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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DEIRDRE COUNCIL-ELLIS,)	
Employee)	OEA Matter No.: 2401-0052-11
)	
v.)	Date of Issuance: February 11, 2014
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	STEPHANIE N. HARRIS, Esq.
Agency)	Administrative Judge
_____)	
Deirdre Council-Ellis, <i>Pro-Se</i>)	
Sara White, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 21, 2010, Deirdre Council-Ellis (“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 abolishing her position through a Reduction-in-Force (“RIF”). Employee’s RIF notice was dated October 22, 2010, with an effective date of November 21, 2010. Employee’s position of record at the time her position was abolished was a Compliance Specialist at the DCPS Office of Special Education’s (“OSE”) Non-Public Unit (“NPU”). Employee was serving in Educational Service status at the time her position was abolished. On January 24, 2011, Agency filed an Answer to Employee’s appeal.

I was assigned this matter on July 30, 2012. A Status Conference was scheduled to be held on October 11, 2012. Agency Representative and Mark Murphy, appearing on behalf of Employee were in attendance, but Employee did not appear. However, because Mr. Murphy and Employee had not submitted a Designation of Representation Form, the Status Conference could not proceed. Employee was ordered to submit a Statement of Good Cause, which she timely submitted on October 16, 2012.

A Prehearing Conference was held on March 19, 2013, wherein all parties were in attendance. On March 22, 2013, the undersigned issued a Post Status Conference Order directing

the parties to address specific issues regarding the RIF; however, both Agency and Employee failed to submit briefs as required. On April 18, 2013, the undersigned issued an Order for Statement of Good Cause to the parties, requiring them to explain their failure to submit their briefs by the prescribed deadline. Both parties timely submitted their Statements of Good Cause and their briefs. All required submissions have been received in this matter. After reviewing the record, I have determined that there are no material facts in dispute requiring further proceedings 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 FACT, ANALYSIS, AND CONCLUSIONS OF LAW

On October 8, 2010, former D.C. School Chancellor Michelle Rhee ("Chancellor Rhee") authorized a RIF pursuant to D.C. Code § 1-624.02, Title 5 of the District of Columbia Municipal Regulations ("DCMR") Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was conducted to eliminate specific positions in NPU and was necessitated by budgetary reasons, curtailment of work and reorganization of functions.¹

Although the instant RIF was authorized in part pursuant to D.C. Code § 1-624.02,² which encompasses more extensive procedures, for the reasons explained below, I find that D.C.

¹ See Agency's Answer, RIF Authorization, Tab 2 (January 24, 2011).

² 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:

Official Code § 1-624.08 (“Abolishment Act” or “the Act”) is the more applicable statute to govern this RIF.

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 (emphasis added).

(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*, 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.”³ 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.”⁴

(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.

³*Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

⁴*Id.* at p. 5.

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, DCPS conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”⁵ The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act instead of “the regular RIF procedures found in D.C. Code § 1-624.02.”⁶ 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.”⁷

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.⁸ 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.”⁹ 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.”¹⁰

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹¹ 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. Therefore, I am primarily guided by § 1-624.08 for RIFs. 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.

Accordingly, the instant RIF will be analyzed under D.C. Code § 1-624.08, as well as District Personnel Manual (“DPM”) Chapter 24. In *Webster Rogers v. District of Columbia Public Schools*,¹² the District of Columbia Superior Court held that D.C. Code §1-624.08 is the correct statute for RIFs conducted due to budgetary constraints and found that DPM, Chapter 24 is the applicable criteria to be used, as opposed to Title 5 DCMR, Chapter 15.

Employee’s Position

In her Petition for Appeal, Employee challenges the procedure, process, and substance of the RIF. She claims that the RIF was procedurally and substantively flawed and it was conducted in a discriminatory and arbitrary manner. Employee further claims that the RIF was pre-textual, conducted for inappropriate statutory reasons, and was actually a disguised termination. Employee also claims that she was detailed to the Placement Specialist position in 2008 and did

⁵ *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

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

¹⁰ *Id.*

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

¹² No. 2012 CA 006364 (D.C. Super. Ct. December 9, 2013).

not receive proper compensation for the last two years. She also alleges that she was RIF'd as a Placement Specialist, but her position of record was a Compliance Specialist.¹³

In her brief, Employee also makes the following contentions:

- 1) In support of her contention that she was on detail, Employee submits documentation showing a detail placement to the Placement Specialist position in October 2008.¹⁴
- 2) Employee alleges that although her RIF Notice stated that she would be separated on November 21, 2010 her separation was actually effectuated on the date of the RIF Notice, October 22, 2010, thus, Agency did not satisfy the thirty (30) day notice. Employee indicates that the RIF Notice did not give any reasons or cause for the RIF.¹⁵ She states that she was also sent an email telling her to report to Agency's Central Office, where she was then informed of her separation.
- 3) She claims that Chancellor Rhee abused D.C. Code §1-624.08 and authorized the instant RIF to dismiss specific employees and avoid using adverse action procedures.
- 4) Employee alleges Chancellor Rhee was not the head of Agency on the effective date of the RIF, November 21, 2010. Employee claims that Chancellor Rhee was not authorized to identify her position to be abolished because she announced her resignation on October 13, 2010, and there was no other indication of another resignation date.¹⁶ She alleges that because Chancellor Rhee was no longer employed by Agency, she improperly issued the RIF Notice dated October 22, 2010.
- 5) Employee questions the statement in the RIF Notice that there is a limited right to appeal a RIF to this Office, citing a portion of the *Washington Teacher's Union*¹⁷ case, noting the following: "At the time of its creation, the Council described the OEA as an independent, personnel appeals authority which will hear all personnel related employee appeals", with Employee adding emphasis on the word 'all.'¹⁸
- 6) She also questions the use of, and reasons for contracting out the positions eliminated in the instant RIF, as described in the October 8, 2010, RIF Authorization submitted by Agency. Employee takes particular issue with Agency's assertion that it would now "be able to establish incentive structures that encourage contractors to address the needs of DCPS students without encouraging the contractors to act in such a manner as to preserve their jobs." She states that based on this intention, the RIF was not the appropriate action to be taken. Employee also suggests that if she was addressing the needs of students to preserve her job, "then the Chancellor was obligated to follow Title 5, Adverse Action Procedures of the CBA between the Council of School Officers and DCPS."¹⁹
- 7) She alleges that there was no true budgetary reduction because the NPU received a 7% increase according to the District of Columbia Annual Operating Budget/Capitol

¹³ See Petition for Appeal (December 21, 2010).

¹⁴ *Id.*, p. 6.

¹⁵ Employee Brief, p. 2 (March 8, 2013).

¹⁶ Employee Brief, Tab 2 (March 8, 2013).

¹⁷ 960 A.2d 1123.

¹⁸ Employee Brief, p. 2; Tab 3 (March 8, 2013).

¹⁹ *Id.*, pp. 2-3.

