

IN THE MATTER OF:

**Washington Teachers' Union, Local #6,
a/w American Federation of Teachers,
Union**

v.

**District of Columbia Public Schools,
Employer**

Step 2 Opinion and Award

Hearing Officer: Gary L. Lieber

Grievant: WTU (Ballou High School)

Appearances:

For the Union:

**Rejis Solis,
Field Service Specialist**

For the Employer:

**Tanya Chor
Assistant Attorney General
Office of the Attorney General, District of Columbia**

INTRODUCTION AND PROCEDURAL SETTING

This case involves a Union grievance arising out of the reconstitution of Ballou High School in the Spring of 2015. There is no dispute that the impetus for the Reconstitution was the Federal No Child Left Behind Act ("NCLB"), Public Law 107-110. Among other things, the NCLB provided legal authority for local school boards to take fairly drastic measures when a particular school failed to show progress in certain educational categories. One such action that was authorized by NCLB was to "reconstitute" the school by laying off teachers and staff and hiring new teachers and staff.

The Union filed an amended grievance on June 23, 2015. While the grievance has numerous subparts there are really only two challenges to DCPS' actions. These challenges are whether DCPS committed contractual violations of the collective bargaining agreement by excessing a number of the teachers for discriminatory reasons because of their Union and or protected activity and whether the entire Reconstitution/excessing procedure was done without Union input in violation of certain provisions of the CBA.

DCPS responded to the grievance by letter dated August 25, 2015. Therein DCPS denied the two basic above-referenced claims. In part, DCPS noted that this was not the first Reconstitution under the NCLB Act and that the Ballou Reconstitution was undertaken in a matter consistent with prior Reconstitutions of which in all cases DCPS asserted was effectuated without Union objection.

The matter proceeded to Step 2 of the grievance procedure.

Step 2 of the grievance procedure provides for a hearing before a neutral hearing officer designated by the DCPS Chancellor. Thus, Article 6.4.2 of the collective bargaining agreement states as follows:

6.4.2 STEP 2

6.4.2.1 If the matter is not resolved at Step 1, the grievance shall advance to Step 2.

6.4.2.2 The Chancellor, or his/her designee, and those he/she may further name, shall meet with the representatives of the WTU, and with the persons referred to in Step 1, within ten school days of such submission,

and the Chancellor or designee shall render a decision, in writing, within ten days of such meeting. This meeting shall take the form of a hearing, before a neutral hearing officer during the course of which the parties are afforded the opportunity to present evidence, witnesses, and arguments in support of their respective position(s). The hearing officers [sic] shall submit his/her decision to the parties and the decision is binding absent a request for arbitration by either party.

The undersigned Hearing Officer is the neutral hearing officer designated by the Chancellor.

The Hearing was conducted over six days between October 5, 2016 and June 13, 2017. The testimony was not transcribed. Witnesses were sworn and testified on direct and cross examination. The witnesses for the Union were Latisha Chisholm, former teacher at Ballou; Samantha Averett-Boyd, former teacher at Ballou; Monica Brokenborough, current Ballou teacher; Stephanie Moody, former teacher at Aiton Elementary School and Charles Moore, Union Field Representative. Witnesses for DCPS were Yetunde Reeves, Principal, Ballou High School and Sara Goldband, Deputy Chief of Procurement for DCPS. The following exhibits were admitted into evidence: Hearing Officer Exhibit 1; Joint Exhibit 1; DCPS Exhibits 1 through 5, 7A, 7B, 7C, 7D, 7E, 7F, 7G, 7H, 7K, 7L, 7V, 7W and 7X, 8, 9, 10, 13, 14, 16 through 21, 23 through 27, 30, 32 through 34, 37, 40 through 47, 51, 53, 62, through 73; Union Exhibits 1 through 14 and 31 through 35. At the end of the hearing, both parties orally argued their respective positions to the Hearing Officer.

STATEMENT OF THE ISSUES

As stated by the parties and as framed herein by the Hearing Officer, the two issues in this case are as follows:

1. Did DCPS select certain teachers for excess as part of the Ballou High School Reconstitution because of their Union and or protected concerted activities in violation of Article 3.1 of the collective bargaining agreement? If so, what shall be the remedy?
2. Whether DCPS' implementation of the Ballou High School Reconstitution was accomplished by DCPS without the appropriate input described in Article 4.5 of the Collective Bargaining Agreement or was DCPS contractually excused from those provisions due to the discretion extended to it in Article 2.8 of the CBA? If DCPS did not properly undertake the Reconstitution, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

Article 3.1 of the collective bargaining agreement states:

ARTICLE 3 – FAIR PRACTICES

- 3.1 DCPS shall not discipline, retaliate against, or discriminate against any Teacher on the basis of:
 - 3.1.1 Membership in any educator organization;
 - 3.1.2 Association with activities of the WTU; or
 - 3.1.3 For requiring that DCPS adhere to the terms of this Agreement.

