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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
PAMELA DISHMAN,)	OEA Matter No. 2401-0028-11
Employee)	
)	
v.)	Date of Issuance: July 21, 2015
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Pamela Dishman (“Employee”) worked as a Program Manager with the D.C. Public Schools (“Agency”). On October 22, 2010, 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 21, 2010.¹

Employee challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals (“OEA”) on November 29, 2010. She argued that the RIF’s procedures and process were flawed and that Agency discriminated against her. Employee also believed that the RIF was a pre-text to terminate her.² Therefore, she requested that Agency’s action be reversed and

¹ *Petition for Appeal*, p. 8 (November 29, 2010).

² She explained that although she accepted a non-public manager position, she was terminated as a non-public coordinator. Employee asserted that when she was terminated, her duties were still being performed by other employees.

that she be reinstated with back pay based on her non-public manager position.³

In its response to the Petition for Appeal, Agency denied Employee's contentions and provided that its action was taken in accordance with D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It asserted that the RIF was based on a reorganization, the elimination of functions, the curtailment of work, and for budgetary reasons.⁴ Agency explained that pursuant to 5 DCMR § 1503.2, the NPU was the competitive area, and the Program Manager position was the competitive level subject to the RIF. It asserted that Employee was provided with one round of lateral competition where she was ranked the lowest within her competitive level. As a result, it provided Employee a written, thirty-day notice that her position was being eliminated. Thus, Agency believed that the RIF action was proper and requested that the appeal be dismissed for failure to state a claim.⁵

The OEA Administrative Judge ("AJ") scheduled a Status Conference and issued a Post Status Conference Order requiring the parties to submit legal briefs addressing whether Agency provided Employee one round of lateral competition and the required notice prior to the effective date of the RIF.⁶ In Agency's brief, it reiterated its previous arguments and reasoned that OEA is limited to determining whether it followed D.C. Official Code § 1-624.02, 5 DCMR §§ 1503 and 1506.⁷ Employee argued that pursuant to D.C. Official Code § 1-624.08, Agency needed an authorized Agency Head to identify the positions to be abolished, but it did not have one as of

³ *Id.* at 5.

⁴ It explained that Employee's position was within the Office of Special Education's Non-Public Unit ("NPU"), and NPU struggled with its functions. Agency provided that in order to reduce administrative complaints, it outsourced the NPU's functions to contractors and eliminated two out of six Program Manager Positions via the RIF.

⁵ Furthermore, Agency provided that OEA lacked jurisdiction to consider Employee's discrimination complaints and allegations concerning a collective bargaining agreement. *District of Columbia Public Schools' Answer to Employee's Petition for Appeal* (January 3, 2011).

⁶ *Order Scheduling Status Conference* (September 27, 2012). Additionally, the AJ ordered Agency to submit the Retention Register used in conducting the RIF; the Competitive Level Documentation Form ("CLDF"); and Employee's latest SF-50, appraisal, and personnel records indicating that she worked in the competitive level from which she was eliminated. *Post Status Conference Order* (October 11, 2012).

⁷ *District of Columbia Public Schools' Brief*, p. 8 (December 11, 2012).

October 22, 2010.⁸ Moreover, Employee argued that D.C. Official Code § 1-624.02 was inapplicable to the RIF. She explained that Agency was obligated to follow the adverse action procedures under its collective bargaining agreement with the Council of School Officers.⁹

The Initial Decision was issued on February 10, 2014. 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.¹⁰ As a result, she ruled that D.C. Official Code § 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 one round of lateral competition within her competitive level. The AJ found that Employee's competitive level was properly

⁸ She explained that Michelle Rhee, the former Chancellor of Agency, resigned prior to the issuance of the RIF notice.

⁹ Employee also contested Agency's assertion that the RIF was for budgetary reasons. She argued that Agency had actually received an increase in its operating budget. Furthermore, Employee provided that although Agency transferred her work to a contractor, there was still a need for the functions of her position. She provided that there were managers who were hired after her separation date. She contended that Agency failed to retain a retention roster for the employees who were affected by the RIF; failed to implement a system for recruiting affected employees; that the information provided in her CLDF was not accurate; that Agency engaged in unfair labor practices and discrimination; that Agency violated the Fair Labor Relations Act; and that Agency targeted the NPU because all of the employees were black and over the age of forty. Lastly, Employee provides that for over two years, she was not compensated as a Non-public Manager. *Employee's Brief in Support of Appeal* (December 31, 2012).

Thereafter, Agency was ordered to provide additional documentation showing the effective date of the former Chancellor's resignation. It was also ordered to identify the Agency Head as of October 22, 2010 and to address Employee's contention that it violated D.C. Official Code § 1-624.08. In response, Agency provided that Michelle Rhee was the Agency Head on October 22, 2010, and she previously authorized the RIF on October 8, 2010. *District of Columbia Public Schools' Brief* (March 28, 2013).