- Plan for FY 2010.²⁰ Employee also claims that the costs associated with replacing Placement Specialists in NPU by hiring contractors exceeded the amount of money proposed to be saved by conducting the instant RIF.²¹
- 8) Employee references an August 15, 2012 press release as evidence that Agency has not operated under a fiscal emergency in over ten years.²²
 - 9) She claims that Agency has not offered any evidence 1) of budgetary constraints at the time of the RIF; 2) to support the reorganization of NPU; 3) to show that a curtailment of work was necessary; or 4) that the competitive level was eliminated. Employee states that NPU continues to be organized as it was in September 2010.
 - 10) Employee asserts that DCPS violated the provisions of the District of Columbia Privatization Act by using contractors from First Home Care to replace Placement Specialists. She explains that this law is applicable because it was prior to the Abolishment Act and was evaluated for compliance in the same year as the Abolishment Act.
 - 11) Employee also argues that Agency's RIF was improper because the Placement Specialist position is not defined by DCPS, but instead is defined by the Individual with Disabilities Education Improvement Act of 2004.
 - 12) Employee submits that work existed and there was no true curtailment of work. Referring to Chancellor Rhee's statement that NPU would function more properly by use of contractors, Employee argues that "if the unit is functioning, then the competitive area has not been eliminated."²³
 - 13) Employee alleges that Agency still employs managers that were hired after the separation date to manage Placement Specialists contractors.
 - 14) In addition, Employee argues that she "was listed in Human Resources as a Compliance Specialist." She also states that she was detailed to be a Placement Specialist in October 2008 for one hundred twenty (120) days, but she was not reassigned to her old position, Compliance Specialist, once the detail expired. Employee notes that "according to the DC Municipal Regulations, after a period of 120 days, the employee either returns to the official job title or is permanently placed in the detailed position and accordingly compensated for it."²⁴
 - 15) Employee also submits that Agency did not compensate her as a Non-Public Manager "after more than years of service in [the] position." She also claims that she was not compensated "after [her] hire date as Director of Student Assignment."²⁵
 - 16) She submits that Agency informed her that her medical insurance would be covered for thirty (30) days after the RIF and then she could utilize COBRA benefits.

²⁰ *Id.*, Tab 6.

²¹ *Id.*, p. 3, Tab 7.

²² *Id.*, Tab 11.

²³ *Id.*, p. 4.

²⁴ *Id.*, p. 5, Tab 12.

²⁵ *Id.*, p. 6.

- However, Employee claims that this provided a great deal of stress to her because she was undergoing medical treatments.²⁶
- 17) Employee claims that Agency failed to 1) retain a retention roster for employees impacted by the instant RIF and 2) establish a mechanism to inform a Recruiting Officer that a RIF'd employee applied for a position. She further claims that Agency "is now acting on the inappropriate RIFs in 2012. Our unit continues to be excluded."²⁷
 - 18) Employee asserts that the factual basis relied on by DCPS to complete Employee's CLDFs was not supported by documentary or testimonial evidence. She further asserts that the allegations raised in her CLDF are not accurate, noting that the RIF was due "to budget and not performance."²⁸
 - 19) She argues that Agency failed to communicate with Union Representatives as it related to positions within the Central Office, noting that positions have been advertised on websites other than the DCPS official website in an effort to hide positions within the Non-Public Unit that are consistent with the prior salary range of the grievant.
 - 20) She alleges that DCPS has engaged in unfair hiring practices, age discrimination, unfair labor practices, and race discrimination. She alleges that Agency uses "fraternization to select and promote employees" and that employees who do not attend mixers and networking events at bars are not considered for promotion or retention on current positions. Employee further alleges that many credentialed employees are passed over in favor of non-credentialed employees who fraternize with DCPS leadership and many positions are filled without ever being advertised.²⁹
 - 21) Employee claims that Agency's efforts to undermine the Council of School Officers ("CSO") have been well documented and constitutes an unfair labor practice in violation of section 7116 of an uncited Federal Labor Relations Authority statute. Employee also claims that Agency favors the Washington Teachers Union ("WTU") over the CSO and has changed positions within the NPU so that they will fall under the WTU.³⁰
 - 22) In regards to race discrimination, Employee contends that Agency "targeted [NPU] for elimination because all (100%) of the people in the identified positions were black, and a majority [were] over the age of 40." She also claims that the majority of OSE personnel are under the age of 40 and consist of races other than black, further noting that these individuals were not included on August and September 2010 trainings."³¹
 - 23) Employee contends that members of the NPU who were retained as Program Managers were not Programs Managers at the time of the instant RIF; she claims that their permanent position at the time of the RIF was one of the positions identified to

²⁶ *Id.*, Tab 3; Employee Brief, Tab 6 (April 29, 2013).

²⁷ *Id.*, p. 5.

²⁸ *Id.*, p. 5.

²⁹ *Id.*, p. 6.

³⁰ *Id.*, p. 6.

