

The following facts are undisputed:

1. On August 19, 2008, Employee was hired as a probationary ET-15 Literacy Coach for Agency.

2. Pursuant to 5 DCMR § 1307.3, an initial appointee to the ET salary class shall serve a two (2) year probationary period. Employee's probationary status was due to expire on August 19, 2010.

3. Annually, it is necessary for DCPS to align staffing levels at each school with student enrollment at each school, a process known as "equalization."

4. On June 14, 2010, while still in a probationary status, Employee was informed by letter that as a result of equalization, her position at McKinley Technology High School had been removed from the staffing plan effective June 22, 2010. See Agency Tab 1.

5. According to the Collective Bargaining Agreement (CBA) between the Washinton Teachers' Union, Local #6 of the American Federation of Teachers, AFL-CIO, and the Agency, 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 student 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.

6. That same June 14, 2010, letter instructed Employee that in order to stay employed with Agency, she would need to interview to secure another position in a DCPS school in her area of certification.

7. On August 16, 2010, Agency sent Employee a letter advising that if she did not secure a position prior to August 21, 2010, she would be separated from service effective August 22, 2010. See Agency Tab 2.

8. On August 23, 2010, Agency sent Employee a letter advising her that her position was terminated because her position had been excessed after the 2009-2010 school year. Moreover, said letter also indicated that she failed to find a position with DCPS within 60 days of her excess on June 22, 2010, and that she was not a permanent status employee at the time of the excess. See Agency Tab 3.

9. Agency does not allege that Employee was terminated for cause.

ANALYSIS AND CONCLUSIONS

1. Whether this Office has jurisdiction over this appeal.

OEA Rule 628.2, 59 D.C. Reg. 2129 (2012), reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." According to OEA Rule 628.1, *id*, a party's burden of proof is by a "preponderance of the evidence", which is defined as "[t]hat 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."

Employee asserts that this Office has jurisdiction over her appeal because her status as a probationary employee ended on August 19, 2010. Therefore, during the effective date of her termination on August 22, 2010, she had already attained permanent career status. Thus, Employee argues, as a permanent Career Service employee, she had a right to appeal her removal to this Office.

Agency asserts that although the CBA provides certain options for excessed, permanent teachers who are not able to secure placement within sixty (60) days of being excessed, these options are not available to teachers in probationary status at the time of the excess. Agency argues that Employee was still probationary at the time of her excess and thus has no right of appeal to this Office.

Probationary Employees

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (the Act), pursuant to the D.C. Official Code, §1-606.03 and OEA Rule 604.2, a D.C. government employee may appeal a final agency decision affecting: (a) A performance rating which results in removal of the employee; (b) An adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more; or, (c) A reduction in force.

Effective June 9, 2000, the Council of the District of Columbia adopted amended regulations for the updated implementation of the Act and, at the outset of the new regulations, provided at Chapter 16, § 1600.1, that the newly adopted regulations apply to each employee of the District government in the Career Service, who has completed a probationary period.

On June 23, 2000, the Council of the District of Columbia further adopted regulations specifically geared for DCPS employees serving in the Educational Service. Thus, for such employees, the following rule on probationary employees appear in 47 DCR 5212, 5215 (June 23, 2000) or 5 DCMR § 1307.

The relevant provisions state:

1307.1 An employee initially entering or transferring into the Educational Service shall meet certification requirements of the Board of Education and serve a probationary period.

1307.3 An initial appointee to the ET salary class shall serve a two (2) year probationary period requirement.

1307.5 The probationary period shall be used to evaluate the performance of the employee.

1307.6 Failure to satisfactorily complete the requirements of the probationary period shall

> result in termination from the position. An employee who satisfactorily completes all probationary requirements shall, upon the recommendation of the appropriate supervisor, receive tenure in the position, or salary class, in which the probation was completed.

SOURCE: Final Rulemaking published at 27 DCR 4297, 4323 (October 3, 1980); as amended by: Final Rulemaking published at 35 DCR 9054, 9056 (December 30, 1988); and Final Rulemaking published at 47 DCR 5212, 5215 (June 23, 2000).

Section 813.11 of the District Personnel Manual also provides that "[s]atisfactory completion of the probationary period is a prerequisite to continued employment in the Career Service." Thus, Agency's regulations clearly indicate that a teacher's probationary status ends after the satisfactory completion of the two (2) year probationary period, at which time the employee attains permanent status.

Agency's argument that because Employee was still probationary at the time of her excess, she was still probationary at the August 22, 2010, effective date of her termination is flawed. Nowhere in the relevant regulations does it state that the date of excess stops the probationary period of an employee. Nor does Agency bring up any statute, rule, or regulation that would support its argument. Indeed, a plain reading of the relevant regulations make it clear that at the end of the two year probationary period, an employee's status as a probationary employee ends.

Based on the record before me, I find that Employee had attained permanent Career Service duty status on August 19, 2010, a full three calendar days before the effective date of her termination on August 22, 2010. I therefore find that when Agency terminated Employee, she was a permanent Career Service employee. It is undisputed that Agency did not terminate Employee for cause. Because Agency did not adhere to the guidelines that must be followed when dismissing a Career Service employee, I am compelled to reverse Agency's action and restore Employee to her position of record.[1]

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency's action of terminating Employee is REVERSED with Employee to be reinstated to her last position of record to be provided with the options available to excessed permanent employees; and

2. Agency shall immediately reimburse Employee all back-pay and benefits lost as a

1 *See also Timothy Nicolau v. D.C. Metropolitan Police Department*, OEA Matter No.:1601-0005-05, *Opinion and Order on Petition for Review* (April 5, 2007).

result of Agency's action; and

3. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge