Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMMA JOHNSON,)	OEA Matter No. 2401-0181-10
Employee)	
)	Date of Issuance: October 29, 2013
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Emma Johnson ("Employee") worked as a Science Teacher 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 November 30, 2009. In it, she argued that Agency violated the RIF procedures. Therefore, she requested an evidentiary hearing and reinstatement to her position.[2]

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,

[1] *Petition for Appeal,* p. 6 (November 30, 2009).
[2] *Id.* at 3 and 7.

Spingarn Senior High School was determined to be the competitive area, and under 5 DCMR § 1502, the Science Teacher position was the competitive level subject to the RIF. Accordingly, Employee was provided one round of lateral competition where the principal utilized Competitive Level Documentation Forms ("CLDF") to rate each employee, as defined in 5 DCMR § 1503.2.[3] After discovering that Employee was ranked the lowest in her competitive level, Agency provided her a written, thirty-day notice that her position was being eliminated.[4]

Thereafter, on March 9, 2010, Employee filed an Amended Petition for Appeal and Motion for Summary Disposition.[5] The Motion for Summary Disposition set forth the same arguments as the Amended Petition and asserted that summary disposition was proper because Agency conceded that she was denied one round of lateral competition.[6] Agency filed an opposition to the motion and requested that Employee's motion be denied. It also requested that OEA grant its Motion for Summary Disposition because there were no genuine issues of fact in dispute.[7]

The OEA Administrative Judge ("AJ") ordered the parties to submit legal briefs

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[3] Agency explained that when it conducted the RIF, 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.
[4] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal* (December 31, 2009).
[5] In the Amended Petition, Employee contested her CLDF ranking and asserted that she was denied one round of lateral competition. Specifically, Employee believed that Agency ignored her academic credentials and community service efforts for the Office or School Needs category; that it should not have given her zero points for the Significant Relevant Contributions, Accomplishments or Performance category because she received "Exceeds Expectations" evaluations for the 2008-2009 school year and previous years; and that she should have received points for the Supplemental Professional Experiences as Demonstrated on the Job category because she organized and developed programs and activities outside the classroom. Furthermore, Employee believed that Agency was not authorized to assign percentage values to the competitive ranking factors because neither D.C. Official Code § 1-624.02 nor 5 DCMR § 1503.2 gave the Chancellor the discretion to do so. Ultimately, Employee believed Agency's actions were unlawful and resulted in her receiving an incorrect and unfair evaluation and competitive ranking which resulted in her separation. Accordingly, she requested that OEA reverse Agency's action and requested reinstatement, back pay, retirement benefits, sick leave, and attorney's fees and costs. *Amended Petition for Appeal,* p. 3-8 (March 9, 2010).
[6] *Memorandum of Points and Authorities in Support of Petitioner's Motion for Summary Disposition,* p. 9 (July 13, 2011).
[7] *District of Columbia Public Schools' Opposition to Employee's Motion for Summary Disposition and District of Columbia Public Schools' Motion for Summary Disposition* (August 8, 2011).

addressing whether Agency followed the District's laws when it conducted the RIF.[8] 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, 5 DCMR §§ 1503 and 1506.[9] Employee argued in her brief that Agency rated her based on its own subjective factors and not in accordance with the D.C. Official Code and DCMR.[10]

The Initial Decision was issued on June 11, 2012. 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.[11] As a result, he ruled that § 1-624.08 limited his review of the appeal to determining whether Employee received a written, thirty-day notice prior to the effective date of her separation and if Agency provided one round of lateral competition within her competitive level. The AJ found that Employee was properly afforded one round of lateral competition and explained that Agency properly considered all of the factors enumerated in DCMR § 1503.2 when it conducted the RIF.[12] He also found that Agency provided Employee the required thirty-day notice. Accordingly, the AJ denied Employee's request for an evidentiary hearing, denied her Motion for Summary Disposition, and upheld Agency's RIF action.[13]

Employee filed a Petition for Review with the OEA Board on July 16, 2012. She argues that the Initial Decision was based on an erroneous interpretation of statute, regulation, and case

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[8] *Amended Order Requesting Briefs* (February 15, 2012).
[9] *District of Columbia Public Schools' Brief,* p. 8-9 (March 7, 2012).
[10] *Petitioner Emma Johnson's Brief,* p. 4-16 (April 10, 2012).
[11] The AJ cited 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. 2-4 (June 11, 2012).
[12] The AJ noted that under *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997) the principal was given wide latitude to rank his teachers. With regard to Employee's claim that she received an improper rating during the RIF process, the AJ held that Employee did not proffer any credible statutes, case law, or other regulation to refute the Agency's position regarding the principal's authority to utilize discretion in completing the CLDF. *Initial Decision,* p. 8-9 (June 11, 2012).
[13] *Id.,* 10-11.

law; it did not address her issues; and it denied her procedural due process rights. Specifically, Employee argues that the AJ was incorrect in finding that the court in *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997) ruled on whether principals have wide discretion to rank their teachers.[14] She reiterates that Agency focused on subjective factors when it conducted the RIF. Therefore, Employee requests that the OEA Board set aside the AJ's order denying her motion and reinstate her with benefits, back pay, and attorney's fees.[15]

In response, Agency submits that Employee's disagreement with how the AJ applied *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia* is not based on any of the grounds for granting a petition for review; it is without merit; and it does not amount to an erroneous interpretation.[16] It claims that her argument regarding the subjective factors it added to the RIF process is baseless. Therefore, it requests that Employee's Petition for Review be denied.[17]

This Board finds that Employee's position lacks merit that *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997) did not provide a precedent as to a principal's discretion. The court clearly provides the following:

> Teachers [are] ranked by their principals, at least in part, on the basis of performance. Among other things, the CLDF required principals to consider teachers' "relevant significant contributions, accomplishments or performance," including "student outcomes, ratings, awards, special contributions, etc.," as well as "negative factors such as

[14] Employee believes that the court in this case ruled on "the constitutionality of the emergency rules." She states that the court's discussion of the principal's wide discretion should not have constituted a precedent because it was a "point of law merely assumed in an opinion . . . [and was] not authoritative." *Petitioner Emma Johnson's Petition for Review,* p. 4-6 (July 16, 2012).
[15] *Id.* at 10.
[16] Agency contends that Employee did not proffer any credible statutes, case law, or other regulation to refute the Agency's position regarding the principal's authority to utilize discretion in completing the CLDF.
[17] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 4-7 (August 14, 2012).

> disciplinary, attendance and failure to meet professional responsibilities, etc." . . . . Aside from the objective question of the length of service and the statutory requirement to add five years for District residents, school principals have total discretion to rank their teachers.

Moreover, the Superior Court of the District of Columbia recently relied on this language in *Onuche David Shaibu v. D.C. Public Schools*, 2012 CA 003606 P(MPA), p. 5 (D.C. Super. Ct. January 29, 2013) and *Phillip Haughton v. D.C. Public Schools,* 2012 CA005282 P(MPA), p. 4 (D.C. Super. Ct August 14, 2013). The court provided in both cases that "principals enjoyed near-total discretion in ranking their teachers" when implementing RIFs (citing *Washington Teachers' Union Local No. 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997). Therefore, the AJ was correct in finding that principals have wide discretion to rank their teachers, as Agency contends.

As for the merits of the RIF action, in *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883 (D.C. 1998), the D.C. Court of Appeals held that OEA's authority regarding RIF matters is narrowly prescribed, and it may not determine whether the RIF was bona fide or violated any law, other than the RIF regulations. 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 it provided a thirty-day notice. Recently, the Superior Court of the District of Columbia held in *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA), p. 4 (D.C. Super. Ct. March 14, 2013), 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."

Substantial evidence is defined as evidence that a reasonable mind could accept as

adequate to support a conclusion.[18] 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. After reviewing the record, this Board believes that the CLDF and the AJ's assessment of this matter were based on substantial evidence.

Agency provided a Retention Register which shows that Employee was the lowest ranked Science Teacher within her competitive level. Employee's final total score was "5;" the other two retained teachers each had scores of "65."[19] Because Employee received the lowest score, she was properly removed from her position. Agency also provided Employee with the requisite 30 days' notice.[20]

The *Onuche David Shaibu v. D.C. Public Schools,* 2012 CA 003606 P(MPA), p. 6 (D.C. Super. Ct. January 29, 2013), Court held 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. However, Employee fails to adequately address the allegations raised in her CLDF. Agency specifically claimed in Employee's CLDF that she was unresponsive to changes to improve student performance; she was inflexible when dealing with scheduling and classroom changes; she exhibited a negative attitude toward administrative guidelines; she refused new students to her classes; she openly expressed her biases to students' abilities to learn; and she refused to respond to staff inquiries while alienating staff and creating

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[18] *Black's Law Dictionary*, Eighth Edition; *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).

[19] It should be noted that there was a fourth CLDF provided by Agency, although the Retention Register only provides the ranking of three teachers, including Employee. The fourth CLDF shows that the fourth teacher received a final total score of "57.5." This does not change the outcome of Employee's ranking. Given that Employee's score was significantly lower than all of the other teachers, she still would have been removed from her position.

[20] *District of Columbia Public Schools' Brief* (March 7, 2012).

conflict.[21] However, Employee offered no evidence to contradict the assessments made on her CLDF. She provided nothing more than conjecture about Agency's scoring.[22] The Superior Court in *Sligh* held that when the record contains no evidence that would raise a material issue as to the veracity of the CLDF, employee's contentions amount to mere allegations. Because Employee failed to provide any evidence that the CLDF or the AJ's decision was not based on substantial evidence, we must DENY her Petition for Review.

ORDER

[21] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, Tab #3 (December 31, 2009).
[22] Employee argues that Agency ignored her academic credentials and community service efforts; that she received "Exceeds Expectations" evaluations for the 2008-2009 school year and previous years; and that she organized and developed programs and activities outside the classroom. However, none of these arguments contradict Agency's claims on her CLDF.

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

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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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.