THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ANITHA DAVIS, Employee	
v.	OEA Matter No.: 2401-0162-13
D.C. PUBLIC SCHOOLS, Agency	Date of Issuance: June 21, 2016

OPINION AND ORDER
ON
PETITION FOR REVIEW

Anitha Davis ("Employee") worked as an Administrative Aide with D.C. Public Schools ("Agency"). On May 24, 2013, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force ("RIF"). The effective date of her termination was August 16, 2013.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 13, 2013. In her appeal, Employee argued that Agency violated RIF procedures by failing to afford her one round of lateral competition.[1] She also contended that Agency did not provide her with information pertinent to the RIF and her appeal rights. According to Employee, Agency also erred in not allowing her to exercise her seniority or retreat rights, in violation of the

[1] *Petition for Appeal* (September 13, 2013).

D.C. Municipal Regulations ("DCMR").[2] Employee, therefore, requested to be reinstated to her former position or any other position for which she was qualified.[3]

Agency filed its Answer to the Petition for Appeal on October 16, 2013. It contended that the RIF was conducted in accordance with Title 5, Chapter 15 of the DCMR and that Employee was provided with the required thirty days' notice prior to the effective date of her termination.[4] Agency stated that the RIF was implemented as a result of reorganization, curtailment of work, and budgetary restraints. Employee's school, M.C. Terrell, was permanently closed, and she was temporarily assigned to Aiton Elementary School from June 20, 2013 through August 16, 2013, pending the effective date of the RIF.[5] According to Agency, Employee was not entitled to one round of lateral competition because she was the sole Administrative Aide at M.C. Terrell, and the entire competitive level in which she worked was eliminated. It, therefore, asked that OEA uphold Employee's separation under the RIF.

An OEA Administrative Judge ("AJ") was assigned to this matter on May 14, 2014. On May 30, 2014, the AJ ordered the parties to submit written briefs addressing whether Agency's RIF action should be upheld.[6] Both parties complied with the order. The AJ issued his Initial Decision on December 30, 2014, holding that Employee was RIF'd in accordance with all applicable laws, rules, and regulations.[7] Specifically, he stated that the entire competitive level in which Employee competed was eliminated; thus, Agency was not required to afford Employee one round of lateral competition under D.C. Official Code § 1-624.08(e).[8] In addition, the AJ

[2] *Id*.
[3] *Id*.
[4] *Agency Answer to Petition for Appeal*, p. 2 (October 16, 2013).
[5] *Id*., Exhibit 2. On July 20, 2013, Agency provided Employee with written notice that she would be detailed to Aiton until the effective date of the RIF.
[6] *Briefing Order* (May 14, 2014).
[7] *Initial Decision* (May 30, 2014).
[8] *Id*. at 4.

determined that Agency provided Employee with thirty days' written notice prior to the effective date of her termination. He also noted that Employee was detailed to Aiton Elementary School from June 25, 2013, until the effective date of her termination under the RIF.[9] However, he determined that Employee's detail had no bearing on the legality of the RIF action.[10] Consequently, Employee's separation from service was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on February 4, 2015. She argues that the AJ's findings were not based on substantial evidence and that the decision did not address all material issues of fact and law that were raised during the course of her appeal.[11] According to Employee, Agency was ordered by the AJ to provide her with a copy of her personnel file so that she could submit a more thorough and complete brief to support her position that the RIF action was flawed.[12] Employee believes that she was officially transferred to a vacant position at Aiton Elementary School. Therefore, Agency should have allowed her to compete for retention at this school based on her Service Computation Date, performance rating, and District of Columbia residency preference.[13] She further contends that Agency submitted a response to the AJ's Briefing Order in an untimely manner, which denied her the opportunity to respond to its rebuttal brief.

