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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 2401-0103-10
MARSHA KARIM,	)	
Employee	)	
	)	Date of Issuance: June 15, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	STEPHANIE N. HARRIS, Esq.
_____	)	Administrative Judge
Marsha Karim, Employee <i>Pro-Se</i>		
Sara White, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On October 27, 2009, Marsha Karim (“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 terminating her employment through a Reduction-in-Force (“RIF”). The effective date of the RIF was November 2, 2009. Employee’s position of record at the time her position was abolished was a Social Studies Teacher at Eastern Senior High School (“Eastern”). Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter on February 6, 2012. On February 7, 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 (“February 7<sup>th</sup> Order”). Both parties have complied. After reviewing the record, I have determined that there are no material facts in dispute 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 FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. School Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, 5 DCMR Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was necessitated for budgetary reasons, explaining that the 2010 DCPS fiscal year budget was not sufficient to support the current number of positions in the schools.<sup>1</sup>

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

Specifically, 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).*

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<sup>1</sup> See Agency's Answer, Tab 1 (December 9, 2009).

<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;
- (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.

(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*,<sup>3</sup> 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.” 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>

However, the Court of Appeals took a different position. In *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*,<sup>5</sup> DCPS conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.” The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act (“the 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

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<sup>3</sup> No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

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

<sup>5</sup> 960 A.2d 1123, 1125 (D.C. 2008).

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

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

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

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, Employee asserts that the RIF was conducted in an illegal manner based on age discrimination. Employee alleges that she was subject to the RIF in retaliation for being a Washington Teachers Union (“WTU”) representative and had previously filed grievances against Agency. She contends that she was not able to provide input for her Competitive Level Documentation Form (“CLDF”), noting that she should have been given her CLDF the same day she received her RIF notice. Employee also states that she received her RIF notice after she was approved for a workers’ compensation claim. She further contends that she received a meets expectations performance rating, which was not used in the CLDF evaluation of school needs.<sup>12</sup>

In her brief, Employee alleges that Agency committed an unfair labor practice, in violation of D.C. Code § 1-617.04(a), by retaliating against her in response to her protected union activity. She contends that the principal of Eastern distorted her CLDF in a deliberate and discriminatory manner “to retaliate against and punish” her for protected union involvement, explaining that her CLDF explicitly focused on her union activity and wholly ignored her prior meets expectations evaluation. Employee further alleges that Agency violated D.C. Code § 1-623.45 by subjecting her to the instant RIF while she was on an approved workers’ compensation claim. In her rebuttal arguments concerning her CLDF, Employee states that the principal deliberately ignored her professional contributions to Eastern and failed to use the same criteria required by the central administration of DCPS. She also claims that she was never cited for truancy or professional violations and she participated in many school related activities that contributed to the positive academic climate at Eastern, contrary to the comments in her CLDF. Additionally, Employee states that she holds a Bachelor’s degree in Political Science and Master’s degree in Community Economic Development, along with certifications in advanced placement courses and numerous post graduate certifications and credits, which she claims placed her in the second highest salary range for teachers with DCPS.<sup>13</sup>

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

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

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

<sup>12</sup> Petition for Appeal (October 27, 2009).

<sup>13</sup> Employee Brief (March 16, 2012).

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

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of her termination.<sup>14</sup> Agency further maintains that it utilized the proper competitive factors in implementing the RIF and, Employee, who was the lowest ranked Social Studies Teacher, was terminated as a result of the round of lateral competition.<sup>15</sup>

### ***RIF Procedures***

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS is authorized to establish the 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 2009/2010 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area.<sup>16</sup> In accordance with Title 5, DCMR § 1502.1, competitive levels in which employees subject to the RIF competed were based on the following criterion:

1. The pay plan and pay grade for each employee;
2. The job title for each employee; and
3. In the case of specialty elementary teachers, secondary teachers, middle school teachers and teachers who teach other specialty subjects, the subject taught by the employee.<sup>17</sup>

Here, Eastern was identified as a competitive area, and Social Studies Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were three (3) Social Studies Teacher positions subject to the RIF.<sup>18</sup> Of the three (3) positions, one (1) position was identified to be abolished. Because Employee was not the only Social Studies Teacher within her competitive level, she was required to compete with other employees in one round of lateral competition.

According to Title 5, DCMR § 1503.2 *et al.*:

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

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<sup>14</sup> Agency Brief at pp. 3-7 (February 28, 2012).

<sup>15</sup> *Id.* at pp. 2, 4-5. School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

<sup>16</sup> Agency Answer, Tab 1, RIF Authorization (December 9, 2009).

<sup>17</sup> *Id.*

<sup>18</sup> Agency Brief, Exhibit A, Retention Register (February 28, 2012).

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.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

- (a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)
- (b) Significant relevant contributions, accomplishments, or performance – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
- (d) Length of service – (5%)<sup>19</sup>

Employee contends that Agency failed to use the same criteria required by the central administration. However, Agency argues that nothing within the DCMR, applicable case law, or D.C. Official Code prevents it from exercising its discretion to weigh the aforementioned factors as it sees fit.<sup>20</sup> Agency cites to *American Federation of Government Employees, AFL-CIO v. OPM*,<sup>21</sup> wherein the Office of Personnel Management was given “broad authority to issue regulations governing the release of employees under a RIF...including the authority to reconsider and alter its prior balance of factors to diminish the relative importance of seniority.”<sup>22</sup> I agree with this position and find that Agency had the discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

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<sup>19</sup> It should be noted that OEA has consistently held that DCPS is allowed discretion to accord different weights to the factors enumerated in § 1503.2. Thus, Agency is not required to assign equal values to each of the factors. *See White v. DCPS*, OEA Matter No. 2401-0014-10 (December 30, 2001); *Britton v. DCPS*, OEA Matter No. 2401-0179-09 (May 24, 2010).

<sup>20</sup> Agency Brief at pp. 4-5 (February 28, 2012).

<sup>21</sup> 821 F.2d 761 (D.C. Cir. 1987).

<sup>22</sup> *Id.*

### ***Competitive Level Documentation Form***

Agency employs the use of a CLDF in cases where employees subject to a RIF must compete against each other in lateral competition. In conducting the instant RIF, the principal of Eastern was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the “length of service” category was completed by the Department of Human Resources (“DHR”).

Employee also contends that Agency failed to provide her with a copy of the CLDF at the time she received her RIF Notice. The RIF regulations do not require Agency to provide a copy of the CLDF at the time the RIF notice is given to employees. However, the undersigned notes that Agency included a copy of Employee’s CLDF in its Answer.<sup>23</sup>

Employee received a total score of four and a half (4.5) points on her CLDF and was therefore, ranked the lowest employee in her respective competitive level. Employee’s CLDF stated in pertinent part, the following:

“[Ms.] Marsha Karim has utilized a lot of her time and efforts to oppose the vision and instruction of school administration. Ms. Karim is knowledgeable of her discipline. She has high expectations for students. However, the techniques and strategies of delivering instruction she uses are ineffective. This is evident because she has a very high failure rate. Ms. Karim’s negative attitude has an impact on the staff as a whole. Ms. Karim wastes a lot of time focusing on things that are not related to the classroom. Her poor attendance weights [sic] heavily on the school. She has very poor attendance.”<sup>24</sup>

### ***Needs of the School***

Employee received zero (0) points out of a possible ten (10) points in this category; a score much lower than the other employees within her competitive level who were retained in service.<sup>25</sup> This category is weighted at 75% on the CLDF and accounts for any factor that may have an impact on the success of the school or the achievement of the students at school. Some of the factors used in consideration for this category include: student learning skills, training, experience, school culture contributions, teaching and learning framework, leadership roles, licensure or certifications, and advanced degrees that pertain specifically to the needs of the school.

Employee alleges that her CLDF was not properly completed because it failed to consider her degrees, certifications, and participation in school related activities. However, Employee has failed to provide any credible evidence or supporting documentation to highlight how her degrees, school participation and certifications translate specifically into how she met the needs of the school. While Employee has provided a detailed rebuttal to the comments in her CLDF regarding the Needs of the School category, she has not proffered any statutes, case law, or other regulations to refute Agency’s position regarding the principal’s authority to utilize discretion in completing an

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<sup>23</sup> *Id.*, Tab 3.

<sup>24</sup> Agency Answer, Tab 3 (December 9, 2009).

<sup>25</sup> Agency Brief, Exhibit A, Retention Register (February 28, 2012).

employee's CLDF during the course of the instant RIF.<sup>26</sup> The principal of Eastern was given the discretion to complete Employee's CLDF and had wide latitude to invoke his managerial discretion. Specifically, in the Office or School Needs category, principals were instructed to assign scores "reflect[ing] [the] best judgment of the extent to which the person meets the particular needs of [the] school."<sup>27</sup> Further, while advanced degrees and certifications are one of the factors considered in this category, there is no specific point designation for any of the multitude of factors that could be considered. Agency did not develop an exhaustive list of factors to be considered, but rather listed examples that could be considered by principals.<sup>28</sup>

**Relevant significant contributions, accomplishments, or performance**

Employee received zero (0) points in this category, which is weighted at 10% on the CLDF. This category evaluates any clear, significant contributions made by employees, above what would normally be expected of an employee in his or her competitive level. Employee has not provided any supplemental evidence suggesting that she should have earned a higher score in this category.

