

In the Arbitration of

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS

and

WASHINGTON TEACHERS
UNION, LOCAL 6

OPINION AND AWARD

AAA No. 16 390 00740 08

(Termination of Probationary
Teachers)

Appearances

For the Employer -

Jonathan K. O'Neill, Esq.
Michael D. Levy, Esq.

For the Union -

Melinda K. Holmes, Esq.

The parties to this dispute are the District of Columbia Public Schools (DCPS or Employer) and the Washington Teachers Union, (WTU or Union). The Arbitrator was selected under the procedures of the American Arbitration Association. The hearing was held at DCPS's offices in Washington D.C., on December 18, 2009, and September 29, 2010.

Both parties were represented at the hearing and had full opportunity to examine and cross-examine witnesses, to offer evidence and to set forth their positions. A court reporter made a verbatim transcript of the proceedings and both parties filed post-hearing briefs. All witnesses were sworn.

Based on the evidence, the positions argued by the parties, and the observation of witnesses while testifying, I make the following findings and Award.

ISSUE

The parties did not stipulate the issue. Based on the total record, I have determined that the issue is:

Did the Agency violate the collective bargaining agreement (CBA) by the manner in which it terminated the employment of approximately 80 probationary teachers at the end of school year 2007-2008? If so, what shall be the remedy?

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT AND REGULATION

I. Article XVI. Teacher Evaluation

B. Immediately following the execution of this agreement, the Superintendent and the President of the WTU agree to consult on modifications to the PPEP or on the development of a new teacher evaluation instrument.

E. If a teacher receives a "Needs Improvement" on any performance standard indicator, he/she shall receive a written plan of assistance for areas of improvement along with the support training and resources necessary for improvement. Support may include, but is not limited to, classroom visitation, mentoring, helping teachers, content specialist, etc. The teacher shall be free to include additional support or resources of his/her choosing. If the teacher receives an overall rating of "Needs Improvement," he/she shall be held on the same pay step until a rating of "Meets Expectations" is received. Upon receipt of a "Meets Expectation" rating, the teacher shall be placed on the next immediate pay step. If the teacher receives an overall rating of "Needs Improvement" for two (2) consecutive years, and there is no significant improvement or reasonable expectation that skillful performance on all standards can be achieved, termination of employment may be recommended.

II. Title 5, District of Columbia Municipal Regulations

1306 PERFORMANCE EVALUATION

1306.1 Official performance evaluation ratings for all employees of the Board of Education shall be inclusive of work performed through June 30, unless otherwise specified in this section.

1306.3 Employees supervised by members of the Board of Education shall be evaluated through procedures established by the Board, to include an appropriate appeal process.

1306.14 The terms of any negotiated agreement pertaining to performance evaluation shall take precedence over the provisions of this section.

1307 PROBATIONARY PERIOD

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.

1307.5 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.

BACKGROUND

In July 2008, DCPS notified approximately 80 probationary teachers that:

. . . based on input from your principal and your status as a probationary employee, your position as teacher with District of Columbia Public Schools is terminated effective August 1, 2008.

This decision was made pursuant to D.C. Municipal Regulations, Chapter 5, Section 1307.

When the Union learned of these actions, WTU Field Representative Charles R. Moore wrote to DCPS Chancellor Michelle Rhee on August 15, 2008. What follows are the pertinent portions of the WTU letter and Chancellor Rhee's reply, dated September 8, 2008:

WTU Letter

Dear Chancellor Rhee:

The Washington Teachers' Union hereby invokes this class action Step III grievance in accordance with Article VI of the grievance and arbitration procedure as outlined in the Agreement between the Washington Teachers' Union and the Board of Education on behalf of probationary teachers, and more particularly, those probationary teachers who were terminated following the end of the 2007/2008 school year on a continuing basis.

The Union files this grievance under Articles VI, VII, XVI, and other applicable Articles. Board Rules, policies, and pertinent regulations. It is requested that the terminations be rescinded, thereby restoring all lost salaries, benefits, and privileges of employment. In other words, the Union requests that the affected employees be made whole.

Chancellor Rhee's Reply

Dear Mr. Moore:

I am writing in response to your letter of August 15, 2008, which purports to assert a "class action Step III grievance" on behalf of certain probationary teachers under the Agreement between the Washington Teachers Union and the Board of Education.

The termination of probationary teachers is not subject to the grievance procedures of the Agreement for a variety of reasons, including but not limited to, the following: the termination of probationary teachers is governed exclusively by the District of Columbia Municipal Regulations and not by the Agreement, and the termination of probationary teachers raises issues of educational policy that are beyond the scope of the grievance procedures. Furthermore, the purported grievance does not comply with the requirement of Article VI.C.1 of the Agreement that "[a]ny grievance raised by the Union, on behalf of an employee must identify the employee."¹

Mr. Moore said Chancellor Rhee's reply was the only response the Union received about the grievance.