Moreover, Employee contends that the AJ erred by failing to address her claims that Agency violated certain sections of the Collective Bargaining Agreement ("CBA") between DCPS and the American Federation of State, County, and Municipal Employees

[9] Employee worked as an Administrative Aide at Terrell Elementary School during the 2011-2012 school year.
[10] *Id*. The AJ did not address any of Employee's claims that constituted grievances and explained that OEA no longer has jurisdiction over such claims.
[11] *Petition for Review* (February 4, 2015).
[12] *Id*. at 3.
[13] *Id*.

("AMSCME").[14] She claims that the AJ should have held an evidentiary hearing for the purpose of adducing evidence to support the conclusion that the RIF action was implemented at the same time Agency was recruiting for and fulfilling the same or similar vacant positions.[15] Employee, therefore, asks this Board to reverse the Initial Decision and find that Agency's RIF action was improper. Agency filed its response to the Petition for Review on March 9, 2016, for the purpose of clarifying that it did comply with the AJ's order to submit a legal brief on or before July 2, 2014.[16]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
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> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
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> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
>
> (c) The findings of the Administrative Judge are not based on substantial evidence; or
>
> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Competitive Area

Agency initiated the instant RIF pursuant to Mayor's Order 2013-015 (January 16, 2013) and in accordance with Title 5, Chapter 15 of the DCMR.[17] The RIF was conducted as a result of the permanent closing of M.C. Terrell Elementary School, reorganization of functions,

[14] *Id*. at 5.
[15] *Id*.
[16] *Answer to Petition for Review* (March 9, 2015).
[17] The Mayor's Order identified thirteen District schools to be closed at the end of the 2012-2013 school year, including M.C. Terrell Elementary School.

curtailment of work, and budgetary restraints.[18] Under DCMR § 1501.1, the Chancellor of DCPS is authorized to establish competitive areas when conducting a RIF as 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."

On June 20, 2013, Agency issued Employee written notice that she was being detailed to Aiton Elementary until the effective date of the RIF.[19] The notice further provided that Employee's detail would not exceed August 16, 2013.[20] When Agency issued its RIF notice, it identified M.C. Terrell/McGogney Elementary School as the competitive area in which Employee was placed. Terrell constituted a clearly identifiable unit within DCPS and was a legitimate competitive area. Agency's June 20, 2013 notice specifically stated that Employee was being detailed to a different school because Terrell was closing. Moreover, there is no credible evidence in the record to support a finding that Employee was officially hired at Aiton Elementary school, as evidenced by a Standard Personnel Form 50 ("SF50"). Therefore, this Board rejects Employee's argument that her competitive area was changed from Terrell Elementary to Aiton Elementary when she was temporarily detailed in June of 2013.

Competitive Level

According to Title 5, DCMR § 1503.2 "if a decision must be made between employees in the same competitive area and competitive level, the following factors…shall be considered in determining which position shall be abolished: significant relevant contributions, accomplishments, or performance; relevant supplemental professional experiences as demonstrated on the job; office or school needs, including: curriculum specialized education,

[18] *Agency Brief*, p. 2 (July 2, 2014).
[19] *Id*., Attachment 2.
[20] *Id.*

degrees, licenses or areas of expertise; and length of service." However, § 1503.3 provides that when an entire competitive level within a competitive area is eliminated, these factors need not be considered in determining which positions will be abolished. This Office has consistently held that when a separated employee is the only member within his or her competitive level or when an entire competitive level is abolished pursuant to a RIF "the statutory provision affording [him/her] one round of lateral competition was inapplicable."[21]

In this case, Agency provided a copy of the retention register that was utilized to conduct the RIF.[22] This document reflects that Employee was the sole Administrative Aide at M.C. Terrell/McGogney Elementary School. Employee was properly placed into a single-person competitive level, and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(e) pertaining to multiple-person competitive levels. Moreover, Agency conducted the RIF as a result of the permanent closing of M.C. Terrell. Thus, all positions were eliminated at the school. Accordingly, this Board finds that Employee was placed in the correct competitive area and competitive level, and she was not entitled to one round of lateral competition.[23]

