

Notice: This decision is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Office Manager of any formal errors in order that corrections be made prior to publication. This is not intended to provide an opportunity of a substantive challenge to the decision.

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

_____	)	
In the Matter of:	)	
	)	
RONA LEWIS,	)	
Employee	)	OEA Matter No.: 2401-0414-10
	)	
v.	)	Date of Issuance: February 4, 2013
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	STEPHANIE N. HARRIS, Esq.
Agency	)	Administrative Judge
_____	)	
Rona Lewis, Employee <i>Pro-Se</i>		
Sara White, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On September 21, 2010, Rona Lewis (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) action of abolishing her position through a Reduction-in-Force (“RIF”). Employee’s RIF notice was dated July 30, 2010, with an effective date of September 4, 2010. Employee’s position of record at the time her position was abolished was an Instructional Facilitator at Leckie Elementary School (“Leckie”). Employee was serving in Educational Service status at the time her position was abolished. On October 22, 2010, Agency filed an Answer to Employee’s appeal.

I was assigned this matter on July 18, 2012. On July 31, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations. Both parties have complied with the aforementioned Order. After reviewing the record, I have determined that there are no material facts in dispute requiring further proceedings and therefore, an Evidentiary Hearing is not warranted. The record is now closed.

### JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

### ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

### BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

### FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

On July 30, 2010, former D.C. School Chancellor Michelle Rhee authorized a RIF pursuant to D.C. Code § 1-624.02, 5 District of Columbia Municipal Regulations (DCMR) Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was conducted to eliminate school-based non-instructional positions and was necessitated by budgetary reasons, curtailment of work and reorganization of functions.<sup>1</sup>

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02, which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act" or "the Act") is the more applicable statute to govern this RIF.<sup>2</sup>

---

<sup>1</sup> See Agency's Answer, DCPS RIF Authorization Notice, Tab 2 (October 22, 2010).

<sup>2</sup> D.C. Code § 1-624.02 states in relevant part that:

(a) Reduction-in-force procedures shall apply to the Career and Educational Services... and shall include:

(1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;

Section § 1-624.08 states in pertinent part that:

(a) ***Notwithstanding*** any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect for the fiscal year ending September 30, 2000, and each subsequent fiscal year, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).

(b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.

(c) ***Notwithstanding*** any rights or procedures established by any other provision of this subchapter, any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).

(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.

In *Mezile v. D.C. Department on Disability Services*, the D.C. Superior Court found that “the language of § 1-624.08 is unclear as to whether it replaced § 1-624.02 entirely, or if the government can only use it during times of fiscal emergency.”<sup>3</sup> The Court also found that both laws were current and that the government triggers the use of the applicable statute by using “specific language and procedures.”<sup>4</sup>

- 
- (2) One round of lateral competition limited to positions within the employee's competitive level;
  - (3) Priority reemployment consideration for employees separated;
  - (4) Consideration of job sharing and reduced hours; and
  - (5) Employee appeal rights.

<sup>3</sup> *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

<sup>4</sup> *Id.* at p. 5.

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, DCPS conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”<sup>5</sup> The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act instead of “the regular RIF procedures found in D.C. Code § 1-624.02.”<sup>6</sup> The Court stated that the “ordinary and plain meaning of the words used in § 1-624.08(c) appears to leave no doubt about the inapplicability of § 1-624.02 to the 2004 RIF.”<sup>7</sup>

The Abolishment Act applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). The legislation pertaining to the Act was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF.<sup>8</sup> The Act provides that, “notwithstanding any rights or procedures established by any other provision of this subchapter,” which indicates that it supersedes any other RIF regulations. The use of the term ‘notwithstanding’ carries special significance in statutes and is used to “override conflicting provisions of any other section.”<sup>9</sup> Further, “it is well established that the use of such a ‘notwithstanding clause’ clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other sections.”<sup>10</sup>

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.<sup>11</sup> Moreover, the persuasive language of § 1-624.08, including the term ‘notwithstanding’, suggests that this is the more applicable statutory provision to conduct RIFs resulting from budgetary constraints. Accordingly, I am primarily guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. Under this section, an employee whose position was terminated may only contest before this Office:

1. That she did not receive written notice thirty (30) days prior to the effective date of her separation from service; and/or
2. That she was not afforded one round of lateral competition within her competitive level.

### ***Employee’s Position***

In her Petition for Appeal and Reply Brief, Employee alleges that the RIF was not facilitated properly and that Agency had “new positions filled in-house.” Employee states that she never worked as an Instructional Facilitator, but instead was serving as a Data Analyst and a Math Pull-out Teacher. She claims that she was not offered an Administrative Officer position, in violation of the RIF provisions regarding priority reemployment consideration. Employee alleges that Agency violated DCMR §1502.1 by hiring another DCPS employee in a different competitive level for the Administrative Officer position. She also alleges that the ET-10

---

<sup>5</sup> *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

<sup>10</sup> *Id.*

<sup>11</sup> *See Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

Instructional Facilitator competitive level was not eliminated because the Administrative Officer position was also an ET-10 position.<sup>12</sup>

Additionally, Employee contends that contrary to Agency's statement, she did not receive her RIF Notice on July 30, 2010. She contends that she was reporting to Agency's Cluster II Office and went to work up until August 2, 2010. Employee states that her RIF notice was delivered via mail on August 2, 2010, and that she did not refuse to sign any acknowledgement or receipt of separation. She also provides the following supporting documentation: 1) elementary school teaching certification; 2) 2009-2010 Impact Performance Assessment Report, showing an effective rating; 3) 2010-2011 Leckie Preliminary Budget allocation, which shows that there were no positions for the Instructional Facilitator position; and 4) a purported Non-Instructional Employee and Leckie Building Seniority List.<sup>13</sup>

In a subsequent Reply Brief, Employee reiterates that she never worked as an Instructional Facilitator, although she acknowledges this was her official title. She claims that she never received a description for the Instructional Facilitator position and was told that the position did not exist, although it was listed in the Leckie Preliminary Budget Allocation, which was included in documentation provided by Employee. She also claims that she had a verbal offer from another DCPS school, which was later improperly rescinded.<sup>14</sup>

### ***Agency's Position***

Agency submits that it followed RIF procedures in accordance with 5 DCMR § 1500.2,<sup>15</sup> and that former Chancellor Rhee authorized the RIF of non-instructional, school-based staff at thirty-seven (37) school due to reorganization of functions, curtailment of work, and budgetary reasons. Agency states that the competitive areas for the RIF were defined by schools where the number of positions for non-instructional staff for the 2009-2010 school year exceeded the number of positions available for the 2010-2011 school year. DCPS determined that Leckie was a competitive area and Employee's position, Instructional Facilitator, was identified as a position that would be subject to the RIF. Agency states that Employee was the only person within her competitive level and that all listed positions in the DCPS RIF Authorization notice were eliminated. Thus Agency contends that neither a Retention Register nor a Competitive Level Documentation Form (CLDF) were created and one round of lateral competition was not required. Agency also claims that it properly gave Employee thirty (30) days written notice of the RIF.<sup>16</sup> Further, agency provided supporting documentation including Employee's last Notification of Personnel Action ("SF-50") and Peoplesoft payroll records showing Employee's title as Instructional Facilitator.<sup>17</sup>

---

<sup>12</sup> Petition for Appeal (September 21, 2010); Employee Reply Brief (August 21, 2012).

<sup>13</sup> *Id.*

<sup>14</sup> Employee Reply Brief, pp. 1-2 (October 25, 2012).

<sup>15</sup> 5 DCMR § 1500.2 states in relevant part that a RIF is a process whereby the total number of positions is reduced for one of the following reasons:

- (a) budgetary reasons;
- (b) curtailment of work;
- (c) reorganization of functions; or
- (d) other compelling reasons.

<sup>16</sup> Agency Brief (October 10, 2012).

<sup>17</sup> *Id.*, Tabs 2 and 3.

### ***Abolishment of Entire Competitive Level***

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS is authorized to establish competitive areas when conducting a RIF so long as those areas are based “upon all or a clearly identifiable segment of the mission, a division or a major subdivision of the Board of Education, including discrete organizational levels such as an individual school or office.” For the 2010-2011 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area. Agency contends that in accordance with Title 5, DCMR § 1502.1, the competitive levels in which employees subject to the RIF competed in were based on a combination of position titles, pay plans, and grades.

Here, Leckie was identified as a competitive area, and Instructional Facilitator was determined to be the competitive level in which Employee competed. According to the DCPS RIF Authorization Notice, the RIF eliminated all of the listed positions at each school and “there [was] no reason to consider competitive factors.”<sup>18</sup> In response to Employee’s contention that she was placed in the incorrect competitive level because she performed different duties, I find that Employee was properly placed in the Instructional Facilitator competitive level. Employee’s Peoplesoft data and her SF-50 show that her title was Instructional Facilitator.<sup>19</sup>

This Office has consistently held that *when an entire competitive level is abolished or an employee holds the only position in her competitive level pursuant to a RIF* (emphasis added), D.C. Official Code § 1-624.08(d), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR § 1503.3 and 6 DCMR § 2420.3, are inapplicable.<sup>20</sup> An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee’s position.