Article 2.8 of the collective bargaining agreement states:

2.8 Notice of School Reform or Restructuring

DCPS shall provide written notice of potential school reform, inclusive of all options under NCLB for restructuring, to the WTU and all Teachers in the affected schools that have been identified. This notice of potential reform shall be made within seven (7) calendar days of the decision to include the school in a reform effort.

Article 4.5 of the Collective Bargaining Agreement is six pages long and, due to its length, is attached as Appendix A of this Opinion and Award.

Additionally, the term “Excess” is defined in the Definitions section of the CBA as follows:

EXCESS. 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.’

STATEMENT OF RELEVANT FACTS

Ballou High School’s Principal in 2014-2015 was first year Principal Yetunde Reeves. This was Principal Reeves’ first year in DCPS. She had previously been a teacher and School Administrator in Northern California.

On May 21, 2015, Principal Reeves announced to her school staff composed of approximately sixty-eight teachers and forty other staff personnel that, pursuant to the No Child Left Behind Act, Ballou would need to be reconstituted. What this meant is

that all personnel would effectively need to reapply for their respective positions. This announcement was accompanied by a PowerPoint presentation by Principal Reeves and Deputy Superintendent Dan Shea which largely consisted of a description of the goals for the school year 2015-2016 that would arise out of the Reconstitution. During this staff meeting, a two page Reconstituted "Frequently Asked Questions" was circulated.

Among other questions and answers was the following:

Q. What does it mean for the staff if the school is reconstituted?

A. In schools that are reconstituted, all staff must reapply for their positions within the building. WTU members who are not retained in the reconstitution will be placed in the excess pool. All other employees who are not retained will be placed at another DCPS school.

Q. Who will make decisions about returning staff?

A. The principal and instructional superintendent will make staffing decisions.

Thereafter, each teacher and staff member subject to losing their position was interviewed. Principal Reeves asked the following four questions of all teachers:

Ballou HS

1. How did you support the climate/instructional initiatives this year? In what ways will you support this work next year?
2. How do you contribute to the adult climate/morale in the building?
3. In terms of your performance, what is your growth area?
4. Why do you want to remain at Ballou High School?

Principal Reeves was the sole decision-maker as to who would keep their position at Ballou and who would not. She testified that her goal was to "get the right

people on the bus.” She said she was trying to build a championship team of educators like the Golden State Warriors, a reference to her years in Northern California. These references were in the context of what she said was a “toxic relationship in the building” that she observed throughout her first year as Principal. This toxic relationship had, according to Principal Reeves, prevented the school from making progress in the manner that she envisioned the school making.

In determining who would “get on the bus” and who would be left behind, Principal Reeves stated that she had access to IMPACT Evaluations but that she did not recall using those evaluation reports to make the decisions. As an Administrator at the school, she had served as one of the evaluators and thus had some recollection of how she had graded the performance of many teachers. Rather than rely on formal evaluations, she relied upon her own subjective sense of teacher performance in the classroom, team contribution, her own overall professional judgment and the answers to the four questions during the interviews.

When the process concluded, twenty-four of the sixty-eight teachers at Ballou were designated to lose their positions at Ballou. This was whittled down due to the fact that several of these teachers otherwise were terminated due to IMPACT evaluation scores and one other was employed due to a grant which was later modified. Among those on the “Excessed” list were several teachers whom the Union deemed the backbone of its organization at Ballou. These teachers were Latisha

Chisholm, Samantha Averett-Boyd, Lauren Falls, Tiffany Green, Joanne Nelson and Joanne Taylor-Colton. The Union contends that all of these teachers were targeted because of their active involvement and support for the Union.

As a result of the Reconstitution, other teachers exercised their contractual rights to transfer to other schools. Still others elected a buy-out of their positions and/or retired. Of those on the excess list, many attempted to attend and participate in job fairs that DCPS held and that DCPS publicized within the Reconstitution process. For example, Latisha Chisholm became a Science and Special Education teacher at Anacostia High School. Samantha Averett-Boyd turned down a job offer at another DCPS High School offered by DCPS and ended up with a teacher's position outside of DCPS.

