THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DOMINICK STEWART,	)	OEA Matter No. 2401-0214-09
Employee	)	
	)	Date of Issuance: June 4, 2012
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Dominick Stewart ("Employee") worked as a Custodian with the D.C. Public Schools ("Agency"). On July 28, 2009, Agency informed Employee that his position was being abolished pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was August 28, 2009.[1]

Employee challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 19, 2009.[2] He argued that the RIF was unjust because it did not consider his eight years of service with the government. He claimed that there were other

[1] *Petition for Appeal*, p. 6-7 (August 19, 2009).

[2] Employee stated in his Petition for Appeal that he initially contacted his union in an attempt to file a grievance pursuant to the Collective Bargaining Agreement that existed between Agency and Union. As a result of Employee's contact with union, OEA Administrative Judge ("AJ") determined that there was a jurisdictional issue that had to be decided before OEA could adjudicate the matter. The AJ issued an order directing Employee to clarify whether there was a formal grievance filed with the union. *Order Directing Employee to Clarify Compliance*, p. 1 (November 12, 2010). After receiving Employee's response to the Order, the OEA Administrative Judge determined that Employee's initial contact with Union did not constitute a formal filing of a grievance; the meeting was a consultation on the appeals procedure.

employees with less seniority whose positions were not eliminated, and he argued that Agency was hiring new employees. Ultimately, Employee believed that the RIF was a pretext for Agency to terminate him without following the disciplinary process.[3] Therefore, he requested to be reinstated and provided back pay and benefits.[4]

Agency asserted that the RIF was due to reorganization, budgetary constraints, and school facility closures. It explained that the reduction of school facilities forced it to reduce the number of school-based, non-instructional staff.[5] Accordingly, it conducted a RIF and removed Employee.[6]

Agency also stated that when it abolished Employee's position, it followed the RIF procedures defined in Title 5, District of Columbia Municipal Regulations ("DCMR") § 1503.1 *et al*. It provided that a retention register was established which included custodial staff on the RW pay plan; supervisory custodial positions; custodial foreman positions on the SW pay plan; and non-instructional staff on the DS or EG pay plan grades 4, 5, 6 and 7. After establishing competitive levels, Agency provided one round of lateral competition by weighing each competitive factor defined in Title 5, DCMR § 1503.2.[7] Finally, the competitive factors were given a numerical score on the Competitive Level Documentation Form ("CLDF"). After

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[3] This argument was raised during a status conference and was later addressed by the AJ in his Initial Decision. *See Initial Decision,* p. 2 (December 10, 2010).

[4] *Petition for Appeal,* p. 3-5 (August 19, 2009).

[5] Agency noted that twenty-three schools were closed after the 2007-08 school year, and an additional three were closed after the 2008-09 school year. To ensure that its resources were centered on educating students, it eliminated non-instructional staff members. *Agency's Answer to Employee's Petition for Appeal,* p. 1 (October 1, 2009).

[6] Kelly Miller Elementary was defined as a competitive area because the amount of school-based, non-instructional employees for the 2008-09 school year exceeded the number of positions available for the 2009-10 school year. *Agency's Answer to Employee's Petition for Appeal* at p. 2-3.

[7] The competitive factors defined in Title 5, DCMR § 1503.2 were given the following weight:

50% towards relevant significant relevant contributions, accomplishments, or performance;
30% toward relevant supplemental professional experiences as demonstrated on the job;
10% towards office or school needs; and
10% towards length of service.

discovering that Employee had the lowest score on his CLDF, Agency abolished his position.[8]

On December 10, 2010, the AJ issued his Initial Decision. After careful review of the evidence of record, he found that Agency complied with the RIF procedures found in Title 5, DCMR § 1503.1 *et al*. In addition, the AJ held that pursuant to D.C. Official Code § 1-624.08, OEA would consider if Employee received a thirty-day written notice prior to his separation, and if he received one round of lateral competition. Since Employee received both, the AJ ruled that Agency complied with the requirements.[9]

As for Employee's claim that the RIF was a pretext, the AJ found that Employee did not supplement this claim with specifics regarding the underlying basis for the allegation. He went on to reason that OEA has held that a claim of pretext would not be considered "unless it invoke[d] a challenge to the legal requirements of conducting the RIF." Moreover, the AJ noted that the D.C. Court of Appeals determined that OEA's authority over RIF matters are narrowly prescribed. As a result of these findings, the AJ upheld Agency's action of abolishing Employee's position.[10]

On January 11, 2011, Employee filed a Petition for Review with the OEA Board. He challenged the AJ's ruling by asserting that the documents provided by Agency during discovery were not in his employment records when he requested them from Human Resources. Employee claimed that he did not receive a signed CLDF. He also argued that he did not receive a copy of the retention register or an affidavit statement regarding how the CLDFs were prepared. Additionally, Employee contended that he did not receive the required thirty-day written notice

[8] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal* (October 1, 2009).
[9] *Initial Decision*, p. 6 (December 10, 2010).
[10] *Id.*

prior to his separation. Finally, Employee claimed that a grievance was filed on his behalf with Agency.[11]

Employee's first argument was that the documents provided by Agency were not included in his employment records provided by Human Resources. However, he offers no evidence to support these claims. Similarly, he offered no arguments pertaining to inaccuracies with or alterations of the documents that may have prejudiced his case. During the course of the proceedings before OEA, Agency provided signed copies of all of the documents in question. [12] The last document was submitted by Agency on November 19, 2010. The Initial Decision was issued on December 10, 2010. Hence, Employee had nearly a month to take issue with these documents and raise any legal arguments or objections before the AJ issued his decision. He did not. Therefore, in accordance with OEA Rule 634.4, this argument is considered waived by this Board.[13]

Employee also claimed that he did not receive thirty days' notice of the RIF action. Agency contends that Employee did receive the notice and was properly RIFed in accordance with Title 5, § 1503. This regulation provides the following:

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[11] *Employee's Petition for Review* (January 11, 2011).