**Relevant supplemental professional experiences as demonstrated on the job**

Employee also received zero (0) points in this category, which is weighted at 10% on the CLDF, and awards points to employees for any additional training or professional experiences outside standard training required by Agency or required to maintain licensure; and application of said training or experience at the school in a way that positively impacted student or school performance. Employee has not provided any documentation to supplement additional points being awarded in this area.

**Length of service**

This category, which was completed by DHR, includes credit for years of service, District residency, veterans' preference, and prior outstanding or exceeds expectation performance rating within the past year. Employees were granted an additional five (5) years of service for D.C. residency, four (4) years of service for veterans' preference, and four (4) years of service for performance evaluations of 'outstanding' or 'exceeds expectations' for the last school year.<sup>29</sup> The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

Here, the record shows that Employee's tenure with DCPS began in 1989, resulting in twenty (20) years of service being credited in this category.<sup>30</sup> She received zero (0) points for D.C. residency and veterans preference. The record shows that Employee resided in Maryland during the instant RIF.<sup>31</sup> Employee states that she received a 'meets expectation' rating for the 2008/2009 school year performance evaluation.<sup>32</sup> Because Employee did not receive an 'exceeds expectations' for the 2008/2009 school year, she was not entitled to the extra four (4) years of service. Employee received

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<sup>26</sup> See *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*, 109 F.3d 774 (D.C. Cir. 1997).

<sup>27</sup> Agency Answer, Tab 2, Attachment B at p. 1 (December 9, 2009).

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

<sup>29</sup> Agency Answer, Tab 2, Attachment B at p. 4 (December 9, 2009).

<sup>30</sup> See Agency Brief, Employee Personnel File (February 28, 2012).

<sup>31</sup> *Id.*; see also Agency Answer, Tab 4 (December 9, 2009).

<sup>32</sup> See Employee Brief (March 16, 2012).

a total weighted score of four and a half (4.5) points in this category. Further, Agency has provided an affidavit from Peter Weber, who served as the Interim Director of Human Resources during the time of the instant RIF.<sup>33</sup> Mr. Weber states that he was responsible for computing employees' length of service for the instant RIF and used the DHR official Peoplesoft system to obtain data for the calculations, which appear in Employee's CLDF. Moreover, a review of Employee's personnel file, which was submitted by Agency, does not reveal any evidence that would necessitate a recalculation of the points awarded in this category.<sup>34</sup> Therefore, based on the evidence of record, I find that Agency properly calculated this number.

Moreover, in reviewing the documents of record, Employee does not offer any statutes, case law, or other regulations to refute Agency's position regarding the principal's authority to utilize discretion in completing an employee's CLDF during the course of the instant RIF. In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*,<sup>35</sup> the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that "school principals have total discretion to rank their teachers" and noted that performance evaluations are "subjective and individualized in nature."<sup>36</sup> Based on *Washington Teachers' Union*, this Office cannot substitute its judgment for that of the principal at Eastern, who was given discretion to complete Employee's CLDF and had wide latitude to invoke his managerial discretion.<sup>37</sup> Thus, with respect to the aforementioned CLDF categories, I find that I will not substitute my judgment for that of the principal of Eastern as it relates to the scores he accorded Employee and her colleagues in the instant matter.

According to the CLDF, Employee received a total score of four and a half (4.5) points after all of the factors outlined above were tallied and scored. The lowest scoring Social Studies Teacher in Employee's competitive level, who was retained in service, received a total score of forty-five and a half (45.5) points.<sup>38</sup> There is no indication that any supplemental evidence would supplant the higher scores received by the remaining employees in Employee's competitive level who were not separated from service.<sup>39</sup> Additionally, Employee has not proffered any credible evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome in this case.<sup>40</sup>

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.<sup>41</sup> This Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."<sup>42</sup> Accordingly, I find that the principal of Eastern had

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<sup>33</sup> Agency Brief, Exhibit B (February 28, 2012).

<sup>34</sup> *Id.*, Employee Personnel File.

<sup>35</sup> 109 F.3d 774 (D.C. Cir. 1997).

<sup>36</sup> See *American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, Exhibit A, Retention Register (February 28, 2012).