Agency contends that no Retention Register was required or necessary because Employee was placed in a single person competitive level.<sup>21</sup> However, without any supporting documentation, Agency’s contention alone is insufficient to show that Employee was placed in a single person competitive level. While 5 DCMR § 1503, which governs RIF procedures for Educational Service employees does not require a Retention Register, Agency must provide specific evidence that Employee was indeed placed in a single person competitive level and that there were no other employees to compete with. Agency did provide supporting documentation in the form of the DCPS RIF Authorization Notice, which specifically stated that all listed positions in the competitive areas for the instant RIF were eliminated and Instructional Facilitator was the position listed for the Leckie competitive area.<sup>22</sup>

---

<sup>18</sup> Agency Answer, Tab 2, DCPS RIF Authorization Notice (October 22, 2010).

<sup>19</sup> Agency Brief, Tabs 1-3 (October 10, 2012).

<sup>20</sup> *Perkins v. District Department of Transportation*, OEA Matter No. 2401-0288-09 (October 24, 2011); *Allen v. Department of Health*, OEA Matter No. 2401-0233-09 (March 25, 2011); *Wigglesworth v. D.C. Department of Employment Services*, OEA Matter No. 2401-0007-05 (June 11, 2008); *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005).

<sup>21</sup> Agency Brief, p. 1 (October 11, 2012).

<sup>22</sup> Agency Answer, Tab 12 (October 22, 2010).

Accordingly, based on the documents of record, specifically the RIF Authorization Notice, I find that Employee's entire competitive level was properly abolished and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(d) pertaining to multiple-person competitive levels when it implemented the instant RIF. For this reason, Agency did not have to provide Employee one round of lateral competition.

### ***Notice Requirements***

Title 5, § 1506 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 1506.1 states that “[a]n 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.” Additionally, D.C. Official Code § 1-624.08(e), which governs RIFs, provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added).

Employee alleges that she did not receive thirty (30) days notice of the instant RIF. Specifically, Employee alleges that her RIF notice was delivered via mail on August 2, 2010. She also claims that she continued to report to Agency's Cluster II Office until she received the RIF Notice on August 2, 2010.

In contrast, Agency asserts that Employee was provided with written notice on July 30, 2010. In support of its argument that Employee received the RIF Notice on July 30, 2010, Agency provides paystub documentation showing that Employee received administrative leave pay for the two pay periods prior to the effective date of the instant RIF (7/31/2010 – 9/25/2010).<sup>23</sup> Agency further contends that Employee stopped reporting to work “on or around July 30, 2010” and received administrative pay, therefore “it is clear that [Employee] received more than the requisite notice of her termination pursuant to the [RIF].”<sup>24</sup> Additionally, Agency posits that had Employee not received the RIF Notice, then she would have continued to report to work and would have been given notice of the RIF and told to no longer report for work. Agency also contends *arguendo* that even if Employee did not receive the notice and continued to report to work, “she would have received notice via her paycheck/paystub, which clearly states that she was on administrative leave with pay, well before the thirty (30) days required notification period.”<sup>25</sup>

Agency's preceding arguments regarding Employee's receipt of the RIF notice are unpersuasive. Agency has the burden of proof in this case and must *specifically* show that Employee *received* thirty (30) days written notice prior to the effective date of the RIF (emphasis added). In *Aygen v. District of Columbia Office of Employee Appeals*,<sup>26</sup> the D.C. Superior Court found that where an employee is in duty status, “the notice of final decision must [be] delivered to the employee on or before the time the action is effective, *with a request for employee to acknowledge it*” (emphasis added). The Court noted that if the employee refused to acknowledge

---

<sup>23</sup> Agency Brief, Tab 3 (October 11, 2012).