Clearly, Chisholm and Averett-Boyd were the most active Union activists at Ballou. Chisholm was the Union's Building Representative for the 2013-2014 and 2014-2015 school years. As such, she was the teachers' frontline representative to the School Administrators. As the Building Representative, she was a member of all the collectively-bargained committees, namely the LSAT (Local School Advisory Team)¹, the SCAC (School Chapter Advisory Committee) and the Personnel Committee. According to both Chisholm and Reeves, they both met regularly on matters relating to

¹ The LSAT is the name of the committee formerly known as the LSRT referenced in Article 4.5.2.2 of the CBA.

the administration of the collective bargaining agreement and they did not always reach agreement on a variety of issues. Boyd was Chisholm's second in command in the 2014-2015 school year and had been the Building Representative in the 2012-2013 school year just prior to Chisholm's reign. In the 2014-2015 school year, Boyd was a member of the LSAT and SCAC. The other four members of the group of six asserted to be targets of Principal Reeves played less significant role in the Union's chain of command.

It is noteworthy that of the twenty-four teachers originally on the Ballou excess list, one had a 2014-2015 IMPACT rating of "Ineffective"; 2 had ratings of "Minimally Effective"; 14 had a ratings of "Developing"; 5 had ratings of "Effective" and two had the top rating of "Highly Effective." Latisha Chisholm was one of the two with a "Highly Effective" rating. Samantha Averett-Boyd was one of the five with an "Effective" Rating.

As noted, Principal Reeves was the final arbiter of who would be asked to remain at Ballou and who would be subject to excess. As such, she did not seek the participation of any Union recognized committee for input as otherwise required by Article 4.5 of the collective bargaining agreement entitled "Performance Based Excessing Policy." DCPS contended that since this was a Reconstitution, it was governed by Article 2.8 of the collective bargaining agreement and, thus, the collective

bargaining agreement did not require direct participation of the Union in the decision-making process.

Position of the Parties

There are two distinct issues in this case. As to the first issue, the Union argues that the six named teachers – Chisholm, Averett-Boyd, Falls, Green, Nelson and Taylor-Cotton were all excessed because of their Union activities in violation of Article 3. As to the second issue, the Union contends that whether called a Reconstitution or by some other name, DCPS may not act unilaterally but must, among other things, first receive the input and recommendation of the LSAT and the Personnel Committee. Further, the Union contends that while reserving the right to make the final decision, DCPS must use the rubric identified within Article 4.5.2.5 of the CBA to make the final decisions.

DCPS' decision is to the contrary on both issues. DCPS states that no teacher was targeted for their Union activities; rather Principal Reeves exercised the discretion afforded to her by virtue of the fact that this was a Reconstitution and that she chose the teachers that she believed would best advance the school's educational goals in concert with the No Child Left Behind Act. As to the second issue, DCPS' position is a bit nuanced. DCPS asserts that the Reconstitution is substantively controlled by Article 2.8, thereby requiring DCPS only to provide the Union with "written notice [within seven days] of potential school reform, inclusive of all options under NCLB for restructuring, to the WTU and all teachers in the affected schools that have been identified." Thus,

according to DCPS, the provisions of Article 4.5 are not applicable. As such, DCPS is not required to obtain input or recommendations from any Union committee in a Reconstitution. A DCPS witness noted in this regard, that the Article 4.5 provisions requiring Union Committee participation are only useful when there is a budget issue and choices must be made among disciplines. That scenario is not applicable in a Reconstitution where the issue is not budgetary and where the entire compliment of teachers is within the pool of teachers that could lose their positions at the school.

The nuanced part of this position is based upon the fact that notwithstanding the nonapplicability of Article 4.5 of the CBA, DCPS opted to characterize the washing out of positions as an excess and utilized those parts of Article 4.5 that it needed to carry out the excess, namely Article 4.5.3 (Notification) and more importantly 4.5.4 (Placement of Excessed Teachers). As such, though not articulated necessarily this way, DCPS gratuitously borrowed these tools within Article 4.5 to effectuate the Reconstitution even though the CBA, in its view, does not require use of any part of Article 4.5 in a Reconstitution. Adding to the confusion, DCPS then labeled the teachers as “Excessed” without any explanation why a knowledgeable or even a casual observer would not otherwise conclude that having called the process an “excess”, DCPS was conceding that even a Reconstitution would be governed, at least in part, by Article 4.5.

ANALYSIS

The Discrimination Claim

I shall dismiss the grievance with respect to the claim that Lauren Falls, Tiffany Green, Joanne Nelson and Joanne Taylor-Cotton were targeted for not being retained at Ballou because of their activity or support for the Union. None of these four persons testified. Moreover, scant evidence was introduced into the record of their Union conduct. Stated simply, there is no evidence that Principal Reeves was motivated by Union considerations in determining that teachers Falls, Green, Nelson and Taylor-Cotton were selected for excess in violation of Article 3 of the collective bargaining agreement.

