THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
VENITA B. COLBERT	)	**OEA 1601-0039-05**
Employee	)	
	)	**Date of Issuance: April 10, 2006**
v.	)	
	)	**Rohulamin Quander, Esq.**
	)	**Senior Administrative Judge**
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS	)	
Agency	)	

Venita B. Colbert, *pro se*, Employee
Harriet Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

On March 18, 2005, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (the "Office"), appealing from the D.C. Public School's (the "Agency") decision to terminate her employment as a Guidance Counselor at Miner Elementary School, effective December 29, 2003. Agency was notified of Employee's appeal on March 28, 2005, and filed a response to the appeal on April 26, 2005.

Agency's response, which challenged the jurisdiction of this Office, was essentially two-fold. First, Agency asserted that, " ... the collective bargaining agreement is controlling regarding when and how a teacher is excessed. It is not the abolishment of a position but the implementation of a Board Rule that controls the number of teachers and student ratio."[1] Second, although Agency did not raise the issue

[1] Although Agency did not specifically recite that this Board rule can be implemented without giving the excessed teacher a prior notice of separation from employment, such is clearly implied, as the Board rule to which Agency refers does not provide that the

of timeliness of filing in its written response to the appeal, Agency did subsequently raise the issue during both the Status Conference that I convened on November 10, 2005, and in Agency's post Status Conference brief. Agency noted that since employee was terminated effective January 29, 2004, but did not file her appeal with the Office until March 18, 2005, almost 14 months after she was terminated, she could not avail herself of the services of the Office, since the appeal was not filed until more than 30 days after the effective date of the Employee's termination from the Agency.[2]

After receiving the respective parties stated legal positions during the Status Conference, and further because the issue of "excessing" was so hotly contested by the Employee, this administrative judge (the "AJ") directed the parties to provide a legal brief, citing points and authorities, in support of their respective positions. Agency filed its brief on January 18, 2006.

Agency's brief stated essentially the following:

- Pursuant to Article IV of the Collective Bargaining Agreement (the "Agreement"), "excessing" is the annual process during which the Agency analyzes student enrollment, local school plans, and the personnel needs of each school, to determine the number of positions needed to fulfill educational requirements at each school.
- Funding allocations by the D.C. Government are based upon the number of students in the school system and the Board of Education mandated number of teacher to student ratio.
- Under the Agreement, Agency must notify excess teachers of their status prior to the last day of the school each year, and provide them with an opportunity to transfer to vacant positions. In the event that an excess teacher cannot be transferred to a vacant position, because a vacancy does not exist, the teacher is separated from employment. There is no further notice required under the terms of the Agreement.
- The Employee in this matter was deemed to be excess and terminated from her position as a Guidance Counselor, because of declining school enrollment, and there being no other vacant position that she could have been transferred to.
- Although the language of the Agreement states that a teacher is transferred, it is the past practice between the parties that if there is no position for the excessed teacher, that teacher is then terminated. The practice of handling cases in this manner is a creature of the Agreement and must be reviewed in that context.

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excessed employee is entitled to receive any notice before being separated.

[2] It would appear that Agency intentionally did not raise the issue of timeliness in its written response to the Petition for Appeal, since Agency maintained that Employee was terminated pursuant to the implementation of a Board rule regarding excessing, which rule specifically did not provide for notice to be given to the terminated employee prior to his or her separation.

- It is established labor law that past practices between the parties is recognized as part of a collective bargaining agreement. It is Agency's position that, despite the Agreement herein being silent on Agency's right to terminate employees who are deemed to be "excess", including the right to give this Employee's no notice prior to being terminated, such right to terminate is part of well established and settled precedent in labor relations.
- The WTU represented employee at Step 2 and 3 of the grievance procedure, and conceded at the Step 3 level that historically, "bumping" of less senior employees out of the Agency was the procedure used, and therefore the termination of this Employee was not improper.
- Employee's termination was neither a summary removal nor an adverse action without cause. Rather, the matter was addressed under the grievance procedure in the Agreement and her appeal was dismissed on its merits after a full hearing under Steps 2 and 3 of the Agreement.
- Employee's appeal was not filed until March 18, 2005, which was untimely, given that she was terminated, effective January 29, 2004. Appeal noted with the Office must be filed within 30 days of the effective date of the action complained about.

Employee filed her responsive brief on February 13, 2006. In her brief, she took the following positions:

- Employee saw the need to seek relief from the Office of Employee Appeals because she could not obtain a fair, objective, unbiased, and timely addressing of her complaint under the Agreement, as interpreted by the Agency and WTU and its field representative, Charles Moore.
- Employee could not get any satisfaction due to a claim of the existence of unwritten alleged past practices, which supposedly supported Agency's right to terminate her, without first providing her notice and an opportunity to respond to the termination
- Pursuant to the Agreement, excessed teachers, which would also include Guidance Counselors, were to be transferred and reassigned to another school, there being no provision in the Agreement that addressed a supposed, unwritten option of terminating an employee when there is no vacant position available.
- Agency has misused and misinterpreted the excessing provisions of Title IV of the Agreement to hide behind supposed Board rules, and likewise avoid giving notice to her when she was separated, effective January 29, 2004, there being no language in the Agreement between Agency and the WTU which contemplates terminating personnel who have been deemed as "excess".
- Despite Agency's use of the term "excessing", in reality, Employee was subjected to an adverse action without due cause, caught up in a so-called system-wide movement of employees, each of whom, according to Employee's information and belief, with the sole exception of herself, was reassigned and/or rehired. Employee was the sole person who was ultimately terminated in what amounted to a mini, targeted reduction in force (the

"RIF"), but without the mandatory notice and notification of appeal rights being given to Employee.