³¹ *Id.*, p. 6.

be eliminated by Chancellor Rhee. Employee further argues that because competitive levels are based on the permanent position of the employee, not the acting or interim status, all displaced employees “should have been given one round of competitive level consideration.”³²

24) In conclusion, Employee *stipulates* that Chancellor Rhee “followed the procedures outlined in D.C. Code § 1-624.2,” but asserts that the applicable provision is “D.C. Code § 1-624.8.” She states that if the “RIF was the intention, Agency should be held to the Abolishment Act.” Employee claims that Agency’s use of “D.C. Code § 1-624.2” constitutes an unfair labor practice (emphasis added).³³

Agency’s Position

Agency submits that it followed RIF procedures in accordance with 5 DCMR § 1500.2,³⁴ and that former Chancellor Rhee authorized the RIF to eliminate specific positions from the NPU in order to address reorganization and elimination of functions, curtailment of work, and budgetary issues. Agency contends that in order to better meet its obligations to students, to reduce administrative complaints, and to promote compliance with the *Blackman/Jones v. District of Columbia*³⁵ consent decree, Agency reorganized NPU by outsourcing functions that could be performed more efficiently and effectively by a contractor under the oversight of DCPS employees. Agency contends that prior to the RIF, NPU consisted of twenty-five (25) DCPS staff positions, and after the reorganization, NPU eliminated all non-management staff positions to reduce costs associated with NPU while improving performance.

Agency asserts that NPU was determined to be a competitive area and the Compliance Specialist position constituted a competitive level. Agency further states that there were two (2) other Compliance Specialists whose positions were eliminated during the instant RIF. Therefore, according to Agency, a Competitive Level Documentation Form (“CLDF”) was not warranted and one round of lateral competition was not required because the entire competitive level was eliminated.³⁶ Agency also asserts that it provided Employee with the required specific written notice thirty (30) days prior to the effective date of the instant RIF. Moreover, Agency denies that Employee received improper compensation and that the RIF was pre-textual and disguised as a termination. Agency also notes that OEA lacks jurisdiction to address the alleged collective bargaining issues raised by Employee.³⁷

Further, in response to Employee’s allegations that Chancellor Rhee resigned from her position prior to the date of the instant RIF, October 22, 2010, Agency submits Chancellor Rhee’s SF-50, which shows the effective date of her resignation as November 2, 2010.³⁸

³² *Id.*, p. 7.

³³ *Id.*, pp. 2, 7. Additionally, it appears that Employee is referencing D.C. Code §§ 1-624.02, 10624.08, as there are no provisions for §§ 1-624.2 and 1-624.8.

³⁴ 5 DCMR § 1500.2 states in relevant part that a RIF is a process whereby the total number of positions is reduced for one of the following reasons:

- (a) budgetary reasons;
- (b) curtailment of work;
- (c) reorganization of functions; or
- (d) other compelling reasons.

³⁵ Civil Action Nos. 97-1629 (PLF) and 97-2402 (PLF) (D.D.C.).

³⁶ Agency Answer, pp. 3-4 (January 24, 2011); Agency Prehearing Statement, pp. 1-3 (March 11, 2013).

³⁷ See Agency Answer, pp. 4-5 (January 24, 2011).

³⁸ OEA Order (March 22, 2013); OEA Scanned Document (February 10, 2014).

OEA's Jurisdiction over RIF Appeal

Employee questions whether OEA in fact has a limited right over RIF appeals and refers to a portion of the *Washington Teacher's Union*³⁹ case which references that at the time of OEA's creation, the D.C. Council described this Office as an "independent, personnel appeals authority which will hear all personnel related employee appeals." Employee's reliance on this statement is misguided. The Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA") amendments provide that employees separated via a RIF are entitled to one round of lateral competition within their competitive level and thirty (30) days advanced written notice of the effective date of the RIF.⁴⁰ Further, OEA's jurisdiction regarding RIFs is well established and this Office has consistently held that RIF appeals are generally limited to whether Agency 1) properly provided Employee with one round of lateral competition within her competitive level and 2) gave Employee thirty (30) days written notice prior to the effective date of the RIF.⁴¹