<sup>39</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (stating that a material fact is one which might affect the outcome of the case under governing law).

<sup>40</sup> *Id.*

<sup>41</sup> See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

<sup>42</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

discretion in completing Employee's CLDF, as he was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. Therefore, I find that Agency did not abuse its discretion in completing the CLDF, and Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

### ***Thirty (30) Days Written Notice***

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 "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 notice shall state specifically what action is 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).

Here, the record shows that Employee received her RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009.<sup>43</sup> The RIF notice states that Employee's position was eliminated as part of a RIF. The RIF notice also provided Employee with information about her appeal rights. Further, Employee has not alleged that she did not receive thirty (30) days notice prior to the effective date of the RIF. Accordingly, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

### ***Discrimination Claims***

Employee alleges that she was subject to the instant RIF due to age discrimination. However, Employee has failed to submit credible evidence to corroborate this claim. Further, D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.<sup>44</sup> Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, the Court in *Anjuwan v. D.C. Department of Public Works*<sup>45</sup> held that OEA's authority over RIF matters is narrowly prescribed. This Court explained that OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied...the rules and regulations issued pursuant thereto." This court further explained that OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs."<sup>46</sup>

However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*<sup>47</sup> stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistleblowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional

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<sup>43</sup> Agency Answer, Tab 4 (December 9, 2009).

<sup>44</sup> D.C. Code §§ 1-2501 *et seq.*

<sup>45</sup> 729 A.2d 883 (December 11, 1998).

<sup>46</sup> See *Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

<sup>47</sup> 730 A.2d 164 (May 27, 1999).

purposes from an independent complaint of unlawful discrimination or retaliation...”<sup>48</sup> Here, Employee’s claims, as described in her submissions to this Office do not allege any whistleblowing activities as defined under the Whistleblower Protection Act. Thus, I find that Employee’s claims of age discrimination fall outside the scope of OEA’s jurisdiction.

### ***Unfair Labor Practices***

Employee alleges that Agency committed an unfair labor practice, in violation of D.C. Code § 1-617.04(a), by retaliating against her because she was a Washington Teachers Union (“WTU”) representative and had previously filed grievances against Agency. She provided copies of grievances filed against the principal of Eastern on behalf of WTU. Employee also contends that the principal of Eastern distorted her CLDF in a deliberate and discriminatory manner “to retaliate against and punish” her for protected union activity, noting that her CLDF explicitly focused on her union activity.

However, Employee has provided no evidence or documentation to corroborate these claims. While Employee’s CLDF states in part that Employee “wastes a lot of time focusing on things that are not related to the classroom,” there are no explicit comments addressing any union activities. Further, D.C. Code §1-605.02, specifically reserves resolution of unfair labor practice allegations to the Public Employee Relations Board (“PERB”). According to the preceding statute, PERB is tasked with deciding whether unfair labor practices have been committed and the issuing of appropriate remedial orders. Moreover, this Office has held that complaints relating to Employee’s union activities are considered grievances and do not fall within the purview of OEA’s scope of review.<sup>49</sup>

### ***Lack of Budget Crisis***

Employee alleges that the instant RIF was illegal. As noted above, in *Anjuwan*,<sup>50</sup> D.C. Court of Appeals held that OEA’s authority over RIF matters is narrowly prescribed. The Court also ruled that OEA lacked authority to determine whether an Agency’s RIF was bona fide. The Court of Appeals explained that as long as a RIF is “justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF...”<sup>51</sup> The Court also noted that OEA does not have the “authority to second guess the mayor’s decision about the shortage of funds...[or] management decisions about which position should be abolished in implementing the RIF.”<sup>52</sup>

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency’s claim of budgetary shortfall, nor can OEA entertain an employees’ claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds on personnel services or how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge (“AJ”) has any control.<sup>53</sup>

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<sup>48</sup> *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

<sup>49</sup> See also *Anjuwan v. D.C. Department of Public Works* 729 A.2d 883 (December 11, 1998).

<sup>50</sup> 729 A.2d 883 (December 11, 1998).

<sup>51</sup> *Id.* at 885.

<sup>52</sup> *Id.*

<sup>53</sup> *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

### *Workers' Compensation Claims*

Employee also alleges that Agency violated D.C. Code § 1-623.45 by subjecting her to the instant RIF while she was on an approved workers' compensation claim. She states that she was approved for a workers' compensation claim on October 1, 2009, one day before she received her RIF notice on October 2, 2009. Employee contends that because she was approved for workers' compensation, she "was protected and should not have been placed included [sic] in the Reduction In Force conducted by DCPS."<sup>54</sup> Employee further asserts that she was entitled to compensation for two years before Agency could terminate her position.