My conclusions regarding Ms. Chisholm and Averett-Boyd are to the contrary. Indeed, I find that the evidence that their being placed on the excess list was precisely because of their Union activities to be overwhelming. This is largely because Principal Reeves admitted as such. I conclude that Principal Reeves did not intend to violate Article 3. She thought that she was privileged via the Reconstitution to excess those teachers that she subjectively believed to be responsible for the “us vs. them” culture aka “toxic relationship in building” irrespective of whether that relationship was the product of Chisholm’s and Averett-Boyd’s representation of the teachers as Union leaders. Yet, it is undisputed that Chisholm and Averett-Boyd were raising issues of various sorts with Reeves as part of their institutional status as Union leaders. Indeed,

one point in her testimony, Reeves expressed an understanding that employees had no protection as long as the Union or Chisholm or Averett-Boyd did not file *formal* grievances. Thus, in Reeves' mind, for Chisholm and Averett-Boyd to receive the protections afforded to them under Article 3, they must have filed formal grievances.

Principal Reeves is mistaken. Protected Union activities extends to a wide variety of activities, formal or informal. As long as employees are raising issues regarding wages, hours and subjects of employment on behalf of more than one employee, the conduct is considered concerted protected activity subject to legal, and almost in all cases, contractual protection.

In a variety of ways, Principal Reeves conceded that these two teachers were selected because of their protected concerted Union activities. Thus, she stated that they were the main source of the toxic environment. No other reason was given.² Furthermore, aside from the admissions of Principal Reeves, the record contains substantial evidence that "but for" the Union activities, these two teachers would have been retained at Ballou. While Principal Reeves may have had the discretion under Reconstitution to not rely upon the IMPACT Evaluations, it is without dispute that one of the main factors that she used to make these decisions was performance in the

² In this regard, DCPS offered no testimony that any of the activities engaged in by these two teachers was accomplished by excessive acts that could somehow cause their conduct to be deemed unprotected.

classroom. By Reeves' own admission, Chisholm was an "excellent teacher." I note in passing that the form letters sent to those retained teachers stated in part "we are confident that you will continue to make a valuable contribution to the academic gains of the school and your students." It is difficult to discern how Latisha Chisholm could not be considered a teacher who has made such a valuable contribution. In this respect, DCPS holds out the IMPACT Evaluation as the primary record of a teacher's accomplishments and shortcomings. A perusal of Chisholm's evaluation for 2014-2015, demonstrates the high quality of her performance. Her overall numerical rating was 369 – just 31 points short of perfect. The praise for Chisholm's classroom performance is contained throughout her IMPACT Evaluation. Suffice it to say that *anyone* reading this evaluation would be forced to conclude that Latisha Chisholm has the characteristics of a teacher DCPS wishes for its teachers -- dedication, intelligence and the drive to succeed in her own right and on behalf of their students.

Ms. Averett-Boyd was not far behind Ms. Chisholm. Ms. Averett-Boyd's rating as an "Effective" Social Studies teacher in her 2014-2015 IMPACT Evaluation was based on a score of 324 points, half way between "Effective" and "Highly Effective." While her evaluation was not as superior as Chisholm's, it was quite good and very positive, reflecting the quality of the teaching that she provided on a day to day basis. For example, in the comments within the TLF category, the primary section of the evaluation, Principal Reeves, the evaluator wrote under Teach 9, the following:

Ms. Averett-Boyd was highly effective at building a supportive, learning-focused classroom community. Students were invested in their work and valued academic success. It was evident that Ms. Averett-Boyd has a rapport with her students and that she has established a classroom community. The classroom environment was safe for students, such that students were willing to take on challenges and risk failure. Students were mostly always respectful of Ms. Averett-Boyd and their peers and when the students were distracted by an odor in the classroom, Ms. Averett-Boyd redirected them immediately. Ms. Averett-Boyd had a positive rapport with students, as demonstrated by displays of positive affect, evidence of relationship building, and expressions of interest in students thoughts and opinions. Ms. Averett-Boyd has clear boundaries and reminded a student that "I am not your friend." Ms. Averett-Boyd should address those students who are not on task more consistently.

Ms. Averett-Boyd was given a "Highly Effective" rating for this rubric.