RIF Procedures

DPM, Chapter 24 has been found to be the governing RIF provision pursuant to D.C. Code §1-624.08. DPM § 2409 states that each agency shall constitute a single competitive area and lesser competitive areas within an agency may be established by the personnel authority. According to DPM §2409.4, the lesser competitive area should be no smaller than a major subdivision of an agency or an organizational segment that is clearly identifiable and distinguished from others in the agency in terms of mission, operation, function, and staff. DCPS, acting as its own personnel authority pursuant to Title 5 DCMR § 1501.1, established competitive areas 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. Here, Agency states that the competitive area for the instant RIF was defined as the Non-Public Unit in the Office of Special Education, which I find is a major subdivision of Agency and meets the requirements of DPM §2409.

Former Chancellor Rhee, acting as the personnel authority, defined several competitive levels for the instant RIF, which included Compliance Specialist.⁴² DPM §2410 states that each personnel authority shall determine the positions comprising the competitive levels that employees compete for retention. Further, DPM §2410 states in relevant part that a competitive level shall consist of all positions in the same grade, which are sufficiently alike in qualification requirements, duties, and responsibilities. Agency has submitted personnel documents showing that Employee's position of record was Compliance Specialist.⁴³ Therefore, I find Employee's arguments that she was terminated from the detailed position of Placement Specialist, unpersuasive. I further find that Agency fulfilled the requirements of DPM §2410 in establishing the Compliance Specialist competitive level. There is no evidence in the record to suggest that Employee was subject to the instant RIF as a Placement Specialist. Employee also failed to submit evidence showing that she worked as a Non-Public Manager and a Director of Student

³⁹ 960 A.2d 1123.

⁴⁰ *Scott-Gilchrist v. D.C. Department of Human Service*, OEA Matter No. 2401-0177-09 (May 28, 2010).

⁴¹ *Id.* See also *Gaddy v. District of Columbia Public Schools*, OEA Matter No. 2401-0036-10 (February 7, 2012); *Cooper v. District of Columbia Public Schools*, OEA Matter No. 2401-0238-09 (February 24, 2011); *Nelson v. Department of Employment Services*, OEA Matter No. 2401-0041-05 (March 14, 2006); *Gill v. District of Columbia Public Schools*, OEA Matter No. 2401-0074-04 (February 23, 20005).

⁴² Agency Answer, DCPS RIF Authorization, Tab 2 (January 24, 2011).

⁴³ Agency Post Prehearing Conference Brief, Exhibit A (April 30, 2013).

Assignment. Moreover, I find that Employee would have been subject to the instant RIF in both the Compliance Specialist and Placement Specialist competitive levels.

Entire Competitive Level Abolished

This Office has consistently held that when an employee holds the only position in her competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added), D.C. Official Code § 1-624.08(d), which affords Employee one round of lateral competition, as well as the related RIF provisions of 6 DCMR § 2420.3, are inapplicable.⁴⁴ An agency is therefore not required to go through the rating and ranking process described in that chapter when the entire competitive level is abolished. The undersigned agrees with Agency's argument that because Employee's entire competitive level was abolished, the use of a CLDF was not required. Moreover, although Employee presented argument that the information on her CLDF was wrong, Agency asserts that no CLDF was completed and there is no evidence of one in the record.

Here, Employee's Notification of Personnel Action, Standard Form 50 ("SF-50") reflects that Employee's position of record at the time she was separated from service was Compliance Specialist.⁴⁵ As noted above, I find that Employee's official position of record was properly used as her competitive level for the instant RIF.