In her brief, Employee provides a copy of the Notice of Determination from the Office of Risk Management ("ORM") approving her disability compensation claim on October 1, 2009. While Employee cites to D.C. Code § 1-623.45, Career and Educational Service Retention Rights, this statute does not exempt an employee from being subject to an Agency's RIF or entitle an Employee to two years of workers' compensation without possible termination. Specifically, § 1-623.45 states that an employee resuming work with the District government is entitled to the "safeguards in reduction-in-force procedures." As noted above, under § 1-624.08, an Employee is entitled to contest before this Office that she did not receive one round of lateral competition and/or that she did not receive proper written notification. In this case, Agency complied and provided employee with the RIF regulations of § 1-624.08.

Employee has failed to provide any statutes, case law, or other regulations showing that an employee approved for a workers' compensation claim is immune from an Agency's properly invoked RIF. In *Horst v. Department of Health & Human Services*,<sup>55</sup> the Federal Circuit explained that where there is no causal connection between the implementation of a RIF and the filing of a workers' compensation claim, the RIF will be found to have been properly invoked. Similarly to the facts in *Horst*, the timing of Employee's workers' compensation and the instant RIF do not support any connection between the two events because the authorization for the RIF was done agency-wide on September 18, 2009, irrespective of Employee's workers' compensation claim filed on August 23, 2009. While employees may contest a termination alleged to have been in retaliation for workplace injuries sustained or the filing a workers' compensation claim, there is no legal requirement that exempts an employee with an approved workers' compensation claim from being subject to a RIF, unless the termination was conducted in retaliation for the filing of the claim.<sup>56</sup> Moreover, Employee's contentions that ORM improperly returned her to work in July 2011 as a rehire are moot and do not fall within the purview of OEA's scope of review.

Additionally, the instructions given to principals to conduct the rating of employees, stated in pertinent part:

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<sup>54</sup> Employee Brief at pp. 3, 5-6 (March 16, 2012).

<sup>55</sup> 173 F.3d 436 (Fed. Cir. 1998).

<sup>56</sup> See *Lyles v. Dist. Of Columbia Dept. of Employment Services*, 572 A.2d 81, 84 (D.C. 1990) (stating that the retaliatory discharge does not reach and would in fact be trivialized if construed to cover the discharge of an employee who the employer in good faith believes has violated work rules); *St. Clair v. District of Columbia Dept. of Employment Services*, 658 A. 2d 1040 (D.C. 1995) (holding that an employer's motivation for terminating an employee must be employee's pursuit of rights under the workers' compensation statute).

“[t]he fact that a staff member is out on an approved leave should NOT be considered in the rating. This means that neither the fact that they are on leave, nor the impact that their absence has had on the school or class, can be considered. On the other hand, the fact that such staff member is on approved leave should not protect such staff member from getting a low rating *if* it is based, for example, on his or her activities in the school while he or she was present or on other criteria having nothing to do with his or her presence in the school.”<sup>57</sup>

Employee has not shown that Agency’s motivation for terminating her through the instant RIF was caused by the filing of a workers’ compensation claim.<sup>58</sup> In fact, Employee acknowledges that the principal “signed for the workers’ compensation claim.”<sup>59</sup> I find that there is no evidence in the record to suggest that Employee was subject to the instant RIF due to her workers’ compensation claim or leave status.

### ***Grievances***

Additionally, 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. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. 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.

### **CONCLUSION**

Based on the foregoing, I find that Employee’s position was abolished after she properly received one round of lateral competition and 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.

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<sup>57</sup> Agency Answer, Tab 2 (December 9, 2009).

<sup>58</sup> See *St. Clair v. Dist. Of Columbia Dept. of Employment Services*, 658 A.2d 1040, 1042 (D.C. 1995) (holding that in order to establish a prima facie case for retaliatory discharge an employee must prove (1) that the claimant made or attempted to make a claim for workers’ compensation, and (2) that the employer discharged him or her in retaliation for that action); *Children’s Def. Fund v. Dist. Of Columbia Dept. of Employment Services*, 726 A.2d 1242, 1244 (stating that employee must prove that agency’s decision was motivated by animus toward her or that the stated reason for her termination, namely, a staff reorganization, was actually a pretext for retaliatory discharge).

<sup>59</sup> Employee Brief at p. 6 (March 16, 2012).

ORDER

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

FOR THE OFFICE:

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STEPHANIE N. HARRIS, Esq.  
Administrative Judge