My analysis of this issue is also based on my evaluation of the credibility of both Ms. Chisholm and Ms. Averett-Boyd. I conclude that both testified truthfully in all respects and I credit each of their testimony that they not only gave maximum effort as teachers but also extended themselves beyond the classroom. In the classroom, Chisholm took on the difficult task of teaching three classes of grade repeaters. Principal Reeves recommended her for an AP Fellows Program and that she teach AP class in Psychology in 2015-2016. DCPS had planned to send her for training for these AP programs. Chisholm was also the Chairman of the English Department. She testified that when Principal Reeves asked for volunteers she always responded positively.

Averett-Boyd's testimony regarding her commitment to Ballou was equally credible. In her rebuttal testimony, she said she was taken aback by the apparent conclusion by Reeves that she was not fully committed to Ballou – the clear inference generated by her selection as an excess teacher. In this respect Averett-Boyd pointed to the IMPACT Evaluation Commitment to School Community rubric in which she was given the "Highest" rating in four of the five categories. While all of the explanatory comments show high praise for Averett-Boyd, the CSC 5 category is illustrative. Therein, the evaluator, (presumably Principal Reeves) declared "In her role as TLI, Ms. Averett-Boyd always seeks to collaborate with other teachers. Her data presentations have been well received and she is always seeking opportunities for collaboration with other teachers."

Finally, although Principal Reeves' admission that she selected Chisholm and Averett-Boyd for excess because of their protected concerted activities is sufficient to sustain the grievance as to them, it is noteworthy that DCPS made no effort to demonstrate that the English and Social Studies teachers that were retained were objectively superior to Chisholm and Averett-Boyd in terms of any criteria including those criteria – e.g., performance, commitment to the school, etc., that Principal Reeves claimed to have employed.³ Indeed, no evidence whatsoever was proffered in support

³ Principal Reeves claims she took notes on her computer regarding the teacher interviews. However, she was unable to produce any such notes in response to a request by the Hearing (continued on next page)

of retaining the teachers over Chisholm and Averett-Boyd. Thus, DCPS proffered no evidence, testimonial or documentary, that might have suggested a legitimate reason for retaining those teachers retained while excessing Chisholm and Averett-Boyd.

In reaching the conclusion that Chisholm and Averett-Boyd were excessed in violation of Article 3 of the CBA, I am not suggesting that DCPS was required to utilize any particular criteria other than what it used. For the reasons fully discussed in the next section, DCPS can use whatever criteria it wishes in making such selections in a Reconstitution. The only exception is criteria expressly forbidden by the collective bargaining agreement, the most prominent of which is selection or retaliation for Union activities. Of course, it goes without saying that Union activists are not legally insulated from discipline or selection for layoff merely because they engage in Union activities. However, here the facts show overwhelmingly that the decision-maker was in fact motivated by a desire to rid Ballou of those two teachers that exercised their legal and contractual rights to advance complaints and issues germane to wage, hours and working conditions that were derived from the parties' collective bargaining agreement. Simply labeling such activity as "toxic" without any evidence that this conduct was not advanced in an outrageous manner that might deprive the employees of the protections

Officer. The notes were within her control and, thus, the failure to produce them creates an adverse inference that had they been produced, they would have been adverse to the interest of DCPS.

afforded to them under law and under the collective bargaining agreement does not serve to delegitimize such activity or cause it to be deemed unprotected.

The Claim that the Collective Bargaining Agreement Prevented DCPS From Unilaterally Implementing The Reconstitution Without Union Input As Provided in Article 4.5 of the Agreement

This is an issue that requires careful analysis and the answer is not obvious at first glance. This is because the Collective Bargaining Agreement is at best ambiguous and at worst contradictory.

To be sure Article 4.5 of the Agreement places clear limits on the Excessing of teachers and DCPS did label the Reconstitution as an Excess. In the end, I find for DCPS despite its peculiar argument that it is privileged to pick and choose which parts of Article 4.5 it may use and wish it may ignore.

The CBA is ambiguous if not contradictory because nowhere is it stated that in the case of a Reconstitution, Article 4.5 is inapplicable. Indeed, the word “Restructuring” appears in both Articles 2.8 and 4.5. I am compelled to conclude that this contractual quagmire is the product of either the negotiators’ oversight or was intentionally left unresolved (as is the case in many collective bargaining negotiations) because it was not then a pressing issue and to solve the problem fully would take too much capital from one or both of the sides.

I do note that Article 2.8 was *not* in the prior agreement and that Article XLII of that prior agreement entitled "Reduction-In-Force, Abolishment and Furlough" stated in its entirety "Prior to a reduction-in-force, abolishment or furlough during the life of this Agreement, DCPS agrees to consult with the Union." I surmise by the change from the prior agreement to the current one that the parties intended to recognize that DCPS could exercise some discretion when it takes action under the No Child Left Behind Act.

