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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| JOANNE TAYLOR-COTTEN, |) | OEA Matter No. 2401-0099-10 |
| Employee |) | |
| |) | Date of Issuance: August 2, 2013 |
| |) | |
| D.C. PUBLIC SCHOOLS, |) | |
| Agency |) | |
| _____ |) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Joanne Taylor-Cotten (“Employee”) worked as a Counselor 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 October 26, 2009. In it, she argued that she should not have been subjected to the RIF because Agency represented to her that she was guaranteed a position for the 2009-2010 school year.² As a result, Employee requested reinstatement to a position with an open

¹ *Petition for Appeal*, p. 61 (October 26, 2009).

² Prior to the RIF, Employee worked at Dunbar Senior High School. During her time at Dunbar, Agency issued a letter to her dated May 11, 2009, which provided that it would implement a staff reconstitution. The letter stated that Employee would be guaranteed a position for the 2009-2010 school year. Because of the staff reconstitution, Employee was involuntarily transferred to Houston Elementary School (“Houston”). Thereafter, Employee discovered that only one Counselor position was budgeted for the 2009-2010 school year at Houston, and there was

vacancy.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, Houston was determined to be the competitive area, and under 5 DCMR § 1502, the Counselor position was determined to be the competitive level subject to the RIF. Accordingly, Employee was provided one round of lateral competition where the principal of Houston rated each employee through the use of Competitive Level Documentation Forms ("CLDF"), as defined in 5 DCMR § 1503.2.⁴ After discovering that Employee received the lower rank in her competitive level, Agency provided her a written, thirty-day notice that her position was being eliminated. Thus, 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 action.⁶ In its responsive brief, Agency reiterated its position and submitted that OEA is limited to determining whether it followed D.C. Official Code § 1-624.02 and 5 DCMR §§ 1503 and 1506.⁷ Employee raised several issues with the CLDF factors and other scoring mistakes by Agency. She went through each of the factors provided on the CLDF and highlighted the work that she performed which was not included in Agency's scoring. Employee also alleged that she was placed at Houston by Agency even though there were no vacant Counselor positions. She contended that given the counselor to student ratio, she should not

already a counselor at the school. Therefore, she believed her placement at Houston was a mistake. According to Employee, she raised her concerns with several Agency representatives. *Id.*, 4-5.

³ *Id.* at 3.

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 9, 2009).

⁶ *Amended Order Requesting Briefs* (February 15, 2012).

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

have been placed at that particular school. Finally, she explained that Agency was in breach of contract because she was guaranteed a position with D.C. Public Schools during the 2009-2010 school year.⁸

The Initial Decision was issued on March 30, 2012. The AJ disagreed with Employee's contentions, holding that Agency's representation in its May 11, 2009 letter did not guarantee her permanent job security. He noted that Employee did not offer any statutory law, case law, or regulations that provided support for her belief that since Agency promised her a position, it was barred from subjecting her to the RIF action. Moreover, the AJ held that Employee did not dispute the propriety of Agency's RIF action. He provided that Employee did not challenge the scoring on her CLDF, and as a result, he did not offer any analysis on the issue. The AJ ruled that Agency's RIF action was conducted in accordance with the applicable laws, rules, and regulations. Consequently, the RIF action was upheld.⁹

On May 16, 2012, Employee filed a Petition for Review with the OEA Board. She subsequently filed an Amended Petition for Review on May 2, 2013, and another on June 4, 2013. Employee argues that the AJ did not adhere to the substantial evidence standard of review of Agency's RIF action. She submits that the AJ erred when he failed to find that Agency gave her inadequate notice regarding her employment status; failed to find that Agency's May 11, 2009 letter guaranteed her employment; failed to find that Agency did not meet its burden of proof that it adhered to the RIF procedures; and failed to accord proper consideration to her arguments and evidence. Employee objects to the rating on her CLDF form because she did not receive points for her rating of "exceeded expectations" in 2008 or for her contributions to Agency, despite her fifteen years of service. She reiterates in her Petition for Review that she

⁸ *Employee's Brief*, p. 3-4 (March 28, 2012) and *Amended Petition for Appeal and Brief on RIF*, p. 2-18 (March 29, 2012).

⁹ *Initial Decision* (March 30, 2012).

should have not been included in the RIF action. Therefore, she requests that the RIF action be reversed and that she be reinstated to her to her position with back-pay, benefits, and legal fees.¹⁰

Material Issue

In accordance with OEA Rule 633.3(d) “. . . the Board may grant a petition for review when the petition establishes that the initial decision did not address all material issues of law and fact properly raised in the appeal.” The D.C. Court of Appeals held in *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 832 (D.C. 2011), that when the AJ is made aware of material issues in an employee’s notice of appeal and there is the absence of any discussion of the employee’s arguments in the OEA’s initial decision, the determination cannot be made that all the issues were fully considered. Moreover, the court held in *District of Columbia Department of Mental Health v. District of Columbia Department of Employment Services*, 15 A.3d 692, 697 (D.C.2011) (quoting *Branson v. District of Columbia Department of Employment Services*, 801 A.2d 975, 979 (D.C.2002)), that it could not assume that “[an] issue has been considered *sub silentio* when there is no discernible evidence that it has.” The *Dupree* court (quoting *Murchison v. District of Columbia Department of Public Works*, 813 A.2d 203, 205 (D.C.2002)) further reasoned that “to pass muster, an administrative agency decision must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency’s conclusions of law must follow rationally from its findings.”

In his Initial Decision, the AJ held that Employee did not dispute the propriety of Agency’s RIF action or the scoring of her CLDF.¹¹ However, it is clear from the record that Employee properly raised arguments before the AJ regarding the CLDF factors and scoring in a

¹⁰ *Second Amended Petition for Review*, p. 3-12 (June 4, 2013).

¹¹ *Initial Decision*, p. 2-4 (March 30, 2012).

November 3, 2009 filing of a document titled “Competitive Level Ranking Score Rebuttal,” as well as in her March 29, 2012 Amended Petition for Appeal and Brief on Jurisdiction.¹² Therefore, the Initial Decision clearly failed to address all material issues of fact surrounding Employee’s CLDF, despite her properly raising them on appeal.

Position Vacancy

The AJ also failed to address another important issue of fact raised by Employee on appeal. The record shows that Employee went to great lengths to show that she was placed in a school that had no vacant Counselor positions. Employee provided that she was transferred from Dunbar High School to Houston Elementary effective August 17, 2009.¹³ She presented documentation that on August 20 and 24, 2009, she contacted Agency representatives expressing her concern that her placement at Houston was a mistake because “there were two counselors . . . with a projected [student population] of 250.” Her correspondence to Agency further provided that the projected budget for the 2009-2010 school year reflected that the budget at Houston could only support one Counselor at Houston.¹⁴ To bolster her argument, Employee provided a Vacancy List dated May 15, 2009, which showed that Houston had no vacancies for the Counselor position.¹⁵ One month after Employee’s effective start date at Houston, on September 26, 2009, Agency completed a CLDF for Employee which was used to eventually RIF her.¹⁶ On October 2, 2009, six days later, Agency served Employee with notice of the RIF action. In its

¹² *Competitive Level Ranking Score Rebuttal*, p. 1-3 (November 3, 2009) and *Amended Petition for Appeal and Brief on RIF*, p. 16-18 (March 29, 2012).

¹³ *Petition for Appeal*, p. 21 (October 26, 2009).

¹⁴ Employee explained that the counselor to student ratio is 250 to 1. She provided that Houston already had a Counselor employed and had 250 students enrolled. Because Houston met the 250 to 1 ratio, Employee believed that Agency mistakenly placed her at the school. *Id.*, 25 and 29.

¹⁵ *Id.* at 56.

¹⁶ *Id.*, 31-34. It should be noted that although the AJ clearly is counting Employee’s employ at Houston from May 2009, it is clear that Employee’s effective date was not until August 17, 2009.

brief, Agency explained that only one Counselor could be retained as a result of the RIF.¹⁷ Thus, it is Employee's belief that she was transferred to a position for which Agency knew there was no vacancy, and she was terminated from the position one month later.