The parties have had a collective bargaining relationship that stretches back for decades. The Union entered into the record CBAs dating from 1971 to the

¹ At the hearing and in its brief, the Employer largely abandoned assertions of non-grievability and non-arbitrability. The brief does argue that the matter at issue may not be treated as a class action. I will discuss that topic below.

present. Mr. Moore testified that he has been a Field Representative for approximately 40 years and served as a DCPS teacher before then. He stated that shortly after the 2007-2008 school term, the Union received calls from probationary teachers saying they had been terminated. This was the first the Union learned of the terminations and it prompted his September 8, 2008, letter to Chancellor Rhee. The Union asked the Employer for information about who had been terminated but that information was not initially provided.

In response to a Union request, the Employer provided a document that contained instructions given to principals via a web portal. It said, in pertinent part:

Introduction

Welcome to the DCPS probationary ET-15 Renewal/Non-Renewal Portal. All ET-15s (e.g., teachers, librarians, counselors, social workers, etc.) in their first and second years in DCPS are on probationary status.

Below you will find a list of all the probationary ET-15s at your school. You need to decide whether you are going to recommend "renewal" or "non-renewal" for each person on this list. Renewal means the individual will remain in the school system. "Non-renewal" means the individual will be separated from the school system.

In making this decision, consider as a general guide whether the individual is making a significant positive contribution to the school. If not, a non-renewal is warranted.

To non-renew a probationary ET-15, you must provide a one-page narrative supporting your decision. (You can use this portal to submit your narratives.) No additional documentation is necessary. Please note that the PPEP regulations do not apply to the non-renewal of probationary ET-15s. You do not need to implement a 90-day plan or conduct any set number of structured or unstructured observations.

You must submit your recommendations using this portal no later than 5:00 PM on Friday, June 13, 2008. The DCPS office of Human Resources will notify all probationary ET-15s of their renewal status

no later than July 11, 2008. Principals should not make notifications.

There was a list of Frequently Asked Questions. In addition to repeating some of the above material, the answers stated that in determining whether a particular teacher was making a positive contribution to the school, the principal should consider "the totality of the ET-15's performance." Principals who chose non-renewal were told they would:

. . . need to write a one-page narrative describing why you've made this decision. Make sure to base your narrative on facts, not conjecture. Consider all of your school-based interactions with the employee when drafting your narrative.

Principals were told they could not use discriminatory reasons as a basis for recommending non-renewal, that there was no limit to the number of non-renewals they could recommend, and that non-renewals could not be appealed.

[Employer witness Jason Kamras, Director of Teacher Human Capital, later testified that there were two buttons on the portal. If the principal clicked "Renewal," that was the end of the process. If the principal clicked "Non-Renewal," he or she had to provide the narrative on the space provided.]

Mr. Moore said that this was an entirely new process. DCPS did not negotiate or inform the Union about it in advance, nor did it copy the Union on the termination letters, which had been its prior practice. The Employer did not tell the teachers the basis for their terminations other than the statement in the letters that it was "based on input from your principal." The principals' narratives were not shared with the teachers. The Union request for them was originally denied but ultimately provided in redacted form.

He said that the Union was aware of two instances in which DCPS reversed probationary teacher terminations. In one, the Employer decided that the recommended non-renewal was based on anti-union discrimination. The other was a case of mistaken identity.

He stated that in the past, if teachers were rated as Satisfactory² and met other requirements -- course work, licensing -- they became permanent. Probationers are in the bargaining unit, they pay the same WTU dues and their dues are deducted from their paychecks by DCPS in the same way as is done with tenured teachers. Their pay and benefits are the same and their terms and conditions of employment are contained in the same CBA. Neither the current CBA nor previous CBAs he was aware of, going back to 1971, limited the rights of probationary teachers.

Mr. Moore testified that the District of Columbia Municipal Regulations (DCMR) cited by the Employer as an authority for the terminations was issued by the Employer without input or negotiation with the Union. The DCMR calls for a performance evaluation system but does not define or describe it; nor does it describe or define a process for terminating teachers while in their probationary periods.

The performance evaluation process in effect in the school year 2007-2008 was known as the Professional Performance Evaluation Process (PPEP).³ Mr. Moore thought it had been in place for some eight years. Each year DCPS issued a new, but substantially similar PPEP. The Employer unilaterally developed the PPEP. The prior system, the Teacher Appraisal Process (TAP), was negotiated with the Union.

As a matter of practice, in some years DCPS required a principal's recommendation for permanent status, in other years, a recommendation was not required. HR would grant tenure after review of the teacher's record. If the teacher was rated Satisfactory under the performance evaluation procedure then in effect, and had met all other requirements, HR would convert the teacher to permanent status. It would do so whether or not the principal had

² The terms " Satisfactory " and "Meets Expectations" were used interchangeably at the hearing and are so used here.

³ A new system, titled IMPACT, was issued in August 2009.

recommended tenure, and even if a principal recommended against tenure, so long as the teacher had a Satisfactory rating and had met all requirements.

Under the PPEP, the principal and teacher agree on objectives to be met in the following academic year. Typically, the principal conducts structured and unstructured observations and holds a mid-year conference with the teacher. The principal gives ratings of "Exceeds Expectations," "Meets Expectations," "Needs Improvement," or "Unsatisfactory." The PPEP applies to both permanent and probationary teachers, but the latter get more observations.

Mr. Moore stated that it was the WTU position that all teachers, including probationers, may grieve a PPEP performance rating if there is a procedural violation. Previously, under TAP, a grievance could challenge the rating given, as well as the procedure.

WTU entered into the record the following examples of grievances by probationers accepted and dealt with by the Employer:

- A 1982 grievance over whether an assistant principal had "violate[d] and/or misinterpret[ed] the Teacher Appraisal Process."
- A 1994 decision by Arbitrator Howard Solomon concerning a WTU claim "that the Employer had violated, misinterpreted, and misapplied the Teacher Appraisal Process (TAP)."⁴
- An August 22, 2007, Notice of Termination to probationary teacher WH, informing him that he was terminated because of an "Unsatisfactory" performance rating. The final paragraph of the Notice states:

You may elect to file a grievance pursuant to Article VI of the Collective Bargaining Agreement by and between the District of Columbia Board of Education and the Washington Teacher's Union.

⁴ *Board of Education of the District of Columbia and Washington Teachers Union, Local 6*, AAA 16 390 00037 94.

- Nine grievances during the years 1982 through 2007 concerning eight terminations and one suspension of probationary teachers. All involved discipline.

No DCPS/WTU contract that Mr. Moore was aware of limited the grievance rights of probationers. In contrast, DCPS and the IBT did have a CBA with such a limit: "Employees who have not completed their one-year probationary period may not grieve the Board's termination of their employment."⁵

In his time as both a teacher and WTU Field Representative, the Employer has never used anything other than the TAP or PPEP for the performance evaluation of probationers or for their termination. He said that some of the probationers involved in this grievance had been evaluated under PPEP in 2007-2008, and some had been rated as, at least, Meets Expectations.

Mr. Moore said that probationary teachers had the same due process rights as tenured teachers. They were entitled to a two-year period to show they were capable of performing satisfactorily. They could be terminated, as could tenured teachers, if judged as Needs Improvement for two consecutive years. They could not be terminated short of those two Needs Improvements, unless their performance was Unsatisfactory. The PPEP requires that both permanent and probationary teachers having difficulty be given a 90-day period in which they be given assistance to improve their performance. The 90-day period can be instituted early in the school year and the teacher may be terminated at the conclusion of the 90 days if there has not been sufficient improvement. If the school year ends before the 90 days expire, the remaining time carries over into the next school year.

On cross-examination, Mr. Moore was shown a copy of a job offer to EA. It is dated September 21, 2007, and says in pertinent part:

Congratulations! The District of Columbia Public Schools (DCPS) is pleased to extend to you an offer of full time employment as a First

⁵ *Agreement Between the District of Columbia Board of Education and Teamsters Locals 639 and 730 Covering Wage Grade Employees, Expiring September 30, 2008.*

Year Probationary Teacher/Service Provider, Grade ET-15.

* * *

This offer is for employment commencing on Monday September 24, 2007 and ending on June 23, 2008 and your current status is probationary. Your continued employment with DCPS for the next school year will be based on a recommendation from your school principal and the satisfactory completion of all teaching requirements. If it is determined that your employment with DCPS will not continue for the next school year, notice will be provided to you. [Underlining in original.]

Mr. Moore said he had seen this letter before, but that the Union did not recognize the language as valid; it violated the Employer's own rules. The Union had not grieved the letters because they were sent to people before they became employees and part of the bargaining unit.

Mr. Moore was the only WTU witness. Mr. Kamras was the sole DCPS witness. He said he started his employment with DCPS in 1996 as a teacher and has held his present position as Director of Teacher Human Capital for three years.

He stated that the purpose of the probationary period is to evaluate the performance of new teachers so as to make a decision about granting tenure. Tenure means the teacher has all the rights under the CBA. To get tenure, a probationer's performance must be rated as Satisfactory and must be recommended by his/her principal.

He helped design the process the Employer used to decide if a probationer should be continued or terminated. The principal's recommendation was seen a necessary component. Those working on the system decided that the best way to get the recommendation was web-based, with the principal clicking either a button that recommended continued employment, or one for non-renewal. In the latter was chosen, the principal would enter a narrative justification for the non-renewal recommendation. He stated that the purpose of the narrative was to get a clear statement for non-renewal that was reasonable and grounded in a compelling reason.

The DCPS Central Office reviewed all of the narratives to assure they contained sufficient justification. In a few cases, the Central Office asked for additional information. Some of those teachers were ultimately terminated but others were not. The same process was used for both first year and second year probationary teachers.

New teachers are given two years in which to obtain a teaching license. A teacher who does not receive a license after two years would be terminated. He said that the September 21, 2007, job offer letter was a standard letter sent to all potential new teachers.

He agreed that this new process had never been used before. It was reviewed for legal sufficiency and with respect to the CBA. He was asked on cross-examination if he had considered that, because the narratives would not be shared and teachers could not challenge what the principals said, that this might encourage principals to embellish what they said, take things out of context, or even lie.

He said he disputed the premise of the question. The narratives had been reviewed by him and by others in his office. Further, DCPS had explored what was legally required and made sure to satisfy those requirements. He did not recall if he, or others in his office, checked the narratives against the performance evaluations given the teachers. He had no recollection of having done so himself.

The DCPS position, based on its interpretation of the DCMR, is that while PPEP should be used for probationary teachers, it was not a requirement. Principals were not required to implement 90-day intervention plans for poor performers or to conduct any set number of structured or unstructured observations. The requirement under the DCMR for receiving or not receiving tenure was the principal's recommendation, and principals could recommend non-renewal even if they had given the teacher a Satisfactory rating under the PPEP.

POSITIONS OF THE PARTIES

WTU

The issue in this arbitration is whether the Employer can terminate probationary teachers in any way other than the agreed-upon and accepted procedures set forth in the CBA and in DCPS practice, i.e., the disciplinary, performance evaluation, and reduction-in-force procedures. The answer is that DCPS is confined to these procedures when it decides to terminate probationary teachers; it may not unilaterally replace them with the secretive and summary process shown here.

DCPS's actions were a violation of the probationary teachers' contractual and due process rights. The Union's abundant evidence demonstrating these violations is almost completely unrebutted. The parties have a long unbroken practice in which the termination of teachers who are in their probationary period has been handled within the existing procedures for separating teachers, subject to review through the grievance procedure.

DCPS has reinterpreted the concept of "the recommendation of the appropriate supervisor" in the Board's Rules in a way that subverts the long-held rights of probationary teachers. These rights are consistent with, and reflective of, a fundamental right of the probationary teachers to due process when being deprived of their jobs, rights which are, in turn, protected by the application of the discipline and performance evaluation procedures. DCPS's admitted abandonment of those procedures constitutes a violation of the parties' collective bargaining agreement and past practice, as well as DCPS rules and regulations and governing law.

The Arbitrator does not have to decide whether individual probationary teachers have a right to grieve their discharge. Arbitrator Michael Wolf has

already established that right in a 2009 decision.⁶ The issue here is whether it is a valid grievance for the Union to contest a new process by which DCPS fired a large group of teachers.

Probationary teachers in DCPS are not "at will" and cannot be fired without reason and without process. In order to terminate a probationary teacher, DCPS must make use of the appropriate process, whether PPEP or the disciplinary process. For over forty years, these are the only procedures the Employer has used to terminate probationary teachers. DCPS's consistent application and use of these procedures to terminate probationary teachers who engage in misconduct or perform poorly creates a classic past practice.

The Employer has the discretion to decide whether and why to terminate a probationary teacher, but the manner in which it acts on that discretion is restrained by its past practice. Accordingly, firing a probationary teacher requires more than a notice that cannot be appealed. Probationary teachers, like other teachers, are entitled to advance notice; an opportunity to respond, via the improvement and 90 day plans in PPEP; a detailed explanation of DCPS's final decision; and the right to appeal. As the record shows, the Union can, and has, grieved violations under both TAP and PPEP.

The secret review made by principals of probationary teachers conduct and/or performance, with no pre- or post-termination due process fell short of serving as an adequate substitute for PPEP or the disciplinary procedure. It was grossly biased against the teachers to whom it was applied, giving them no notice of the standard on which they were being judged or that they were being judged; inadequate notice before the end of the previous school year; no chance to explain or rebut the allegations against them; and certainly no appeal. It was bereft of any indicia of either due process or accuracy, and does

⁶ *DCPS v. WTU*, AAA Case No. 16-390-629-06. "Based on the terms of the collective bargaining agreement and a lengthy and mutually accepted past practice, I conclude that the parties did not intend to bar probationary employees, like the Grievant, from grieving and arbitrating their separations from employment."

not satisfy the parties' standards in their contract and past practice.

DCPS has reinterpreted the Board's Rules on teachers being probationary, and has read "probationary" as synonymous with "at will." It has read "supervisor's recommendation" as describing the extent of the process DCPS is obligated to provide to probationary teachers it is firing. Such interpretations are not true to the intent behind, nor the meaning given by the parties over time, to the Board's Rules. The un rebutted evidence in the record shows that a principal's recommendation is not determinative and is not given the dispositive weight the procedure adopted in the 2007-2008 school year grants it.

In *Cleveland Board of Educ. V. Loudermill*,⁷ the Supreme Court held that public sector employees can have a property interest in their positions that give rise to an entitlement of due process in the form of pre-termination notice and an opportunity to be heard.

It is clear that both first and second year probationary teachers had an expectation of continued employment when they completed the previous school year without notice otherwise. Instead, they were given less than two weeks notice that they were being fired, with no reasons provided. Principals were insulated from having to explain or justify their reasoning and decisions to the teachers, and the Central Office's review did absolutely nothing to confirm anything said by the principals about teachers.

While other issues may exist about the specific standard to be applied to probationary teachers in reviewing their terminations, the fact of what is the appropriate process through which a probationary teacher can be terminated and the exercise of a right to appeal that termination is undisputed.

The limited support offered by DCPS for the notion that probationers have different rights than permanent teachers is contained in the September 21,

⁷ 470 U.S. 532 (1985).

2007, standard job offer letter. DCPS offered no evidence to show how long that letter had been in use, or that it had ever enforced the rule regarding a principal's recommendation.

This grievance should be granted and the Union specifically asks that the remedy in this case include at least the following:

1. A declaration that DCPS follow established procedures when terminating probationary teachers, procedures that are limited to the official performance evaluation procedure, the discipline procedure, RIF procedures, and the grievance and arbitration procedure;
2. Full backpay and a make whole order rescinding the terminations for all of the affected teachers;
3. Offer of reinstatement to all affected teachers that must include:
 - a. Teachers who accept reinstatement will be returned to an appropriate position in the same probationary status held when terminated.
 - b. Teachers who waive reinstatement to receive a lump sum payment in the amount of one year of the average salary for a first and second year teacher and a revision of all personnel records to reflect that the teacher resigned.
 - c. Teachers who do not respond to the offer will have their personnel records corrected to show a resignation. Their back pay and waiver pay to be paid to the Union.

DCPS

The DCMR, specifically, §1307.6, empowers the Employer to terminate probationary teachers who fail to obtain favorable recommendations from their supervisors. Even an employee who has satisfactorily completed the requirements of the probationary period is not guaranteed tenure in the absence of a positive recommendation from the appropriate supervisor.

The principals who supervised the teachers involved in this grievance recommended against granting them tenure. As a result, the teachers could not

obtain tenure regardless of whether or not they had fulfilled the other requirements of the probationary period. This rule most clearly applies to the probationary employees who had completed their second school year (of which there are approximately 22). They had inarguably reached the end of the probationary period yet received negative recommendations from their respective supervisors. As a result, a tenure appointment was not possible under the plain language of the rules, and, as the employees did not have tenure in any prior positions, they had to be terminated pursuant to §1307.6.

Section 1307.6 also applied to employees who had only completed their first school year. These employees were deemed by their supervisors to be ineffective or worse. They, too, failed to obtain one of the basic requirements for acquiring tenure. DCPS presented evidence that the principals had a reasonable basis for making negative recommendations that blocked further efforts to seek tenure appointments.

The DCPS Central Office reviewed the narratives. In some cases, it requested clarification or additional information from the principal. If the Central Office ultimately determined that the narrative was insufficient to warrant discharge, the teacher was continued.

The Union cannot take the position that the new system for identifying unsuitable probationary teachers is a violation of past practice. As Mr. Moore testified, in some years DCPS required written recommendations from principals, in some years not. HR would review the record of the probationary teacher, determine if they were rated "Satisfactory" and had completed all requirements. If they had, HR would convert the teachers to permanent status. Even if the principal, although having rated the teacher as "Satisfactory," would not provide a recommendation, HR would convert the teacher to permanent if all other requirements had been met. The Employer did not violate past practice because there was no past practice to violate.

The standard letter offering employment to prospective teachers contained a

notification of the need for a positive recommendation from their principal after the first year in order to continue employment. The Union never demanded bargaining or filed a grievance regarding the policy statement made in the offer letter, even though the requirement of a recommendation is inarguably a term of employment.

The decision to terminate probationary teachers in their first or second year based on a negative recommendation is clearly authorized by the DCMR and the offer letter. Neither the DCMR, the letter offering employment, nor Article XVI of the CBA, tie formal employment evaluation - via the PPEP or otherwise -- to supervisory recommendations regarding whether or not a probationary employee may be terminated.

Article XVI, §E, of the CBA states that termination may be recommended if an employee receives a performance evaluation of "Needs Improvement" or below for two consecutive years and the employee does not seem likely to improve, but the Article (and the entire CBA) is silent as to what other criteria may be considered when a principal makes a decision whether or not to recommend a probationary teacher for continued employment. There is no language limiting a supervisor's discretion to only consider PPEP performance evaluations when making decisions pursuant to the policies established in the DCMR and established by the offer letter. As a result, the issue is not relevant to this case.

Arbitrator Wolf's 2009 decision is distinguishable and, thus, inapposite. A substantial portion of that decision discussed whether or not probationary teachers were "at-will" employees. In the instant case, DCPS does not argue that probationary employees are "at-will," such that they may be discharged without the need to demonstrate cause. Rather, DCPS contends that rights of probationary employees to continued employment are restricted by the requirement for positive recommendations from supervisors.

Employees can have their rights restricted by law and unchallenged em-

ployer policy. Here, the DCMR provides an overt restriction on the manner in which probationary teachers obtain tenure. Even if Arbitrator Wolf's award is considered, it explicitly does not preclude an arbitrator from determining that a different scope of rights applies to the termination of probationary teachers for reasons other than unsatisfactory performance. The policy established in the offer letter constitutes a further, similar, restriction on the rights of probationary teachers to continued employment.

These restrictions are very different from the near absence of rights of an "at-will" employee. The restrictions in DCMR §1307.6 and the offer letter do not provide for the removal of a probationary teacher during the school year. They do not constitute discipline or an allegation of misconduct. They simply require that, after each year of the probation period, a probationary teacher must receive a positive recommendation from his or her supervisor to continue working for DCPS.

The WTU has styled this grievance as a "class action." However, it is clear from the contractual grievance procedure that the parties did not intend for the Union to be able to proceed on a class-action basis. There no specific mention of class action grievances, but Article VI.C.1 mandates that:

Any grievance raised by the Union on behalf of the employee must identify the employee. The Union may not process a grievance on behalf of an employee without that employee's consent.

Requiring the identification and consent of employees precludes a class action grievance, which is by definition a claim prosecuted on behalf of unnamed grievants. The language of the collective bargaining agreement therefore establishes that the parties did not agree that grievances could be brought on a class basis.

Further, Supreme Court precedent prevents this matter from proceeding as class action. In *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. _ (2010), the Court ruled that arbitration may only proceed on a class basis if it

is clear that the parties intended to permit class actions. Whether to proceed as a class action is not a mere procedural issue left to the discretion of the arbitrator; it must be part of the parties' agreement.

For the various reasons stated above, this grievance should be dismissed.

DISCUSSION AND FINDINGS

Both parties have cited Arbitrator Wolf's 2009 decision. It was a case of first impression and it is a suitable place to begin.

The grievant in his case was a terminated probationary ET-15 literacy coach, not a probationary teacher.⁸ The Employer had argued that probationers were at-will employees; they "could be separated for any reason or no reason as long as the separation was not arbitrary, capricious or discriminatory." As a probationer, the employee was not a member of the ET bargaining unit and did not have access to the grievance and arbitration procedures.

Arbitrator Wolf ruled otherwise. He found that the employee was a member of the bargaining unit and that both the PPEP and the CBA applied to him.

With respect to the grievance that is before me, the following of Arbitrator Wolf's findings are of particular interest:

1. Probationary teachers are not at-will employees. They may grieve a termination under the CBA grievance procedure and the grievance may be taken to arbitration. [This conclusion was based on much the same evidence as was presented to me: the CBA does not exclude terminated probationary teachers from the grievance process, in contrast to the IBT contract; "there has been a sustained practice of permitting probationary employees to access the contractual grievance process"; and prior termination notices to probationary employees specifically notified them that they could "file a grievance pursuant to Article VI" of the DCPS/WTU contract.]
2. Terminated probationary teachers do not have the same "just cause"

⁸ The decision applies equally to probationary teachers.

rights as permanent teachers. This conclusion is based on arbitral common law definitions of "probationary employee"; the treatment of probationary employees in the Federal Service; and the treatment of probationary employees under title 5 of the DCMR, which places permanent and probationary employees on different footings.

3. The standard he used in his review of the employee's termination was that of "arbitrary, capricious, or discriminatory."

In the brief it submitted in the present case, the Employer acknowledged two important points:

Probationary employees are not 'at-will.' They may not be discharged without the need to demonstrate cause.

"The restrictions in DCMR §1307.6 and the offer letter [September 21, 2007] do not provide for the removal of a probationary teacher during the school year. . . . They simply require that, after each year of the probation period, a probationary teacher must receive a positive recommendation from his or her supervisor to continue working for DCPS."

After due consideration of the total record placed before me, I find that DCPS has the right to insist on a positive recommendation from a supervisor (i.e., principal) if a probationary teacher, either in the first year or second year, is to be retained. That is in keeping with DCMR §1307.6 and, as I mention below, the 2007 job offer letter. The language of DCMR §1307.6 makes it clear that there are two requirements that must be met if a probationer's employment is to be continued: 1) the satisfactory completion of all probationary requirements, and 2) the recommendation of the appropriate supervisor.

This leaves the question of the role of the PPEP in the probationary period. Article XVI, §§B and E, make it clear that the parties had the PPEP in mind when they negotiated the CBA. Section B explicitly refers to the PPEP and §E repeats and expands on the PPEP discussion of the treatment to be given probationers who are rated "Needs Improvement." With regard to their termination it says:

If the teacher receives an overall rating of "Needs Improvement" for two (2) consecutive years, and there is no significant improvement or reasonable expectation that skillful performance on all standards can be achieved, termination of employment may be recommended.

That does not establish, however, that this is the only basis on which a probationer may be terminated.

The concept of probationary status is that it is a trial period that new employees must successfully complete in order to attain permanent status. The main distinction between a probationer and a permanent employee is in the right to continued employment. Permanent employees have a firmer hold on their jobs than do probationers. Because probation is a trial period, it is almost universally recognized in the collective bargaining world that a probationary employee may be terminated more easily, and with lesser appeal rights, than a permanent employee.

That concept applies here. Probationary teachers do not have the full protections that permanent teachers have under the CBA or the PPEP. I find that, as the Employer's brief contends, DCPS could require that probationary teachers must receive a positive recommendation from their supervisors after each year of the probationary period.

In that regard, I note that the September 21, 2007, job offer letter clearly set forth that "continued employment with DCPS for the next school year *will be based on a recommendation from your school principal* and the Satisfactory completion of all teaching requirements." [My *italics*.] This was another way of saying what §1307.6 says.

The letter went to candidates who would become first year teachers in school year 2007-2008. WTU knew of the letter. Mr. Moore said that the Union did not grieve the letter because it went to people who were not yet employees and thus not in the bargaining unit. That, however, ignores the fact that the letter established a term and condition of employment that DCPS asserted

would govern these teachers during their employment as bargaining unit members.

The record does not show if anything similar was sent to the affected second year teachers, but they, too, were subject to the §1307.6 requirement for a principal's recommendation. Mr. Moore credibly testified that, many times, DCPS did not require the principal's recommendation, or even acted against it. To that extent, DCPS violated its own rule, but that did not make invalid this unilaterally established rule.

There is not a binding past practice with respect to PPEP. Although it is mentioned in the CBA, the PPEP, like the DCMR, is a unilateral document. Indeed, the PPEP is required to be unilateral by the U.S. Congress.⁹

In July 2008, DCPS informed approximately 80 probationary teachers that their employment was being terminated "based on input from your principal and your status as a probationary employee." That is the extent of what they were told.

I have randomly reviewed the redacted narratives. As best I can tell, there are 75. I looked at every tenth narrative plus number 75. Below are excerpts from each:

#10 - "[She] failed on a daily basis to attend collaborative meetings with her colleagues." "[She] violated professional protocols in communication with the principal, CTE Director [blank] and with the [school] faculty often sending mass emails rebuking her supervisors to the entire staff."

#20 - "This staff member came to us in November 2007 from [another school system]. During her tenure at the school, she had poor classroom management skills and was AWOL from the school since May 5, 2008.

#30 - "She has extremely poor classroom management skills. . . . Les-

⁹ The first sentence of Article XVI, §A, states "U.S. Congressional legislation has determined that the teacher evaluation instrument shall be developed by the District of Columbia Public Schools (DCPS)."

son plans are not always followed. She does not listen or adhere to suggestions she is given."

#40 - "His rude and aggressive demeanor toward his paraprofessional compelled Dr. [blank] to augment his class with two paraprofessionals to facilitate teaching and learning." "[He] failed to conduct a second classroom observation after being directed by Dr. [blank] to do so."

#50 - "His lesson plans are always sketchy or non-existent. "He has had an excessive failure rate at every marking period and has not provided any interventions for his struggling students."

#60 - "[She] has received a Needs Improvement rating for the year. She has excessive absences and latenesses, including 24 tardies, and 20 days of absences AFTER returning from two months of sick leave for an injury. . . . After the initial sick leave, most of these absences were call-ins on Mondays and Fridays."

#70 - "I have given [him] warnings about playing DVD movies during class time, playing religious Gospel songs during class time, and using inappropriate language with students." Students reported "he told them to go to H-E-L-L (spelled out). "[He] said he didn't see anything wrong with it because the word hell is in the bible."

#75 - "After many adjustments to [his] teaching load (movement of difficult students to other classes), coaching by the numeracy coach and the helping teacher, [he] was able to have better control of his classes. However, as a veteran teacher who has taught in [other schools], he continues to have problems managing and monitoring his students learning and following through on his professional responsibilities."

This sample shows criticisms that are performance related, although others are clearly matters of discipline. Be that as it may, I will assume for the sake of discussion that these eight narratives are representative of the total and that the criticisms therein, if valid, would warrant termination of a probationary teacher.¹⁰

Even with that assumption, the Employer's actions cannot stand. The issue posed in this dispute is whether DCPS violated the CBA by the manner in

¹⁰ I emphasize that this is for the sake of discussion; I make no such finding. I need not go further into this question because the validity of the narratives is not the issue before me.

which it terminated the probationary teachers. To get right to the point, the answer is "yes."