Recognizing this limited lesson from the parties last negotiations, I conclude that the language of Article 2.8 and not Article 4.5 is the controlling language to describe this grievance. Stated simply, the Union's reliance on Article 4.5 is not palatable without an explanation for the meaning of Article 2.8. The Union did not and apparently cannot explain the significance of Article 2.8 and did not explain how or why the clear language of Article 2.8 should be ignored. That language states clearly that in the case of an NCLB restructuring, all DCPS must do is to provide advance notice of the restructuring. If all that is required is advanced notice, then, *a fortiori*, there would logically be no other requirements -- including preselection receipt of recommendations from the LSAT and Personnel Committees.

To be sure, I am troubled by what some might label sloppy contractual language, particularly the use of the word "restructuring" in both Article 2.8 and Article 4.5.1.1. I note, however, the NCLB is referenced only in Article 2.8, thereby giving further credence to this conclusion.

DCPS' position is that it used some of the excessing provisions in Article 4.5, particularly Articles 4.5.4 and 4.5.5 in implementing the NCLB restructuring. This decision made sense to DCPS because Article 2.8 contains no procedure identifying the rights of excessed teachers to obtain another position in the DCPS system or to obtain some form of remunerative benefit for leaving DCPS. Of course, the use of the provisions did tend to play into the Union's argument that Article 4.5 is controlling as demonstrated by DCPS' utilization of parts of it. It did not help either that DCPS could not articulate a contractual basis for why DCPS could gratuitously apply portions of Article 2.8 without being bound by all of it.

In summary though, I conclude that Article 2.8 is the controlling provision to the exclusion of Article 4.5 for two reasons. First, standing alone, Article 2.8 is unambiguous. It requires notice only.⁴ If DCPS was restrained in any other way in the case of an NCLB Reconstitution, presumably the parties would have said that in Article 2.8 or somewhere else in the CBA. Second, for its part, DCPS is correct that Article 4.5.2 Excessing provisions are more appropriate where there is an "affected area" (e.g. Art. 4.5.3.3) or where the excess is limited to a particular area of teacher certification to be

⁴ Ironically, the record does not contain evidence that this seven-day notice was provided. However, that was not a claim made by the Union and at no time during the hearing did the Union seek any finding in that regard. Otherwise, the Union received notice in the ordinary course of the Reconstitution and was not prejudiced in any way by a failure to provide a written seven-day notice. For these reasons, I do not find that DCPS violated Article 2.8's notice requirement.

chosen. Overall, the language of Article 4.5.2 does not lend itself for use in a Reconstitution under NCLB.

I do not find DCPS' adoption of some of the provisions of Article 4.5 to carry out the Reconstitution fatal. It is a gratuitous adoption of these implementing steps. Since it is gratuitous, it should not impact, from a contractual interpretation standpoint, the conclusion that Article 2.8 applies and left DCPS with wide authority to both select those to be separated from Ballou and to determine what options those selected teachers would have. The fact DCPS unilaterally chose to use some of the provisions contained in the CBA, does not detract from the underlying finding that DCPS has all the rights it otherwise has under the applicable language in Article 2.8.

REMEDY

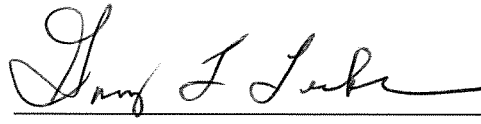
The grievance is entirely dismissed except for the claim inuring to the benefit of Ms. Chisholm and Ms. Averett-Boyd. DCPS shall extend to them offers to return to Ballou for the 2017-2018 school year. If they elect not to return to Ballou at their former positions, they should be extended preferential rights over all candidates for 2017-2018 vacant positions in the system for which they are qualified. Alternatively, the parties could work out a mutually agreeable settlement of their rights consistent with this Opinion and Award. Chisholm and Averett-Boyd should also be made whole monetarily for any loss of income or benefits. Their records should be expunged to

reflect that they were not excessed. Finally, I shall retain jurisdiction to effectuate this Remedy should my services be required.⁵

AWARD

For the above reasons and subject to the parties' rights under Article 6.4.3, Step 3 of the collective bargaining agreements, the grievance is granted in part and denied in part.

7/26/17
Date


Gary L. Lieber
Hearing Officer

⁵ The only other discrete claim the Union made that is in any way separate from these other two issues is that DCPS should apologize to one of the teachers for the disclosure of confidential information. I find that DCPS did apologize and that no further remedy is required on that claim.

