**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| DANIEL BUSTIOS, | ) | OEA Matter No. 2401-0220-10 |
| Employee | ) | |
| | ) | Date of Issuance: September 18, 2013 |
| | ) | |
| D.C. PUBLIC SCHOOLS, | ) | |
| Agency | ) | |
| | ) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Daniel Bustios ("Employee") worked as an Elementary Teacher with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that he was being separated from his 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 December 2, 2009. He asserted that he was terminated for insufficient cause and contested the information provided in his Competitive Level Documentation Form ("CLDF").[2] Ultimately, Employee believed that he should not have been subjected to the RIF

[1] *Petition for Appeal*, p. 6 (December 2, 2009).
[2] Employee believed that that certain statements in the CLDF were inaccurate. He provided hat he was not observed by the principal, and Agency did not hold a conference regarding his teaching styles. He explained that his lesson plans followed Agency's standards, and in his previous performance reviews, he was rated "exceeds expectations" and "meets expectations." *Id.* at 12.

action and requested reinstatement to his position.[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, Barnard Elementary was determined to be the competitive area, and under 5 DCMR § 1502, the Elementary Teacher position was determined to be the competitive level subject to the RIF. Accordingly, Employee was provided one round of lateral competition where the principal utilized the CLDFs to rate each employee, as defined in 5 DCMR § 1503.2.[4] After discovering that Employee was ranked as one of the lowest in his competitive level, Agency provided him a written, thirty-day notice that his position was being eliminated. Therefore, 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.[6] In its responsive brief, Agency renewed 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.[7] Similarly, Employee submitted the same arguments that he provided in his Petition for Appeal.[8]

The AJ issued her Initial Decision on June 7, 2012. She 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

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[3] Employee claimed that after he was excessed from Barnard Elementary School during the 2008-09 school year, Agency placed him back at Barnard but gave him a position supporting third grade math. Employee stated that this placement was outside of his specialty area, and as a result, Agency placed him in a vulnerable position. *Id.* at 5.
[4] 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.
[5] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal (*January 7, 2010).
[6] *Order Requesting Briefs (*February 14, 2012).
[7] *District of Columbia Public Schools' Brief,* p. 8-9 (March 6, 2012).
[8] *Employee's Brief* (May 3, 2012).

applicable statute to govern the RIF.[9] As a result, the AJ ruled that § 1-624.08 limited her 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. She held that Employee was properly afforded one round of lateral competition and explained that Agency considered all of the factors enumerated in DCMR § 1503.2 when it conducted the RIF. With regard to Employee's disagreement with the statements provided in his CLDF, the AJ stated that although he provided supporting documentation for his argument, he did not provide ". . . any evidence to highlight how [it] translated into classroom expertise."[10] She also found that Agency provided Employee the required thirty-day notice. Accordingly, the RIF action was upheld.[11]

Employee filed a Petition for Review on July 6, 2012. He disagrees with the AJ's findings that he was properly afforded one round of lateral competition and that he was provided the required thirty-day notice. Employee explains that after he received his notice of the RIF action, he was not allowed to re-enter the school, and therefore, was unable to show improvement of his poor evaluation. He disputes that he was provided one round of lateral competition because the principal of Barnard Elementary was newly appointed and never questioned him on his practices or provided feedback on his teaching. He also explained that he received good reviews from the previous principal at Barnard. Therefore, he requested that the

[9] 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 7, 2012).

[10] *Id.* at 8. With regard to Employee's assertion that the principal did not hold a conference with him, the AJ noted that the principal had discretion in completing Employee's CLDF, and the criteria Agency instructed the principal to use to rank employees did not require formal observations. In addition, the AJ ruled that Employee's arguments regarding his classroom assignment and monetary bonus were grievances that were not within the purview of OEA's scope of review.

[11] *Id.* at 11.

Board allow him to proceed with his case against Agency.[12]

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 his competitive level and if they provided a thirty-day notice. Recently, the Superior Court of the District of Columbia held 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."[13]

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[14] 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.[15]

The CLDF provided that Employee had an inflexible attitude toward implementing the

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[12] Employee asserts that Agency was untruthful in stating that he was unwilling to change his teaching practices because the principal did not see his work or hold a conference with him, as it claimed on his CLDF. *Employee's Petition for Review*, p. 2-4 (July 6, 2012).

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

[14] *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).

[15] The AJ found that Employee was afforded one round of lateral competition and provided a detailed assessment of all the factors in DCMR § 1503.2 that Agency used when it conducted the RIF. A retention register was provided to show Employee's ranking after one round of lateral competition. Agency also provided Employee the required thirty-day notice. He received notice on October 2, 2009, and he was effectively RIFed on November 2, 2009. Additionally, the AJ adequately considered Employee's argument regarding his reemployment rights. *District of Columbia Public Schools' Answer to Employee's Petition for Appeal (*January 7, 2010); *District of Columbia Public Schools' Brief* (March 6, 2012); and *Initial Decision* (June 7, 2012).

math curriculum as Agency required. It went on to note that Employee's instruction did not yield a higher level of achievement by his students. Moreover, the CLDF described that Employee's rigid inflexibility to adapt the requirements of Agency was an impediment. Finally, the form provided glowing remarks of Employee's contribution to nurturing cultural diversity and sensitivity to the school.[16]

However, Employee offers only general statements about Agency's scoring his CLDF. He neglected to address any of the specific allegations made against him. He claimed that he was not allowed to re-enter the school, and therefore, was unable to show improvement for his poor evaluation. Further, he asserted that he received positive evaluations from the previous principal before the newly appointed principal conducted the RIF action against him.

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. Moreover, the court in *Onuche David Shaibu v. D.C. Public Schools,* 2012 CA 003606 P(MPA)(D.C. Super. Ct. January 29, 2013) 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 (emphasis added).[17] However, Employee offered no evidence that contradicts the assessments made on his CLDF.[18]

As for Employee's argument regarding his previous evaluations, the *Shaibu* court held that "the fact that [an employee] got better evaluations from prior principals . . . does not mean that [their] evaluation was not supported by substantial evidence . . . . It means only that different supervisors reached different conclusions about [employee's] performance." The Court further

[16] *Petition for Appeal,* p. 10 (December 2, 2009).
[17] *Id.* at 6.
[18] Moreover, Employee's claim about not being allowed into the school, shows his misunderstanding of the RIF action. It was because of his poor ranking that he was removed. Agency did not have a duty to allow him to make improvements before effectuating the RIF.

provided that unless an employee can show that each supervisor based their evaluation on materially identical information, then different supervisors may disagree about an employee's performance and reach different opinions that may be supported by substantial evidence.[19] Consequently, Employee's past ratings do not mean that the principal's assessment at Barnard Elementary was wrong or unsupported by substantial evidence. As the AJ properly held, school principals have total discretion to rank their teachers. Moreover, performance evaluations, by their nature, are subjective and individualized.[20] Thus, the principal could rate Employee as they saw fit. Because Employee failed to provide any evidence that the CLDF or the AJ's decision was not based on substantial evidence, we must DENY his Petition for Review.

[19] *Onuche David Shaibu v. D.C. Public Schools,* 2012 CA 003606 P(MPA), p. 8-9 (D.C. Super. Ct. January 29, 2013).
[20] *Initial Decision,* p. 7 (June 7, 2012) (quoting *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)).

**ORDER**

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.