<sup>24</sup> *Id.* at p.2

<sup>25</sup> *Id.*

<sup>26</sup> No. 2009 CA 006528; No. 2009 CA 008063 at p. 9 (D.C. Superior Ct. April 5, 2012).

receipt, a signed written statement by a witness may be used as evidence of service.<sup>27</sup> Additionally, the Court found that where an employee is not in duty status, the notice “must be sent to employee’s last known address by courier, or by certified or registered mail, *return receipt requested*, before the time of the action becomes effective” (emphasis added).<sup>28</sup> The court further explained that “a dated cover letter, by itself, was insufficient evidence” of a mailing date or proof of receipt by an employee.<sup>29</sup>

While, Agency maintains that Employee received her RIF notice on July 30, 2010, they have failed to submit any documentary evidence confirming that Employee *received* the RIF notice on this date, such as Employee’s signature acknowledging receipt, a signed statement by a witness that Employee refused acknowledgement, or use of certified or registered mail with return receipt acknowledgment (emphasis added). Agency’s arguments regarding notice given by administrative leave pay or being told to no longer report to work by school officials are insufficient to corroborate Employee’s receipt of the RIF notice on July 30, 2010. Although Employee likewise failed to submit any corroborating evidence showing that she did not receive the RIF notice on July 30, 2010, the fact remains that Agency has the burden of proof in this matter.

Here, Employee acknowledges that she received the RIF notice via mail on August 2, 2010. Accordingly, Employee received thirty three (33) days notice prior to the September 4, 2010 effective date of the RIF.<sup>30</sup> Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the instant RIF.

### ***RIF Rationale***

Employee alleges that the RIF was not facilitated properly and that Agency filled new positions “in-house.” Regarding the alleged continued hiring by Agency, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity, which may have occurred at an agency.<sup>31</sup> Further, in *Anjuwan v. D.C. Department of Public Works*,<sup>32</sup> the D.C. Court of Appeals ruled that OEA’s authority over RIF matters is narrowly prescribed. The Court ruled that OEA lacked authority to determine whether an Agency’s RIF was bona fide and explained that OEA’s authority is to determine whether the RIF complied with applicable District personnel statutes and regulations dealing with RIFs. The Court further noted that OEA does not have the “authority to second guess ... management decisions about which position should be abolished in implementing the RIF.”<sup>33</sup> OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of whether an Agency’s RIF was bona fide, nor can

---

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at pp. 10-11.

<sup>30</sup> See OEA Rule 603.1, 59 DCR 2129 (March 16, 2012) which states that in the computation of time periods, the first day counted shall be the net calendar day following the day the event occurs from which the period begins to run. Accordingly, there are thirty-three days from the start date (August 3, 2010) to and including the end date (September 4, 2010).

<sup>31</sup> *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003).

<sup>32</sup> 729 A.2d 883 (December 11, 1998).

<sup>33</sup> *Anjuwan*, 729 A.2d at 885.



OEA entertain an employees' claim regarding how an agency chooses which positions are subject to a RIF. In this case, how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.<sup>34</sup>

### ***Priority Reemployment***

Employee also argues that she was not offered an Administrative Officer position, in violation of the RIF provisions regarding priority reemployment. As discussed above, § 1-624.08, the Abolishment Act, and not § 1-624.02 applies to the instant RIF. The Abolishment Act does not require Agency to engage in priority reemployment procedures. Moreover, Agency's RIF Notice states that "[e]mployees separated pursuant to a reduction in force receive priority reemployment consideration, but are not guaranteed reemployment."<sup>35</sup> The notice also explained that employees may apply for future job vacancies at DCPS or within the District government that arise in the future.<sup>36</sup> Further, 5 DCMR § 1505.3<sup>37</sup> states that while Agency is authorized to establish and implement priority reemployment procedures, separated employees are not granted a right to be reemployed. As such, the undersigned reiterates that Agency is not required to offer or guarantee Employee any position under the priority reemployment provisions.

### ***Grievances***

Additionally, Employee claims that she never received a job description or worked as an Instructional Facilitator, but instead served as a Data Analyst and Math Pull-out Teacher. However, Employee does acknowledge that her title was Instructional Facilitator. She also claims that Agency violated the RIF provisions by improperly rescinding a verbal offer for an Administrative Officer position and hiring another DCPS employee in a different competitive level for said position.

Complaints of this nature, regarding Employee's work duties and Agency's hiring practices, are considered grievances and do not fall within the purview of OEA's scope of review. Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

---

<sup>34</sup> *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

<sup>35</sup> See Agency's Answer, Tab 1 (October 22, 2010).

<sup>36</sup> *Id.*

<sup>37</sup> 49 DCR 5975 (2002).

CONCLUSION

Based on the foregoing, I find that Employee was properly separated via the instant RIF after her entire competitive level was abolished and she was given thirty (30) days written notice prior to the effective date of the RIF. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

---

STEPHANIE N. HARRIS, Esq.  
Administrative Judge