Appendix A

- 4.3.5 In cases where transfers are necessary as a result of excessing, teachers will be notified in writing of their excess status by their supervisors prior to the last day of school for teachers.
- 4.3.6 A teacher who is involuntarily transferred shall carry forward his or her building seniority.
- 4.4 Mutual Consent
 - 4.4.1 No Teacher shall be placed at school without the Teacher's and the Supervisor's consent, except as provided for in this Agreement ("mutual consent").
- 4.5 Performance-Based Excessing Policy
 - 4.5.1 Definition
 - 4.5.1.1 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.'
 - 4.5.2 Rules Governing the Excessing Decision
 - 4.5.2.1 DCPS shall be prohibited from excessing a Teacher by changing the name of the Teacher's position in an effort to artificially produce a change in the "local school program" without any material change in the subject matter of the position.
 - 4.5.2.2 When DCPS determines an excess is necessary, the Local School Restructuring Team (LSRT) shall make a recommendation as to the area(s) of certification to be affected.
 - 4.5.2.3 The Personnel Committee shall make a recommendation to the supervisor as to the Teacher(s) to be affected. The Teachers in the affected area may provide evidence to the Personnel Committee for their consideration.
 - 4.5.2.4 The Supervisor shall consider the recommendations of the Personnel Committee and shall retain the right to make the final excessing decision.
 - 4.5.2.5 DCPS shall retain the right to make the final excessing decision according to the following rubric:

Category	Rating	Points
1) Previous Year's Final Evaluation	Highest	50
	Second Highest	40
	Third Highest	30
	Fourth Highest	0
	Lowest	0
2) Unique Skills and Qualifications	High	20
	Medium	10
	Low	0
3) Other Contributions to the Local Educational Program	High	20
	Medium	10
	Low	0
4) Length of Service*	20+ Years	10
	10-19 Years	5
	1-9 Years	1
*Individuals with DC residency at the time of excessing shall receive a five-year service credit. Individuals with veteran status at the time of excessing shall also receive a five-year service credit.		

4.5.2.6 DCPS shall use all data gathered for the formal DCPS educator evaluation process as of the date of the excessing decision when assigning points for Category 1 for Teachers who are new to DCPS (as they will not have an evaluation from a previous year). If an excess occurs sufficiently early in the academic year such that no data have yet been gathered for the formal DCPS educator evaluation process, DCPS shall use all other available data on the Teacher's performance for Category 1.

4.5.2.7 The Teacher in the competitive area (as determined in accordance with Title 5 of the DCMR) with the lowest point value overall according to the rubric above shall be the first Teacher to be excessed. The Teacher with the second lowest point value shall be the second Teacher to be excessed, and so on.

4.5.2.8 When the Supervisor's final decision departs from the recommendation of the LSRT, as to the area affected, the Supervisor shall prepare a written justification. A copy of the justification shall

be provided to the Chancellor and the President of the WTU. Upon the request of the WTU President, the justification shall require the approval of the Chancellor, or the Chancellor's designee prior to implementation of the excess at that school.

4.5.2.9 When the Supervisor's final decision departs from the recommendation of the School Personnel Committee, as to the individual Teacher(s) to be affected, the Supervisor shall prepare a written justification. A copy of the justification shall be provided to the Chancellor and the President of the WTU. Upon the request of the WTU President, the justification shall require approval of the Chancellor, or the Chancellor's designee prior to implementation of the excess of that school.

4.5.3 Notification

4.5.3.1 DCPS shall provide written notification to all Teachers who are to be excessed at least (10) school days prior to the effective date of the excess.

4.5.3.2 If a vacancy for which an excessed member is qualified occurs within the school prior to the effective date of the excess, the excessed status of the teacher shall be rescinded.

4.5.4 Placement of Excessed Teachers

4.5.4.1 The placement of excessed teachers shall be subject to the mutual consent policies outlined in this Agreement.

4.5.4.2 To facilitate the placement of excessed Teachers, DCPS shall post all known vacancies on the DCPS website in a timely fashion.

4.5.4.3 DCPS shall provide vacancy lists to the WTU, upon request.

4.5.4.4 Included in each vacancy listing shall be the School name, discipline or specialized program, position, and required certification.

4.5.4.5 DCPS shall post on its website copies of all position descriptions, when available.

4.5.4.6 To further facilitate the placement of excessed Teachers, DCPS shall provide multiple hiring opportunities (e.g., hiring fairs and other similar activities).

4.5.5 Options for Excessed Permanent Status Teachers

4.5.5.1 Excessed permanent status Teachers shall have sixty (60) calendar days following the effective date of the excess to secure another placement in DCPS under mutual consent.

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.