Agency was subsequently ordered to submit a signed and dated CLDF; a written explanation for who conducted the CLDF for the Program Manager competitive level; an affidavit from the author of the CLDF attesting to its truthfulness and accuracy; an explanation for why the original submission did not contain dates or signatures from a Human Representative or the Non-public Team Director; and any further evidence on whether Employee was given one round of lateral competition. *Order Requiring Agency to Submit Additional Information* (August 30, 2013). In response, Agency submitted CLDFs signed by Joshua Wayne, the Program Director of the NPU. Mr. Wayne also provided an affidavit addressing the AJ's concerns in her Order. *Statement of Good Cause and Response to August 30, 2013 Order* (October 22, 2013).

¹⁰ The AJ cited to 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. 3-5 (February 10, 2014).

established, and she was afforded one round of lateral competition.¹¹ She also held that Agency provided Employee the required thirty-day notice.¹² Accordingly, Agency's RIF action was upheld.¹³

Employee filed a Petition for Review with the OEA Board on March 14, 2014. She provides, *inter alia*, that the former Chancellor did not have discretion to impose a RIF; the AJ incorrectly determined that the Abolishment Act applied to the RIF; Agency did not prove that her last position of record was a Program Manager; and the AJ failed to address her belief that the RIF was a pre-text to terminate her.¹⁴ Employee states that the AJ ignored her evidence which proved that Agency manipulated personnel information in order to terminate her. Furthermore, she argues that the ratings that she received by Mr. Wayne were substantially different from her previous ratings and were written in an effort to justify her removal. Lastly, Employee asserts that based on the evidence submitted she should have been afforded a hearing. Therefore, she requests that the matter be remanded to the AJ and that the Initial Decision be reversed.¹⁵

Agency filed a Response to the Petition for Review on April 18, 2014. It argues that the

¹¹ However, the AJ concluded that Agency failed to evaluate the competitive level employees by tenure groups in accordance with § 2413.5 of the District Personnel Manual. Nevertheless, she determined that this error was harmless because all of the employees within the competitive level met the requirements for tenure group I. *Id.* at 10.

¹² As for Employee's other claims, the AJ found that Employee submitted no evidence to prove that the RIF was actually an adverse action; OEA could not address whether the RIF was bona fide; OEA lacked jurisdiction to consider post-RIF activity, and therefore, could not address her concerns regarding other employees performing her duties after the RIF; OEA lacked jurisdiction to consider grievances; OEA lacked jurisdiction to consider discrimination allegations; and OEA lacked jurisdiction to consider claims regarding the District of Columbia Privatization Act. *Id.*, 14-17.

¹³ *Id.*

¹⁴ Employee reasons that there was no indication in the record that proved that the Chancellor had delegated authority from the Mayor to implement the RIF. Moreover, she argues that the AJ's reliance on the Court's decision in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123 (D.C. 2009) to hold that the Abolishment Act applied was in error. She reasons that the AJ held that all RIFs based on budgetary reasons are in accordance with the Abolishment Act, but it is her position that the Abolishment Act and general RIF procedures can coexist.

¹⁵ *Petition for Review of Initial Decision*, p. 12-17 (March 14, 2014).

Mayor's Order 2007-186 delegated to the Chancellor all personnel authority, and at the time of the RIF, this Order was still in effect. Agency reiterated that its use of D.C. Official Code § 1-624.02 and 5 DCMR 1503 was proper. It provided that it was impossible for it to conduct the RIF under D.C. Official Code § 1-624.08 because the Abolishment Act did not apply to Employee, who was an Educational Service employee at the time of the RIF.¹⁶ However, Agency provides that the AJ's findings were based on substantial evidence, and the Initial Decision addressed all materials of law and fact raised on appeal. Accordingly, it believes that the RIF should not be reversed.¹⁷

Employee submitted a Notice of Supplemental Authority in Support of her Petition for Review on June 20, 2014. She provides that in accordance with the Board's decision in *James Johnson v. D.C. Homeland Security and Emergency Management Agency*, OEA Matter No. 2401-0011-11, Opinion and Order on Petition for Review (June 10, 2014), the official position of record is established by the Standard Form 50.¹⁸ Thus, Employee contends that based on this error alone, the RIF must be reversed.¹⁹

At the onset, this Board must note that Employee retained new counsel to represent her on Petition for Review. Attorney Mark Murphy represented Employee on Petition for Appeal before the Administrative Judge. Attorney Stephen Leckar now represents Employee on Petition for Review. This is important to note because there are several issues raised on Petition for

¹⁶ Furthermore, Agency opined that the Abolishment Act only applied to employees with the Office of the State Superintendent of Education. *District of Columbia Public Schools' Response to Employee's Petition for Review*, p. 3-5 (April 18, 2014).

¹⁷ *Id.* at 6. Employee subsequently filed a Reply to Agency's Response on June 9, 2014. In her reply she reiterates many of the arguments she submitted in her Petition for Review. With regard to Agency's assertion that the Abolishment Act did not apply to Education Service employees, Employee argues that the Act ". . . draws no distinction between Educational Service employees working at [the Office of the State Superintendent of Education] and their counterparts working elsewhere. . . ." *Employee's Reply to Agency's Opposition to Petition for Review of Initial Decision*, p. 10 (June 9, 2014).

¹⁸ She reiterates that Agency did not submit official documentation to prove that her position of record was Program Manager. Employee provides that Agency conceded this issue when it did not address it in its opposition.

¹⁹ *Employee's Notice of Supplemental Authority Supporting Petition for Review of Initial Decision* (June 20, 2014).

Review that were not preserved on appeal before the AJ.

This Board has consistently held that in accordance with OEA Rule 633.4, any objections or legal arguments which could have been raised before the AJ, but were not, are considered waived by the Board.²⁰ Moreover, the Superior Court for the District of Columbia held in *Bonita Brown v. Office of the Chief Medical Examiner*, 2012 CA 007394 P(MPA)(D.C. Super. Ct. February 4, 2015)(citing *Brown v. Watts*, 993 A.2d 529, 535 (D.C. 2010)) that “in order for a factual issue to be preserved for appeal, it must be raised before the ALJ and be a part of the evidentiary record.” The AJ thoroughly addressed every issue that was raised before her on appeal in her Initial Decision. Those arguments included the actual RIF procedures used (including analysis of the competitive level and Retention Register); the CLDF form; the notice requirements; the use of D.C. Official Code § 1-624.02 verses § 1-624.08;²¹ the budget rationale for the RIF action; post-RIF violations; violations of the collective bargaining agreement; discrimination allegations; collateral issues; and grievances.

However, on Petition for Review, there are new arguments presented that were not raised previously. They include that the Personnel Reform Amendment Act of 2008 should have been used and not D.C. Official Code §§ 1-624.02 or 1-624.08. Employee also claims that Agency failed to seek Mayoral approval before conducting the RIF. Moreover, she asserted that her

²⁰ *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); *Beverly Gurara v. Department of Transportation*, OEA Matter No. 1601-0080-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Dominick Stewart v. D.C. Public Schools*, OEA Matter No. 2401-0214-09, *Opinion and Order on Petition for Review* (June 4, 2012); *Darlene Redding v. Department of Public Works*, OEA Matter No. 1601-0112-08R11, *Opinion and Order on Petition for Review* (April 30, 2013); *Markia Jackson v. D.C. Public Schools*, OEA Matter No. 2401-0138-10, *Opinion and Order on Petition for Review* (August 2, 2013); *Latonya Lewis v. D.C. Public Schools*, OEA Matter No. 1601-0046-08, *Opinion and Order on Petition for Review* (April 15, 2014); and *Sharon Jeffries v. D.C. Retirement Board*, OEA Matter No. 2401-0073-11, *Opinion and Order on Petition for Review* (July 24, 2014).

²¹ On appeal, Employee contended that D.C. Official Code § 1-624.08 was the proper statute to be used in this matter. However, on Petition for Review, her new attorney argues that this statute was inappropriately used by the AJ and that the Personnel Reform Amendment Act of 2008 should have been used.

position of record was not Program Manager.²² Employee opined that there were discrepancies in her performance reviews.²³ She presented issues with the language used to describe her performance in the CLDF.²⁴ Because none of these issues were raised on appeal, they are waived on review before this Board.

D.C. Official Code § 1-624.08

Employee and Agency present several arguments of their positions on the use of D.C. Official Code § 1-624.02 verses § 1-624.08. Because this is really the crux of the case, we will address this issue. The Superior Court for the District of Columbia specifically settled the conflict between the two statutes. In *Sheila Gill and Rhonda Robinson v. District of Columbia Office of Employee Appeals and District of Columbia Public Schools*, 2012 CA5844 and 5883 (MPA) (D.C. Super. Ct. October 23, 2013), the Court affirmed OEA's holding and ruled that although Agency conducted the RIF actions pursuant to D.C. Official Code §1-624.02, D.C. Official Code §1-624.08 was the appropriate statute for the 2009 RIF matters. The court upheld OEA's assessment that in accordance with *Washington Teachers' Union v. District of Columbia Public Schools*, 960 A.2d 1123, 1132 (D.C. 2008), a RIF authorized for budgetary reasons triggers D.C. Official Code §1-624.08. In accordance with the ruling in *Gill and Robinson*, Employee's contention that the AJ incorrectly relied on D.C. Official Code §1-624.08 lacks

²² However, on Petition for Appeal, Employee clearly indicates that she sought to be reinstated with back pay and benefits to the position of "Program Manager." Additionally, Employee provided a notice which provides justification for her to be promoted to the position of "Program Manager within DCPS." *Petition for Appeal*, p. 5 and 10 (November 29, 2010).

²³ Although it is unnecessary for us to address this claim, this Board will note that the D.C. Court of Appeals held in *Onuche David Shaibu v. D.C. Public Schools*, 2012 CA 003606 P(MPA)(D.C. Super. Ct. January 29, 2013) 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.

²⁴ The *Shaibu* court held that only 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 (emphasis added). Employee offered no evidence that contradicted the assessments made on her CLDF.

merit.²⁵

District Personnel Manual Chapter 24

In *Webster Rogers, Jr. v. D.C. Public Schools*, 2012 CA 006364 P(MPA)(D.C. Super. Ct. December 9, 2013), the Superior Court for the District of Columbia held that D.C. Official Code § 1-624.08 was the proper statute to be used when analyzing these RIF cases. However, it found that the OEA Administrative Judges incorrectly used Chapter 15 of the DCMR when issuing their rulings on these cases. The court held that Chapter 24 of the DPM should be used when determining if the RIF actions conducted under D.C. Official Code § 1-624.08 were proper.

In the current case, the AJ followed the ruling in *Rogers* and provided her analysis of DPM Chapter 24. She held that Employee received one round of lateral competition and thirty days' notice as required by Chapter 24. As it relates to one round of lateral competition, Employee claims that she was not within the proper competitive level. However, as the AJ provided in her Initial Decision, DPM §2410 states that "each personnel authority shall determine the positions comprising the competitive levels that employees compete for retention." Moreover, the section provides that a competitive level shall consist of all positions within the same grade, which are sufficiently alike in qualification requirements, duties, and responsibilities.

As stated above, Employee submitted documentation that she was a Program Manager. Furthermore, Agency offered evidence authorizing the reduction of Program Managers from six to four positions.²⁶ Additionally, Agency provided personnel documentation that at the time of

²⁵ The Court also upheld OEA's use of D.C. Official Code §1-624.08, instead of D.C. Official Code §1-624.02 in *Vilean Stephens and Ike Prophet v. D.C. Department of Mental Health*, 2010 CA003345 and 2010 CA003346 P(MPA)(D.C. Super. Ct. February 14, 2014);

²⁶ *District of Columbia Public Schools' Response to Employee's Petition for Review*, Exhibit A (April 18, 2014) and *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, Tab #2 (January 3, 2011).

the RIF action, Employee's position was Program Manager.²⁷ Moreover, there are affidavits which contend that Employee was a Program Manager and received the lowest ranking of the six Program Managers within her competitive level.²⁸ Agency submitted the actual CDLFs which show that Employee competed and was ranked against other Program Managers within the Non-Public School Unit.²⁹ Finally, Agency provided the Retention Register which showed Employee with the lowest rank within her competitive level.³⁰ Therefore, Agency and the AJ did adequately establish that Employee received one round of lateral competition. Thus, the AJ's decision was based on substantial evidence.³¹

Finally, Employee received the requisite thirty days' notice as provided in DPM § 2422.1. Agency provided the RIF notice on October 22, 2010. The effective date of the RIF action was November 21, 2010.³² This is exactly thirty days. Therefore, this requirement was met.

Conclusion

Because Employee raised several issues on Petition for Review that were not preserved on Petition for Appeal, we are unable to address them. However, we were able to determine if she was afforded one round of lateral competition and thirty days' notice. Agency adequately proved that it complied with the statutory and regulatory requirements pertaining to one round of

²⁷ *District of Columbia Public Schools' Response to Employee's Petition for Review*, Exhibit C (April 18, 2014) and *District of Columbia Public Schools' Brief*, Tab #1 (December 11, 2012).

²⁸ *District of Columbia Public Schools' Response to Employee's Petition for Review*, Exhibits D and E (April 18, 2014) and *District of Columbia Public Schools' Brief*, Tab #2 (December 11, 2012).

²⁹ *District of Columbia Public Schools' Response to Employee's Petition for Review*, Exhibit E (April 18, 2014) and *District of Columbia Public Schools' Brief*, Tab #3 (December 11, 2012).

³⁰ *District of Columbia Public Schools' Brief*, Tab #3 (December 11, 2012).

³¹ According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. 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. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *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).

³² *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, Tab #1 (January 3, 2011).

lateral competition and notice. The AJ's decision was based on substantial evidence. Therefore, we must deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

William Persina, Chair

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.