This case appears to exhibit similarities that were presented in *Levitt v. District of Columbia Office of Employee Appeals*, 869 A.2d 364 (D.C. 2005) because of Employee's assertions that Agency made personnel changes *before* the RIF action that was imposed (emphasis added). The *Levitt* court found that OEA abused its discretion by not allowing discovery and failing to conduct a hearing when an employee provides detailed allegations involving improper personnel actions related to pre-text RIF claims. In *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883, 885-86 (D.C.1998), the D.C. Court of Appeals held that an employee challenging the abolition of the position he occupied needed to demonstrate that his contention was non-frivolous in order to be entitled to a hearing. Similarly, the *Dupree* court provided that a hearing is necessary when issues are raised that require clarification and cannot be decided solely on the documentary evidence in the administrative record. We conclude that the contentions in Employee's Petition for Appeal were not frivolous and, therefore, met the threshold established in *Anjuwan*.

There were a series of events that occurred before Employee's RIF that raise material questions of fact. Employee outlined position vacancy issues at Houston on appeal before the AJ that were not addressed. In accordance with OEA Rule 633.3(d), “. . . the Board may grant a petition for review when the petition establishes that the initial decision did not address all material issues of law and fact properly raised in the appeal.” Furthermore, the D.C. Court of Appeals held in *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 831-832 (D.C. 2011) that when the AJ is made aware of material issues in an employee's notice of appeal and there is

¹⁷ *District of Columbia Public Schools' Brief*, p.1 (March 7, 2012).

the absence of any discussion of the employee's arguments in the OEA's Initial Decision, the determination cannot be made that all the issues were fully considered. Additionally, the court held in *District of Columbia Department of Mental Health v. District of Columbia Department of Employment Services*, 15 A.3d 692, 697 (D.C. 2011) (quoting *Branson v. District of Columbia Department of Employment Services*, 801 A.2d 975, 979 (D.C.2002)), that it could not assume that "[an] issue has been considered *sub silentio* when there is no discernible evidence that it has." The *Dupree* court (quoting *Murchison v. District of Columbia Department of Public Works*, 813 A.2d 203, 205 (D.C.2002)) further reasoned that "to pass muster, an administrative agency decision must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions of law must follow rationally from its findings." This Board believes that Employee adequately laid the ground work to have the AJ consider if Agency's action of transferring her to a school with no vacant Counselor positions, one month before the RIF, was appropriate. Because the AJ failed to address the vacancy issue raised by Employee on appeal, we must remand this case for him to consider the merits of this material issue of fact.

Substantial Evidence to Support CLDF

This Board also finds that this matter must be remanded for the AJ to determine if there is substantial evidence to support the CLDF. The D.C. Court of Appeals held in *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883, 885-86 (D.C. 1998) that OEA's authority regarding RIF matters is narrowly prescribed. 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. More recently, in *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697

P(MPA)(D.C. Super. Ct. March 14, 2013), the Superior Court of the District of Columbia held that a hearing on the facts and circumstances of computing the CLDF may be necessary for OEA to determine if one round of lateral competition was actually satisfied in these RIF cases. It went on to reason 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.”¹⁸ Moreover, the Superior Court for the District of Columbia held in *Onuche David Shaibu v. D.C. Public Schools*, 2012 CA 003606 P(MPA), p. 6 (D.C. Super. Ct. January 29, 2013) 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. As previously noted, Employee specifically addressed each allegation made on her CLDF.¹⁹ She offered a detailed list of items that contradict Agency’s contentions. Thus, as provided in *Sligh* and *Shaibu*, the AJ must determine if there was substantial evidence to support the CLDF.

As a result of the aforementioned unaddressed issues, this matter is REMANDED to the AJ to consider the merits of Employee’s claims regarding the scoring of her CLDF; to consider Agency’s action of transferring Employee to a position for which there was no vacancy one month before the RIF; and to determine if the CLDF was based on substantial evidence.

¹⁸ *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA), p. 4 (D.C. Super. Ct. March 14, 2013).

¹⁹ *Competitive Level Ranking Score Rebuttal*, p. 1-3 (November 3, 2009) and *Amended Petition for Appeal and Brief on RIF*, p. 16-18 (March 29, 2012).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**; the matter is **REMANDED** to the Administrative Judge to consider Employee's claims regarding her CLDF scoring; to consider the merits of Employee's vacancy arguments; and to determine if the CLDF was based on substantial evidence.

FOR THE BOARD:

William Persina, Chair

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.