The glaring and fatal flaw in the process that DCPS used is that teachers were never told why they were terminated, other than that it was based on the input from their principals. They were not told what that input was. They had no opportunity to provide their side of the story.

In its brief, the WTU cited *Loudermill*, and urged that I find that the teachers' constitutional right to due process was violated. I do not need to go there. The Employer has acknowledged that the teachers were are not 'at-will' employees and that "cause" had to be demonstrated if they were to be fired. The CBA speaks of "just cause." Whichever term is used, neither "cause" nor "just cause"¹¹ means the same for a probationer as it does for a permanent employee, but it surely means more than merely informing employees they have been separated as a result of unspecified input from their supervisors.

Based on the record before me, there can be no doubt that a probationer has the right to grieve a termination action under the CBA, and that the Union may take that grievance to arbitration. That right has been shown by DCPS's long-standing acceptance of such grievances; the non-exclusion language in the WTU contract compared to that in the IBT contract, which does prohibit the use of the grievance procedure by probationary employees to contest termination; and prior termination notices to probationary employees telling them that they could "file a grievance pursuant to Article VI" of the DCPS/WTU contract."

If grievance and arbitration rights are to be meaningful, the Employer must give a substantive rationale for the terminations. The teachers must be told what their alleged shortcomings are and be given the opportunity to answer, to explain or refute what has been said about them. The process used in this

¹¹ Unless defined otherwise, I regard the two terms as synonymous.

case was so devoid of due process as to be arbitrary and capricious. It nullified the right of the probationers to an effective use of the grievance and arbitration procedures.

Arbitrator Wolf used the test of "arbitrary, capricious, or discriminatory" when he considered whether discharge of the grievant in his case should stand. However, he explicitly stated that his decision did not establish a general standard of review to be used when considering the discharge of probationary teachers.

Notwithstanding this, it is my view that "arbitrary, capricious, or discriminatory" is the appropriate standard for such cases. It balances the need of the Employer for flexibility in making decisions about the retention or termination of probationary teachers, while at the same time providing the teachers with a probationer-appropriate level of protection. If the review of the termination of a probationary teacher is found to be arbitrary, capricious, or discriminatory, the termination should not stand. If not found arbitrary, capricious, or discriminatory, the action should be upheld.

Finally, there is the matter of a "class action" grievance. The definition I have for "class action" is:

A class action provides a means by which, where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class. . . .¹²

Although Mr. Moore's August 15, 2008, letter to Chancellor Rhee stated that he was filing a "class action," I regard that phrase as something of a misnomer. I would use the term "group grievance." The WTU was filing a grievance on behalf of a specific group of probationary teachers, all members of a bargaining unit for which the WTU is the exclusive representative. I, and I am

¹² Black's Law Dictionary, Abridged 5th Ed., 1983.

sure many other arbitrators, have commonly encountered group grievances filed by unions in both the private and the public sectors. It is my experience that many union-filed grievances are on behalf of a group of employees.

The Supreme Court decision cited by DCPS, *Stolt-Nielsen S. A. v. Animal-Feeds Int'l Corp.*, is not pertinent. It did not involve a union-represented group of employees or a CBA.

The CBA (Article VI, Grievance and Arbitration) says nothing, one way or the other, about class actions. It does, however, contemplate group grievances. Step 3 of the grievance procedure says that the written "Statement of grievance" shall include "The name(s) of the employee(s) involved." Also, item 7 of Step 4 refers to grievances that involve "a matter of general application."

However, the grievance procedure also states that "Any grievance raised by the Union on behalf of an employee must identify the employee." The September 8, 2008, grievance did not name employees.

That was not a fatal flaw under the circumstances. Mr. Moore's letter said that the grievance was on behalf of "probationary teachers who were terminated following the end of the 2007/2008 school year." There should have been no doubt on the part of DCPS about who it was that was included in the grievance. In addition, Mr. Moore testified, without dispute, that the Employer rebuffed the Union's initial request for information about who it was that had been terminated.

AWARD

This grievance is granted. The remedy shall be as follows:

1. DCPS shall make a 60-day good-faith effort to locate terminated teachers. It shall offer them reinstatement to an appropriate position, effective to the date of termination. All will be made whole, minus any appropriate deductions.
2. Teachers who accept reinstatement shall be returned to the probationary status they held prior to termination. The Employer may make

a new determination, by means of an appropriate process, if a reinstated teacher should be continued or terminated.

3. Teachers who waive reinstatement shall have their records changed to show that they resigned.

4. Teachers who cannot be located, or who do not respond within the 60-day window, shall have their records changed to show they resigned. No other action is required.

The Arbitrator will retain jurisdiction for 30 days past the 60 day window for the sole purpose of resolving any disputes that may arise out of the implementation of this Award. This retention of jurisdiction does not extend to new grievances from reinstated teachers.



Charles Feigenbaum

February 7, 2011

Date