- Employee did not address the issue of timeliness in detail, other than to assert that at no time was she notified of her appellate rights, which presumably would have also included a notification that she had up to 30 days to note an appeal with this Office.
- Employee raised several other issues, some of which are outside of the jurisdiction of this Office, related to Agency's admitting that her seniority rights for reinstatement under the terms of the Agreement were incorrectly overlooked when Agency reinstated another Guidance Counselor with only three months service, ignoring Employee's seniority of 2.5 to 3.0 years of service; salary dispute; human rights violations; and being declared as an excess employee twice in one academic year between September and December 2003.

JURISDICTION

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

ISSUES

1) Whether this Office has jurisdiction in this matter; and

2) If so, whether Employee's termination constitutes adverse action taken for cause.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On or about December 18, 2003, Employee received a letter from the Agency, which bore a heading notice, stating "Notice of Termination Due to Declining Student Enrollment/Equalization". The letter advised Employee as follows:

> This is to officially inform you, in accordance with the provisions of the collective bargaining agreement between the Board of Education and the Washington Teachers' Union relating to excessing employees your employment with DCPS will be terminated on **January 29, 2004.** This decision is based on changes in the local school student enrollment formula which is defined as the school equalization process. You will be on **paid** administrative leave effective **December 29, 2003.**

Although Agency argued in both its response to the Petition and again in its brief that the action taken herein constitutes a procedure that is in accord with the negotiated Agreement over which this Office has no jurisdiction, from this AJ's perspective, Agency has not demonstrated that this matter and the way Agency addressed it, is anything but an improper termination of employment, without proper notice, over which this Office

clearly has jurisdiction. This Office has recently addressed this identical issue. In *Nursat I. Aygen v. D.C. Public Schools,* OEA Matter 1601-0004-04, (4-15-05) __ D.C. Reg. _ _ ( ), the Office held that Agency's actions presented two diametrically opposite positions.

In one instance, Agency is arguing that the procedure was *not* an abolishment of a position (i.e., a RIF), but rather was an "excessing" of a position, pursuant to Article IV, § C, of the Agreement, Teacher Transfer Policy, and the implementation of Board rules regarding equalization of teachers to students. On the other hand, Agency readily admits that Employee's position was abolished due to the need for aligning positions to fit budgetary constraints, which is the classical reason most often cited for the implementation of Agency-wide or system-wide RIFs. Here, Agency has implemented a smaller, more targeted RIF, by removing only a very few employees, all of whom apparently were promptly or eventually reassigned, except for the Employee herein. Most telling however, is that this mini RIF action was accomplished without giving appeal right notification to the affected personnel, and this Employee in particular.

Agency has pointed to the "excessing" provisions of Title IV of the Agreement, supplemented by a claim of past practices and supposed "labor law principles" which authenticate the viability of this practice. However, nowhere in the reading of this title is there a provision to support the basis for the termination action taken by the Agency. Rather, the provision clearly anticipates and provides for the potential transfer of personnel within the Agency, which action was not what occurred here. This same position was noted by Thomas F. Howder, Sr., the Hearing Officer who conducted the administrative hearing at the Agency level, prior to Employee filing her Petition with the Office.

With the creation of so many charter schools in the District of Columbia, resulting is a continuing decline in the student enrollment levels in the public schools, and likewise a decrease in the number of needed teachers and other educational personnel, the issue of downsizing and equalization of teacher student ratio in the D.C. public schools has now become a daily issue. To allow the Board to now hide behind its supposed rules and to rely upon a claim of "past practices" and "labor law principles" as an avenue to separate employees from the Agency without first giving them either a proper notice of separation and/or notification of their appeal rights, will quickly lead to widespread abuse.

Of particular interest in the December 18, 2003, notice is the provision that the Employee was being terminated, effective January 29, 2004, more than a full month later, but that she was being immediately placed on paid administrative leave. This type of language is universally inconsistent with a RIF notice. However, it is consistent with the typical notice in communications which either proposes to remove an employee, or which subjects the employee to a summary removal, effective immediately. In both of these instances, and in order to be legally compliant, the notification letters always contain a statement of cause for the action, and likewise an explanation of what the affected employee can do to appeal the action.

Agency also asserted that Employee's Petition was untimely filed, and therefore

should be dismissed. However, that contention is without merit, since Employee was never given a timely notice from the Agency which notified her of her appeal rights before this Office. See *Tatum v. D.C. Public Schools*, OEA Matter No. 1601-0013-03 (6/3/03), __ D.C. Reg. __ ( ).

Having reviewed the record as a whole, and considering the language contained in the termination notice that Employee received, I conclude that what initially appeared to be a mini RIF without proper notification of appeal rights, was actually in the nature of an adverse action taken without cause. Employee was not accorded a proper notice at the time of her termination, and likewise had no opportunity to select which avenue of appeal, whether via her union or through this Office, she was entitled to use for her response. This improper adverse action cannot stand and must be reversed.

ORDER

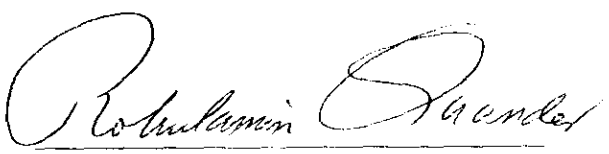
The foregoing having been considered, it is hereby

ORDERED that Agency's action of removing Employee is REVERSED; and, it is

FURTHER ORDERED that Agency reinstate Employee with all back pay, a restoration of all benefit losses sustained as a result of the improper removal, and that relevant personnel records be corrected to reflect that she had no break in service at the Agency; and, it is

FURTHER ORDERED that Agency file with this Office, within 30 days of the date on which this decision becomes final, documents showing compliance with the terms of this Order.

FOR THE OFFICE:



ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge