THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MARLA SUE ZONGKER,	)	OEA Matter No. 2401-0174-10
Employee	)	
	)	Date of Issuance: August 2, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Marla Sue Zongker ("Employee") worked as an Elementary Teacher with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that she was being separated from her position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was November 2, 2009.[1]

Employee challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 28, 2009. She argued that the RIF process was flawed.[2] Employee contended that when Agency conducted the RIF, it failed to consider her qualifications, seniority, experience, performance evaluations, and contributions. As a result, she

[1] *Petition for Appeal*, p. 14 (November 28, 2009).
[2] Employee believed the competitive level procedures for the RIF were changed from the past. She stated that less weight was given to seniority and performance and more weight was given to school needs. She believed this change ignored her due process rights. *Id.*, 4-5.

requested reinstatement to her position with a salary step increase.[3]

In its answer to Employee's Petition for Appeal, Agency explained that it conducted the RIF pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It argued that pursuant to 5 DCMR § 1501, Lafayette Elementary School ("Lafayette") was determined to be the competitive area, and under 5 DCMR § 1502, the Elementary Teacher position was determined to be the competitive level subject to the RIF. Accordingly, Employee was provided one round of lateral competition where the principal rated each employee through the use of Competitive Level Documentation Forms ("CLDF"), as defined in 5 DCMR § 1503.2.[4] After discovering that Employee was ranked the lowest in her competitive level, Agency provided her a written, thirty-day notice that her position was being eliminated. Therefore, it believed the RIF action was proper.[5]

Prior to issuing the Initial Decision, the OEA Administrative Judge ("AJ") ordered the parties to submit briefs addressing whether Agency followed the District's laws when it conducted the RIF.[6] In its brief, Agency reiterated its position and submitted that OEA is limited to determining whether it followed D.C. Official Code § 1-624.02, 5 DCMR §§ 1503 and 1506.[7] In response to Agency's brief, Employee contended that Agency did not follow the proper RIF procedures because it did not provide her with one round of lateral competition and failed to consider her for priority reemployment.[8]

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[3] *Id.*, 4-5 and 8-12.
[4] Agency explained that its Office of Human Resources computed Employee's length of service, including credit for District residency, veteran's preference, and any prior outstanding performance rating when it conducted the RIF.
[5] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal (*December 30, 2009).
[6] *Order Requesting Briefs* (February 6, 2012).
[7] *District of Columbia Public Schools' Response to Brief of Employee in Support of Appeal*, p. 8 (February 28, 2012).
[8] Employee objected to the CLDF, explaining that Agency failed to properly complete the competitive level ranking score card in comparison to other employees within her competitive level. Employee, again, alleged that Agency did not consider her qualifications, including advanced degrees, certifications, continuing graduate level courses, and her implementation of literacy programs. *Employee Marla Zongker's Response to District of Columbia Public*

The Initial Decision was issued on May 25, 2012. The AJ found that although the RIF was authorized pursuant to D.C. Official Code § 1-624.02**,** D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF.[9] As a result, she ruled that § 1-624.08 limited her review of the appeal to determining whether Employee received a written, thirty-day notice prior to the effective date of her separation and if Agency provided one round of lateral competition within her competitive level.[10] The AJ found that Employee was afforded one round of lateral competition and explained that Agency considered all of the factors enumerated in DCMR § 1503.2 when it conducted the RIF.[11] She also found that Agency provided Employee with the required thirty-day notice. Accordingly, the RIF action was upheld.[12]

On June 25, 2012, Employee filed a Petition for Review with the OEA Board. She avers that the Initial Decision did not address all issues of law and fact raised in her appeal. She states that from 2001 to 2009, her evaluations at previous schools within Agency were "Exceeds Expectations," and therefore, she should have been able to utilize this rating for three years.[13] She, again, highlights the relevant contributions she made to Agency, despite its failure to consider her for priority reemployment subsequent to the RIF.[14] Therefore, she requests reinstatement with back-pay.[15]

Schools' Brief, p. 6-9 (March 20, 2012).

[9] The AJ cited the District of Columbia Court of Appeals' position in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools,* 960 A.2d 1123 (D.C. 2009) and reasoned that D.C. Official Code § 1-624.08 or the "Abolishment Act" was the applicable statute because the RIF was conducted for budgetary reasons, and the statute's 'notwithstanding' language is used to override conflicting provisions of any other section. *Initial Decision,* p. 2-4 (May 25, 2012).