[12] A signed copy of Employee's final notice and instructions on how to conduct the RIF actions from Chancellor Michelle Rhee. The document was dated July 28, 2009, and submitted to the AJ on October 1, 2009. It should be noted that a copy of this document was submitted by Employee as an attachment to his Petition for Appeal. Agency also provided copies of the retention register and a signed CDLF. The documents were dated on June 22, 2009, and also submitted by Agency on October 1, 2009. Additionally, a signed affidavit from the Special Assistant to the Chancellor with specific instructions of how the CDLFs were computed and another copy of the final retention register were filed on November 19, 2010. Agency also provided CLDFs for all employees within Employee's competitive level, along with the retention register. It is reasonable that this information may not have been in Employee's personnel file.

[13] OEA Rule 634.4 provides that "any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." *Calvin Braithwaite v. D.C. Public Schools,* OEA Matter No. 2401-0159-04, *Opinion and Order on Petition for Review* (September 3, 2008); *Collins Thompson v. D.C. Fire and EMS,* OEA Matter No. 1601-0219-04, *Opinion and Order on Petition for Review* (November 13, 2008); and *Beverly Gurara v. Department of Transportation,* OEA Matter No. 1601-0080-09, *Opinion and Order on Petition for Review* (December 12, 2011).

1503.1 An employee who encumbers a position which is abolished shall be separated in accordance with this chapter notwithstanding date of hire or prior status in any other position.

1503.2 If a decision must be made between employees in the same competitive area and competitive level, the following factors, in support of the purposes, programs, and needs of the organizational unit comprising the competitive area, with respect to each employee, shall be considered in determining which position shall be abolished:

(a) Significant relevant contributions, accomplishments, or performance;
(b) Relevant supplemental professional experiences as demonstrated on the job;
(c) Office or school needs, including: curriculum specialized education, degrees, licenses or areas of expertise; and
(d) Length of service.

1503.3 When an entire competitive level within a competitive area is eliminated, these factors need not be considered in determining which positions will be abolished.

Title 5, § 1506 goes on to provide that type of notice required for the RIFs and states that:

1506.1 An employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The specific notice shall state specifically what action is to be taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights.

1506.2 An employee may also be given a written general notice prior to a separation due to a reduction-in-force but such general notice is not required. The general notice may be used when it is not yet determined what individual action, if any, will be taken.

Similarly D.C. Official Code 1-624.08(d), (e), and (f) establishes the circumstances under which the OEA may hear RIFs on appeal.

(d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited

> to positions in the employee's competitive level.
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.
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> (f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:
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> > (1) An employee may file a complaint contesting a determination or separation pursuant to subchapter XV of this chapter or § 2-1403.03; and
> >
> > (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied."

Therefore, in accordance with Title 5, § 1506 and D.C. Official Code § 1-624.08, this Office is authorized to review RIF cases where an employee claims the agency did not provide one round of lateral competition, or where an employee was not given a 30-day written notice prior to their separation. In his Petition for Review, Employee does not assert that Agency failed to provide one round of lateral competition. He does contend that he was not provided with written notice 30 days prior to his effective RIF date. However, he failed to raise this issue before the AJ. Thus, in accordance with OEA Rule 634.4, this Board will not consider this argument because it could have been raised before the AJ but was not.

Employee's final argument is that he believed a grievance was filed before Agency. D.C. Official Code § 1-616.52 (e) and (f) provides that:

> (e) Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to § 1-606.03, or the negotiated grievance procedure, but not both.

> (f) An employee shall be deemed to have exercised their option pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure at such time as the employee timely files an appeal under this section or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, whichever event occurs first.

Therefore, Employee had the option to either grieve his termination through the negotiated grievance procedure or appeal to OEA, but he could not do both. Hence, we must determine which appeal route Employee elected to use first as it pertains to his appeal options. OEA held in *Robert Mayfield v. D.C. Department of Health,* OEA Matter No. J-0105-08, *Opinion and Order on Petition for Review* (April 5, 2010), that this is of particular importance because if an employee chooses to use the negotiated grievance process, then OEA would lack jurisdiction to consider the matter. Counsels for both parties agreed that although Employee consulted with his union, he did not file a grievance, but instead filed an appeal with OEA. Because Employee elected to file an appeal with OEA, he is prevented from utilizing the grievance procedure.

Employee raised two arguments in his Petition for Review that he failed to raise before the AJ on appeal. Accordingly, the Board did not address those claims. Agency provided Employee with thirty days' notice and one round of lateral competition. Despite Employee's misgivings, he elected to file an appeal before OEA instead of a grievance with the union. Therefore, Employee's Petition for Review is denied.

ORDER

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

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

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.