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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
ARVELL BROOKS	)	OEA Matter No. 2401-0120-04
Employee	)	
	)	
v.	)	Date of Issuance: September 29, 2006
	)	
	)	Sheryl Sears, Esq.
	)	Administrative Judge
D.C. PUBLIC SCHOOLS	)	
Agency	)	
_____	)	

Mark J. Murphy, Esq., Employee Representative  
Harriet Segar, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION

Arvell Brooks (“Employee”) was a custodian at Charles Young Elementary School when Agency abolished one custodian position pursuant to a reduction in force (RIF). In order to identify the employee to be removed, the principal, Robert Johnson, conducted an evaluation of Employee and the other custodian using the standards embodied in a Competitive Level Documentation Form (CLDF). Employee contends that the principal failed to evaluate him properly and, as a result, incorrectly ranked and wrongly separated him from service on June 30, 2004.

Employee filed a timely petition for appeal with the Office of Employee Appeals (“the Office”). On May 11, 2005, the parties convened for a pre-hearing conference. An evidentiary hearing began on November 4, 2005 and concluded on April 5, 2006. This decision is based upon the record of documentary and testimonial evidence and the parties’ oral and written arguments. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606-03 (2001).

### ISSUE

Whether Employee was denied a lawful round of lateral competition.

### BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” Accordingly, Agency has the burden of proving that officials acted properly in evaluating, ranking and separating Employee.

### FINDINGS OF FACT AND ANALYSIS AND CONCLUSIONS

Section 1503 of Agency’s RIF regulations provide as follows:

#### 1503 REDUCTION IN FORCE PROCEDURES

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, and/or areas of expertise; and
- (d) Length of service.

43 D.C. Reg. 5266.

Employee contends that he did not receive a fair round of lateral competition in that Principal Johnson did not give him enough points to reflect the true value of his work and

credentials. Johnson testified that in order to evaluate the employees, he developed a “rubric” by which he specified the kinds of achievements and activities for which points would be assigned in each category. He divided the total number of points in each category to establish a value for each item as will be enumerated below. He then applied the rubric applicable to these employees.

The principal’s rubric was as follows: For “Relevant Significant Contributions, Accomplishments or Performance” (25 points), the principal specified that an employee could receive up to 5 points for each of these items: A) performance rating, B) student outcomes, C) special awards received by self or your students, D) assemblies, programs, trips, guest speakers and E) special classroom projects. For “Relevant Supplemental Professional Experience as Demonstrated on the Job,” an employee could receive a total of 25 points for “professional development courses or programs which you implement.” An employee of the school could receive 5 points each for such programs as “Win/Win Discipline; Voyager Reading; Primary Computers; Art in the City; Conflict Resolution; In2books; Literacy thru Photography; Turning the Page, etc.” For “Office or School Needs,” an employee could received up to 25 points as follows: A) current valid teaching license = 10 pts, B) advanced degree relating to education = 5 pts, c) certification or licenses in special education areas = 5 pts, D) sponsorship of extra-curricular activities/club/organization, etc. = 1 point each one up to five.”

Principal Johnson relied upon his direct knowledge of the work performed and additional activities in which each custodian was involved and his recollection of reports from their supervisors. He said that he used “direct observation, something assigned by me, something that was needed in the school that was assigned by me, or their supervisor reported to me.” He did not inquire of the supervisors at the time he was preparing the CLDF. The principal also considered the employees’ evaluations for the prior year. Johnson testified that he distributed the forms well in advance of the deadline so that each employee could make entries for him to consider. Employee maintains that he only had one day.

Employee was one of two custodians in his competitive level. The competitive level documentation forms indicate that the employees were scored as indicated below. Each employee’s job performance score was determined by the principal’s assessment. The length of service and D.C. residency or pre-1980 score was based upon the records of the D.C. Office of Human Resources. Principal Johnson gave Employee 15 points for the quality of his work and 25 points for his years of service. Employee’s total was 40.

M.B., the other employee in Employee’s competitive level, got 50 points for his work and 5 points for his 4 years of service. His total score was 55. Because Employee’s score was lower, he was selected for removal. If Employee had received a total of 56 points, he would have displaced M.B. and been retained. In order for Employee to prevail in this appeal, the evidence must support a finding that he was wrongly denied at least 16 points.

<b>EMPLOYEE</b>	<b>JOB PERFORMANCE</b>	<b>LENGTH OF SERVICE/D.C. RESIDENCY OR PRE-1980 EMPLOYEE</b>	<b>TOTAL</b>	<b>FINAL RANKING</b>
M.B.	50	5	55	1
A.B. (Employee)	15	25	40	2

#### Relevant Significant Contributions, Accomplishments or Performance

The first section of the CLDF form accounts for an employee's "Relevant Significant Contributions, Accomplishments or Performance: 25 points Maximum (For example, student outcomes, ratings, awards, special contributions, etc.) May also include negative factors such as disciplinary, attendance, and failure to meet occupational responsibilities, etc. with documentation." In this section, Employee noted "electrical services; and helping young school and school maintenance." The principal testified that Employee was credited only for performing electrical services. Johnson said that Employee's claim that he was helping at the school "couldn't be supported by documentation" and that "school maintenance" was in his job description.

Employee testified that he performed a variety of electrical services that warranted greater credit such as replacing "ballasts in lights," configuring all of the televisions in the building and running lines in the computer for the library." He said that some of this work was performed in the mornings when there was less traffic in the school. Employee also testified that he worked a late shift, from 1:00 p.m. until 10:00 p.m. or 11:00 a.m. until 8:00 p.m., and the principal did not have the opportunity to see all of the work that he performed. According to Agency, the work on the computer lines occurred prior to Johnson undertaking the duties of principal. Therefore, he did not observe it.

Employee received no credit for a performance appraisal because he was absent during the period of time when it was it was conducted, M.B. received points for his evaluation. The principal gave Employee a total of 5 points in this category.

#### Relevant Supplemental Professional Experience as Demonstrated on the Job

The second section of the form accounts for "Relevant Supplemental Professional Experience as Demonstrated on the Job: 25 Points Maximum (For example, experience or training, professional development, performance based education, science, math, literacy, technology advancement, etc. with documentation.)" Employee noted "school. . .electrical development. . .[illegible] electrical school. . .ro[o]fing school." In this section, Johnson gave Employee 5 points of credit for his "direct observation of Mr. Brooks assisting quite a few of the staff members throughout the day outside of his job description." "If there was something- -if a staff member needed something, needed assistance in maybe setting up a classroom or doing something like that, did see Mr. Brooks openly assist. . ."

In comparing Employee to M.B., Johnson noted that he observed M.B. working weekly with a “mentoring group to help at-risk students” and conducting “fund-raising activities during sporting events or during back-to-school nights” for the group and working with other organizations such as the Boy Scouts, Hands on DC and Parent Teachers Association.” M.B. also “would assist in tutoring students for the STAT 9” a yearly assessment. M.B. also volunteered on Saturdays to tutor students and cut the grass on weekends. The principal gave Employee 5 points in this category also.

#### Office or School Needs

The third section of the form accounts for “Office or School Needs: 25 points maximum. (For example, curriculum, specialized education, conflict resolution, degrees, licenses, areas of expertise, extra curricular sponsorship, etc. with documentation).” Employee wrote “license master electrician/journey electrician. . licensed in Maryland notary public.” Employee testified that he provided notary services to counselors who worked in the building so that they would not have to leave the building and parents who needed proof of residence. The principal said that even if he had been aware of that, he would not have given credit for it. He said that being a notary public was not related to Employee’s job duties. Agency also contends that, inasmuch as the notary license relied upon by Employee was effective only on May 15, 2004, just before the end of the school year, he could not have had time to provide services of such significance as to warrant credit in the CLDF evaluation. The principal testified that, if he had been aware of that, he would have given Employee credit for his electrician’s license. Johnson said, “Mr. Brooks would have received credit for if there was a license or certification or something provided attached to [the CLDF].” The principal gave Employee a total of 5 points in this category.

Employee has challenged the evaluation process. He protests that the rubric used by the principal was “neither reviewed or approved by anyone from DCPS.” With the rubric, the principal identified the credentials, activities and accomplishments for which an employee would receive credit. In each category, the rubric flows logically from the work done at the school. Therefore, the use of the rubric is no basis for adjusting Employee’s CLDF score.

Employee also maintains that Johnson erred in his “refusal to consider the skills or specialized training of any employee unless Mr. Johnson witnessed such skills or training himself or had documentation to establish the skills or training.” Employee contends that he “may have performed certain tasks relating to his skill as an electrician at times during his shift when Mr. Johnson was not present at the school to witness these tasks.” However, Johnson had the same opportunity, or lack thereof, to observe M.B., the other employee in his competitive level. So, their chances to receive credit for their work were equal. And the principal’s reliance upon his observations is not a sound basis for granting Employee more points.

Employee contends that he was wrongly denied points for a performance evaluation. However, there was no performance evaluation in the record for the relevant period. There is no negative inference to be drawn from that. However, this Judge cannot speculate as to what his evaluation would have been. There is no disputing the historical fact that the evaluation did not occur. Employee cannot receive credit for it.

The principal said that, even if demonstrated, his notary license would not be relevant to his duties at the school. Employee responded that M.B. was credited with activities that were not related to his duties as an electrician. However, those activities included volunteer work with students and cutting the grass of the school on the weekends. Those services are directly related to the mission of the school and, therefore, justifiably worth credit. Notary services, while beneficial to those individuals who have access to them, do not directly contribute to accomplishing the mission of the agency.

According to the principal, Employee would have received points for his electrician's license if he'd been aware of it. It is undisputed that Employee did not present documentation of the license at the time of the CLDF evaluation. Agency urges an inference against Employee on this matter. However, it is clear from the record as developed before this Office that Employee had the license at the time. Therefore, it is reasonable that he should receive credit for it. In the category of "Office of School Needs" under "licenses," Employee is entitled to receive 5 additional points in keeping with the principal's rubric.

Employee supplemented the record with tax documents showing that he was a D.C. resident at the time of the RIF. He was, therefore, entitled to an additional 5 points.

Employee was entitled to 10 additional points. Those 10 points added to his original score of 15 equals 25. With the 25 points for his work performance, his total is 50. It is the conclusion of this Judge that Employee otherwise received a lawful round of lateral competition. As noted above, to displace M.B. for retention, Employee would have to get a score of at least 56. His score, at 50, does not qualify him for retention.

#### ORDER

It is hereby ORDERED that Agency's decision to separate Employee by reduction in force is UPHOLD.

FOR THE OFFICE:

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SHERYL SEARS, ESQ.  
ADMINISTRATIVE JUDGE