[10] Although the AJ found that § 1-624.08 limited her review of the appeal, she considered Employee's argument regarding priority reemployment rights under § 1-624.02 and stated that there was no evidence to suggest that Employee was not given priority reemployment consideration. *Id.,* 9-10.

[11] The AJ noted that the principal had discretion to rank Employee when completing the CLDF.

[12] *Initial Decision* (May 25, 2012).

[13] *Petition for Review* (June 25, 2012).

[14] Employee, in an attachment to her Petition for Review, also objects to the principal's statements in her CLDF. She believes that the principal was annoyed by her need for a handicapped accessible classroom. She states that she was discriminated against based in her age.

[15] *Petition for Review*, p. 5 (June 25, 2012).

In *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883 (D.C. 1998), the D.C. Court of Appeals held that OEA's authority regarding RIF matters is narrowly prescribed, and it may not determine whether the RIF was bona fide or violated any law, other than the RIF regulations. According to D.C. Official Code § 1-624.08(d) and (e), OEA is tasked with determining if Agency afforded Employee one round of lateral competition within her competitive level and if they provided a thirty-day notice. Recently, the Superior Court of the District of Columbia held that "implicit in the authority to determine whether an employee has been given one round of lateral competition is the jurisdiction to decide whether an employee's CLDF is supported by substantial evidence."[16]

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[17] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. After reviewing the record, this Board believes that the CLDF and the AJ's assessment of this matter were based on substantial evidence.[18]

Employee offers nothing more than conjecture about Agency's scoring her CLDF. She argued that Agency failed to properly complete her score card when conducting the RIF.

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[16] *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA), p. 4 (D.C. Super. Ct. March 14, 2013).

[17] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

[18] The AJ found that Employee was afforded one round of lateral competition and provided a detailed assessment of all the factors in DCMR § 1503.2 that Agency used when it conducted the RIF. A retention register was provided to show Employee's ranking after one round of lateral competition. Agency also provided Employee the required thirty-day notice. She received notice on October 2, 2009, and she was effectively RIFed on November 2, 2009. Additionally, she considered Employee's argument regarding her reemployment rights. *District of Columbia Public Schools' Answer to Employee's Petition for Appeal (*December 30, 2009); *District of Columbia Public Schools' Response to Brief of Employee in Support of Appeal* (February 28, 2012); and *Initial Decision* (May 25, 2012).

However, she neglected to address any of the specific allegations made against her on her CLDF. The Superior Court in *Sligh* held that when the record contains no evidence that would raise a material issue as to the veracity of the CLDF, employee's contentions amount to mere allegations. Moreover, the court in *Onuche David Shaibu v. D.C. Public Schools,* 2012 CA 003606 P(MPA)(D.C. Super. Ct. January 29, 2013) held that if an employee offers evidence that directly contradicts any of the factual basis for the CLDF, then OEA must conduct a hearing to address the material fact in question.[19] However, Employee offered no evidence that contradicts the assessments made on her CLDF.

As for Employee's argument regarding her previous ratings of "exceeds expectations," the *Shaibu* court held that "the fact that [an employee] got better evaluations from prior principals . . . does not mean that [their] evaluation was not supported by substantial evidence . . . . It means only that different supervisors reached different conclusions about [employee's] performance." The Court further provided that unless an employee can show that each supervisor based their evaluation on materially identical information, then different supervisors may disagree about an employee's performance and reach different opinions that may be supported by substantial evidence.[20] Consequently, Employee's past ratings do not mean that the principal's assessment at Lafayette was wrong or unsupported by substantial evidence. As the AJ properly held, school principals have total discretion to rank their teachers, and performance evaluations, by their nature, are subjective and individualized.[21] Thus, the principal could rate Employee as they saw fit. Because Employee failed to provide any evidence that the CLDF or the AJ's decision was not based on substantial evidence, we must DENY her Petition for

[19] *Id.* at 6.
[20] *Id.,* 8-9.
[21] *Initial Decision,* p. 8-9 (May 25, 2012) (quoting *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia,* 109 F.3d 774 (D.C. Cir. 1997)).

Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

_____
William Persina, Chair

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Sheree L. Price, Vice Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.