4.5.5.3 The Three (3) Options:

4.5.5.3.1 Option 1: Buyout

4.5.5.3.1.1 Excessed permanent status Teachers shall have the option to receive a \$25,000 cash buyout resulting in separation from DCPS. This provision shall be subject to necessary government approvals.

4.5.5.3.1.2 An excessed permanent status Teacher who opts for the buyout shall not be eligible for employment with DCPS for a period of three (3) years.

4.5.5.3.1.3 This option shall only be available to permanent status Teachers whose most recent evaluation score was "Effective" or higher.

4.5.5.3.2 Option 2: Early Retirement

4.5.5.3.2.1 Excessed permanent status Teachers with twenty (20) or more years of creditable service shall have the option of retiring with full benefits. This provision shall be subject to necessary government and budgetary approvals.

4.5.5.3.2.2 This option shall only be available to permanent status Teachers whose most recent evaluation score was "Effective" or higher.

4.5.5.3.3 Option 3: A Year to Secure a New Placement

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.")

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.

4.5.5.3.3.3 Excessed permanent status Teachers who select the Extra Year, shall, during the year, be:

4.5.5.3.3.3.1. Provided with full salary and benefits;

4.5.5.3.3.3.2. Provided with multiple hiring opportunities (e.g., hiring fairs and similar activities);

4.5.5.3.3.3.3. Provided with the opportunity for a minimum of twelve (12) hours of professional development that shall include instruction on interviewing skills and the creation of professional portfolios; and

4.5.5.3.3.3.4. Assigned by DCPS to serve in one (1) or more instructional support capacities (e.g., one-on-one tutoring, small group instruction, class coverage, long-term Teacher replacement, or

central office support)
that are within the
Teacher's discipline and
located at a maximum
of two (2) work
locations per school
year.

- 4.5.5.3.3.4 In making the assignment referenced above, DCPS shall consider the teacher's preference and the best interests of the school system.
- 4.5.5.3.3.5 DCPS shall have the right, at the conclusion of the Extra Year, to separate from DCPS all excess permanent status Teachers who are unable to secure a new placement within the school system under mutual consent during the year.
- 4.5.5.3.3.6 The Extra Year shall only be available to permanent status Teachers whose most recent evaluation score was "Effective" or higher.
- 4.5.5.3.4 The three (3) options listed above shall not be provided to members who have not made a "substantial effort" (defined below) to secure a placement within DCPS. Such Members shall be subject to separation on the 66th calendar day following the effective day in which they were excessed.
- 4.5.5.3.5 A Member shall be deemed to have made a "substantial effort" if s/he:
 - 4.5.5.3.5.1 Has made a good faith effort to interview at a minimum of five (5) Schools; or
 - 4.5.5.3.5.2 Has made a good faith effort to interview for all vacant positions for which the Member is qualified if the total number of such positions system wide is less than five (5).
- 4.5.5.3.6 Teachers who have challenged their excess through the grievance and arbitration procedures shall have ten (10) calendar days following receipt of written notice of the

Step 2 grievance decision to select one of the three options in section 4.5.5.3.

4.5.5.3.7 DCPS shall notify Teachers in writing of the process for selecting one of the three options and for notifying DCPS of the selection.

4.5.6 Special Rules Governing the Placement of Excessed Permanent Status Teachers Who Qualify for the DCPS Performance-Based Compensation System

4.5.6.1 Excessed permanent status Teachers who qualify and volunteer for the DCPS Performance-Based Compensation System shall have sixty (60) calendar days following the effective date of the excess to secure another placement in DCPS under mutual consent.

4.5.6.2 DCPS shall offer multiple hiring opportunities (e.g., job fairs, interviews, access to job postings, etc.) for all such Teachers during the sixty (60) calendar day period.

4.5.6.3 All such Teachers who are unable to secure a placement under mutual consent during the sixty (60) calendar day period shall be subject to separation from DCPS on the 61st calendar day.

4.5.6.4 All such Teachers shall not have access to the options described in Section 4.5.5.3.

4.5.7 Reapplication Rights

4.5.7.1 All Teachers who are separated by DCPS according to the provisions of this article shall have the right to reapply to DCPS at any time, except as otherwise required by applicable law.

4.5.7.2 If rehired, such Teachers shall be placed on the next salary step for which they would have been eligible at the time of their separation.

4.5.7.3 If rehired within one year of separation, such Teachers shall incur no break in service for pension purposes.

ARTICLE 5 - PERSONNEL FILES

5.1 Personnel Files

5.1.1 General

5.1.1.1 A Teacher's official personnel file shall be maintained at the DCPS Office of Human Resources. This file shall be the Teacher's only official personnel file.