Personnel File

Employee argues that she was not afforded an opportunity to respond to Agency's argument that its RIF action was conducted properly because she was not provided with a copy of her personnel file or the retention register that was used to rank and rate other employees in

[21] *See Lyles v. D.C. Department of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).
[22] *Agency Brief*, Tab 4 (July 2, 2014).
[23] This Board notes that Employee does not dispute that she received at least thirty days' notice prior to the effective date of the RIF.

her competitive level. This Board disagrees. On May 30, 2014, the AJ issued a Briefing Order, requiring both parties to submit legal briefs addressing whether the RIF was conducted in accordance with the proper District laws, rules, and regulations.[24] The order required Agency to include with its submission a copy of the retention register, in addition to a copy of Employee's personnel file. The deadline for Agency's brief was July 2, 2014. Employee was given until August 3, 2014, to provide a response.[25] On July 2, 2014, Agency submitted its legal brief to OEA, which included an electronic, CD-ROM copy of Employee's personnel record.[26] Agency's brief also included a Certificate of Service, which states that a copy of its brief and attachments were mailed to both Employee and her AFSCME union representative, Steven White, on July 2, 2014.[27] Thus, both Employee and her representative were given approximately one month to review the documents and legal arguments submitted by Agency and to respond accordingly.

It should further be noted that Agency submitted a timely response to the AJ's briefing order; however, Employee's response brief was not filed until August 4, 2014, a day after the prescribed deadline. Consequently, Employee's position that she was not afforded an adequate opportunity to review her personnel file and the retention register prior to submitting her legal brief is without merit. Likewise, Employee could have, but did not submit any statements or affidavits from persons identified in her Petition for Review to support and/or clarify her position that she should not have been separated from service pursuant to the RIF action.[28]

Pre-RIF and Post RIF Activities

Employee claims that the AJ should have held an evidentiary hearing for the purpose of

[24] *Briefing Order* (May 30, 2014).
[25] *Id*.
[26] Employee's electronic file was attached to Agency's July 2, 2014 brief as Exhibit 5. The document is approximately 173 pages in length.
[27] *Id*. at 4.
[28] Employee has also failed to provide any credible evidence to this Board that any genuine issues of fact exist to support a conclusion that the AJ should have conducted an Evidentiary Hearing.

adducing evidence to support the conclusion that the RIF action was implemented at the same time Agency was recruiting for and fulfilling the same or similar vacant positions. However, in *Anjuwan v. D.C. Department of Public Works*, 729 A.2d 883 (D.C. 1998), the D.C. Court of Appeals held that OEA lacked the authority to determine whether an Agency's RIF was bona fide. OEA has interpreted the ruling in *Anjuan* 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 claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds for personnel services is not an issue for OEA to consider. Likewise, how Agency elected to reorganize internally, was a management decision, over which neither OEA nor this Board have any control.

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[29] In *Baumgartner v. Police and Firemen's Retirement and Relief Board*, the D.C. Court of Appeals held 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.[30]

In this case, the AJ has provided an in-depth analysis of Agency's RIF action. The AJ's conclusions flowed rationally from the evidence presented by the parties, and there is no credible evidence in the record to prove that the AJ abused his discretion. The Board, therefore, finds that the Initial Decision was based on substantial evidence.

[29] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).
[30] 527 A.2d 313 (D.C. 1987).

Conclusion

Based on the foregoing, this Board concludes that Agency properly RIF'd Employee in accordance with all applicable statutes, laws, and regulations. She was not entitled to one round of lateral competition and received thirty days' written notice prior to the effective date of her separation. The Board further finds that there is no evidence to support a finding that the AJ's decision was based on an erroneous interpretation of statute. Accordingly, Employee's Petition for Review must be denied.

ORDER

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

FOR THE BOARD:

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.