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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0202-10
EMYRTLE BENNETT,)	
Employee)	
)	Date of Issuance: June 7, 2012
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	STEPHANIE N. HARRIS, Esq.
_____)	Administrative Judge
Emyrtle Bennett, Employee <i>Pro-Se</i>		
W. Iris Barber, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2009, Emyrtle Bennett (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“the OEA” or “the 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 Counselor at Coolidge Senior High School (“Coolidge”). Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter on February 6, 2012. On February 15, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations (“February 15th Order”). Agency complied, but Employee did not respond to the February 15th Order. On March 30, 2012, I issued an Order for Statement of Good Cause to Employee (“March 30th Order”). Employee was ordered to submit her Statement of Good Cause by April 10, 2012, based on her failure to provide a response to the February 15th Order. On April 10, 2012, Employee through Counsel submitted her Statement of Good Cause, noting that she did not submit her brief because she did not have an understanding of what was required of her.¹ In light of Employee’s response, on April 12, 2012, the undersigned issued an Order (“April 12th Order”) directing Employee to address whether her Statement of Good Cause served as the brief required by the February 15th Order. Employee was ordered to submit her response on or by April 26, 2012, thereby giving her an additional two weeks to prepare her brief.

¹ While the Statement of Good Cause was submitted by the Law Offices of Gary M. Gilbert & Associates, Counsel submits that they do not represent Employee in her appeal to OEA.

On May 22, 2012, Employee contacted the undersigned via telephone inquiring whether any additional correspondence had been sent out on this matter since she submitted her Statement of Good Cause, through Counsel, on April 10, 2012. The undersigned informed Employee that an Order had been sent out on April 12, 2012. Employee asserted that she did not receive the April 12th Order sent by the undersigned. In light of this assertion, the undersigned extended the due date for Employee's response and ordered Employee to address whether her Statement of Good Cause serves as her brief in this matter. Employee timely submitted her response on June 1, 2012. Based upon Employee's response, her Statement of Good Cause will serve as her legal brief for this matter. 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.²

² See Agency's Answer, Tab 1 (December 31, 2009).

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02,³ 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).

(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*,⁴ 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

³ 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.

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.”⁵

However, the Court of Appeals took a different position. In *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*,⁶ 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.”⁷ 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.”⁸

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.⁹ 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.”¹⁰ 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.”¹¹

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹² 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 states that Agency did not follow the established criteria for the rubrics, which would determine which positions would be eliminated in the instant

⁴ No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

⁵ *Id.* at p. 5.

⁶ 960 A.2d 1123, 1125 (D.C. 2008).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

¹¹ *Id.*

¹² *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

RIF.¹³ Employee provides a detailed description of her qualifications, expertise, and activities conducted at Coolidge. Also, Employee submits that she has “more education credentials, work experience, and areas of expertise in comparison to all the staff in [her] competitive level.”¹⁴ She alleged that her personnel file was empty, indicating that her competitive level ranking was incorrect.¹⁵ Additionally, Employee claims that she erroneously received zero (0) points under the ‘exceeds expectations’ category. She further explains that she had copies of the ‘exceeds expectations’ evaluations; however, she failed to submit these documents to the undersigned.¹⁶ Additionally, Employee requests reinstatement of her job and tort damages.¹⁷

Additionally, in her Statement for Good Cause, Employee asserts that Agency did not adequately follow proper District of Columbia statutes, regulations, and laws in subjecting her to the instant RIF.¹⁸ However, Employee submits that Agency provided her with 30 days notice of the instant RIF and one round of lateral competition; but, contends that it was done in a discriminatory manner.¹⁹

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.²⁰ Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that the lowest ranked counselor, Employee, was terminated as a result of the round of lateral competition.²¹

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. 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

¹³ Petition for Appeal (December 1, 2009).

¹⁴ *Id.*, Attachment at p. 3.

¹⁵ Agency provided a copy of Employee’s personnel file, which is approximately 200 pages, with its brief dated March 7, 2012.

¹⁶ Petition for Appeal (December 1, 2009).

¹⁷ *Id.*

¹⁸ Employee Statement of Good Cause (April 10, 2012).

¹⁹ *Id.*; *see also* Employee Response (June 1, 2012).

²⁰ Agency Brief at pp. 3, 7 (March 7, 2012).

²¹ *Id.* at pp. 3-5. School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

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.

Here, Coolidge was identified as a competitive area, and the Counselor position was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were three (3) Counselor positions subject to the RIF.²² Of the three (3) positions, one (1) position was identified to be abolished. Because Employee was not the only counselor 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 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%)

²² Agency Brief, Exhibit A, Retention Register (March 7, 2012).

(d) Length of service – (5%)²³

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.²⁴ Agency cites to *American Federation of Government Employees, AFL-CIO v. OPM*,²⁵ 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.”²⁶ 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.

Competitive Level Documentation Form

Agency employs the use of a Competitive Level Documentation Form (“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 Coolidge 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 received a total of fourteen and a half (14.5) points on her CLDF, and was, therefore, ranked the lowest in her respective competitive level. Employee’s CLDF stated, in pertinent part, the following:

“Ms. Bennett does not complete academic interest inventories for all students to identify student needs, career interests, and personal/social development. Many students’ needs go unmet, which leads to academic failure and lack of interest in school...Ms. Bennett makes no use of data to analyze and improve the learning of students. Ms. Bennett has unexcused documented attendance where she is often late for her tour of duty. Ms. Bennett does not contribute to school wide initiatives such as reduction of suspensions and increased student attendance. Ms. Bennett rarely attended the Collaborative Planning Sessions with other departments in the school to improve student performance. She operates in isolation from the staff. Ms. Bennett fails to consistently model appropriate professional behavior. Recently, she was engaged in two verbal confrontations with another staff member. On the positive side, Ms. Bennett has forged partnerships with community agencies, business[sic] and universities, which has contributed to an increase in the amount of students applying

²³ 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).

²⁴ Agency Brief at pp. 4-5 (March 7, 2012).

²⁵ 821 F.2d 761 (D.C. Cir. 1987).

²⁶ *Id.*

to college...Ms. Bennett played a role in partnering with an organization (College For Every Student) that has had some success with bring[ing] awareness to college access for some students.²⁷

Office or school needs

This category is weighted at 75% on the CLDF and includes: curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of one (1) point out of a possible ten (10) points in this category; a score much lower than the other employees within her competitive level, who received scores of four (4) and eight (8) points.²⁸ Employee argues that the documentary evidence does not support the score afforded to her and that Agency did not follow the established criteria rubrics.²⁹ Although Employee has provided a detailed description of her experience and expertise in relation to this category, she has failed to provide any evidence to highlight how this translates into her classroom expertise or would bolster a score in this area. Further, the instructions for completing the CLDF do not specify a determinate amount of points to be given for any specific factor. 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.”³⁰ The principal of Coolidge was given the discretion to complete Employee’s CLDF and had wide latitude to invoke her managerial discretion. With respect to this, I find that I will not substitute my judgment for that of the principal of Coolidge as it relates to the score she accorded Employee and her colleagues in the instant matter.

Relevant significant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received two (2) points in this area. The principal of Coolidge noted that Employee “played a role in partnering with an organization (College For Every Student) that has had some success with bring[ing] awareness to college access for some students.”³¹ Employee made similar arguments as noted in the preceding section in order to substantiate her contention that her CLDF was inaccurate. However, Employee has failed to provide any documented supplemental evidence that would supplant the higher score received by the remaining employees in the competitive level who were not separated from service. I find that the evaluation of this category falls within the rubric of managerial discretion.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee received zero (0) points in this area. While Employee does not provide any documentation to supplement additional points being awarded in this area, the undersigned reiterates that the principal of Coolidge was given discretion to assess Employee in this category.

²⁷ Agency Answer, Tab 3 (December 31, 2009).

²⁸ Agency Brief, Exhibit A, Retention Register (March 7, 2012).

²⁹ See Petition for Appeal (December 1, 2009).

³⁰ *Id.*

³¹ Agency Answer, Tab 3 (December 31, 2009).

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. The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

Employee claims that she erroneously received zero (0) points under the 'exceeds expectations' category and was able to locate copies of the 'exceeds expectations' evaluations; however, Employee has failed to provide this documentation. Further, after a review of the personnel file submitted by Agency, the undersigned was unable to locate a copy of this evaluation. Agency has provided an affidavit from Peter Weber, who served as the Interim Director of Human Resources during the time of the instant RIF.³² 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. Therefore, based on the evidence of record, I find that Agency properly calculated this number. Further, Employee received the maximum five (5) points available in this category, thus a recalculation of this category would not provide Employee with a change in her CLDF score.

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*,³³ 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."³⁴ According to the CLDF, Employee received a total score of fourteen and a half (14.5) points after all of the factors outlined above were tallied and scored.³⁵ The remaining counselors in Employee's competitive level received scores of thirty-six (36) and sixty-six and a half (66.5) points.³⁶ Although Employee has provided a detailed description of her credentials, expertise, and experience, she has not proffered any documented evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome in this case.³⁷

Additionally, the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.³⁸ 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

³² Agency Brief, Exhibit B (March 7, 2012).

³³ 109 F.3d 774 (D.C. Cir. 1997).

³⁴ See also *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.)

³⁵ Agency Brief, Exhibit A, Retention Register (March 7, 2012).

³⁶ *Id.*

³⁷ 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).

³⁸ 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).

legitimately invoked and properly exercised.”³⁹ Agency instructed principals in the instant RIF to assign scores to each person in a competitive level that reflected the principal’s “best judgment.”⁴⁰ Accordingly, the undersigned finds that the principal of Coolidge had discretion in completing Employee’s CLDF, as she was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. Further, the undersigned finds 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, 2009.⁴¹ Further, 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 acknowledged that she received thirty (30) days notice prior to the effective date of the RIF.⁴² Accordingly, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Lack of Budget Crisis

Employee alleges that there was no budget shortfall and that Agency used the “financial crisis as a pretext” to terminate employees.⁴³ In *Anjuwan v. D.C. Department of Public Works*,⁴⁴ the D.C. Court of Appeals 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...”⁴⁵ 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.”⁴⁶

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 employee’s 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

³⁹ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

⁴⁰ Agency Answer, Tab 2, Attachment B (December 31, 2009).

⁴¹ *Id.*, Tab 4 (December 31, 2009).

⁴² See Employee’s Statement of Good Cause (April 10, 2012).

⁴³ Petition for Appeal (December 1, 2009).

⁴⁴ 729 A.2d 883 (December 11, 1998).

⁴⁵ *Id.* at 885.

⁴⁶ *Id.*

reorganize internally was a management decision, over which neither OEA nor this Administrative Judge has any control.⁴⁷

Discrimination Claims

Employee alleges that the instant RIF was handled in a discriminatory manner. However, Employee has provided no evidence or documentation 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.⁴⁸ 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*⁴⁹ 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.”⁵⁰

However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*⁵¹ 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 purposes from an independent complaint of unlawful discrimination or retaliation...”⁵² 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 discrimination fall outside the scope of OEA’s jurisdiction. The undersigned also notes that Employee has filed a federal court case currently pending in D.C. District Court.⁵³

Grievances

Employee contends that she faced retaliation for refusing to teach additional classes beyond her counseling abilities. However, Employee has provided no credible evidence to support this contention, which renders it a generalized unsupported allegation. Employee further alleges that she was never properly evaluated or observed by anyone. The undersigned notes that the criteria Agency instructed the principals to use in ranking employees did not require a formal observation of employees.⁵⁴ She also claims that Agency failed to provide her with a final evaluation and alleges that “based on information and belief, one of the two remaining persons in [her] competitive

⁴⁷ *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

⁴⁸ D.C. Code §§ 1-2501 *et seq.*

⁴⁹ 729 A.2d 883 (December 11, 1998).

⁵⁰ See *Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

⁵¹ 730 A.2d 164 (May 27, 1999).

⁵² *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

⁵³ See Employee Statement for Good Cause (April 10, 2012).

⁵⁴ Agency Answer, Tab 2, Attachment B (December 9, 2009).

level [was] not licensed or certified to be a counselor.”⁵⁵ Complaints of this nature are 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. This is not to say that Employee may not challenge these issues elsewhere; however, the undersigned is unable to address the merits of such claims.

Moreover, the undersigned notes Employee’s concern that she has “suffered irreparable harm, including but not limited to securing a new job, securing life insurance for a reasonable cost..., securing health insurance at a reasonable cause, and pain and suffering because [her] career and reputation [have] been wrongfully tarnished.”⁵⁶ While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that corroborates or proves that the RIF was conducted unfairly or in contradiction of District of Columbia statutes, regulations, and laws.

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.

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

⁵⁵ Petition for Appeal, Attachment at p. 3. (December 1, 2009).

⁵⁶ *Id.*, Attachment at p. 7.