According to the RIF Authorization Notice, the Compliance Specialist position, along with several others, was eliminated subject to the instant RIF.⁴⁶ Employee claims that the competitive area was not eliminated as a result of the instant RIF. Agency has not claimed that the entire competitive area was eliminated; only that certain competitive levels, including Compliance Specialist, were eliminated. The elimination of the entire competitive area is not necessary for Agency to eliminate Employee's entire competitive level under the RIF regulations of D.C. Code §1-624.08. Further, in support of its assertion that the instant RIF eliminated the entire competitive level, Agency provided an affidavit from Neela Rathinasmay, who served as the Senior Director of Administration in the Office of Special Education during the time of the instant RIF. Ms. Rathinasmay states that she was responsible for notifying employees of terminations resulting from the RIF. Ms. Rathinasmay further asserts that the entire competitive level for the Compliance Specialist position was eliminated and therefore, Employee was not provided with one round of lateral competition.⁴⁷

Additionally, Employee claims that there was no true curtailment of work because contractors were hired for Placement Specialist positions. However, the undersigned notes that Employee's official position of record was Compliance Specialist. Furthermore, Agency's use of contractors does not in and of itself prove that there was no curtailment of work.

⁴⁴ *Perkins v. District Department of Transportation*, OEA Matter No. 2401-0288-09 (October 24, 2011); *Allen v. Department of Health*, OEA Matter No. 2401-0233-09 (March 25, 2011); *Wigglesworth v. D.C. Department of Employment Services*, OEA Matter No. 2401-0007-05 (June 11, 2008); *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005).

⁴⁵ Agency Post Prehearing Conference Brief, Exhibit A (April 30, 2013).

⁴⁶ Agency Answer, RIF Authorization, Tab 2 (January 24, 2011).

⁴⁷ Agency Prehearing Statement, Tab 1 (March 11, 2013).

Employee Detail

Employee claims that she was detailed as a Placement Specialist in October 2008 and that after her one hundred twenty (120) day detail expired, she was never reassigned to another position and continued working as a Placement Specialist.⁴⁸ Employee has submitted a Detail Assignment Letter (“Detail Letter”) dated October 31, 2008, which reflects that pursuant to Title 5 DCMR §1303, Employee was detailed as a Placement Specialist. The Detail Letter explained that there would be no change to Employee’s compensation and benefits and that the detail would range from thirty (30) days to one hundred twenty (120) days. While Employee claims that she continued to work as a Placement Specialist well past the one hundred twenty (120) day expiration period and was never reassigned to another position, there is nothing in the record to corroborate this as Employee’s official position of record remained Compliance Specialist. Title 5, DCMR §1303.1(b) states in relevant part that detailed employees will *return to their regular duties at the end of the detail or be reassigned* (emphasis added). Upon expiration of Employee’s detail, there was no need for Agency to reassign her to another position, as she could automatically revert back to her original position. Further, according to 5 DCMR §1303.2, as a detailed employee, *pay shall be based on the official position of record or assignment*, not on the job or duties from the detailed position (emphasis added).

Notice Requirements

Chapter 24 of the DPM provides the notice requirements that must be given to an employee affected by a RIF. Section 2422.1 states that “each competing employee selected for release from his or her competitive level...shall be entitled to written notice at least thirty (30) full days before the effective date of the employee’s release.” The specific notice shall specify the effective date of an employee’s release from his or her competitive level. 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’s RIF notice was dated October 22, 2010 and the effective date for the RIF was November 21, 2010.⁴⁹ The notice states that Employee’s position was eliminated as part of a RIF and also provided Employee with information about her appeal rights. Moreover, Employee acknowledged that she received her RIF notice on October 22, 2010, which equates to thirty (30) days written notice.⁵⁰ Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the instant RIF.

Employee also contends that she was not properly given thirty (30) days notice because the RIF was actually effectuated on the date of the RIF Notice, October 22, 2010. She also states that the RIF Notice did not give any reasons or cause for the RIF. I disagree with Employee’s contention. DPM §2423 does not require Agency to provide a reason or cause for the RIF. In its Answer, Agency provided a copy of the RIF Authorization, dated October 8, 2010, which detailed the specific reasons and legal basis for the instant RIF.⁵¹

⁴⁸ Employee Brief, p. 3, Tab 3 (April 29, 2013).

⁴⁹ Agency Answer, Tab 1 (January 24, 2011).

⁵⁰ Petition for Appeal, p. 3 (December 21, 2010).

⁵¹ Agency Answer, Tab 2 (January 24, 2011).

I find that it is within Agency's discretion to place an employee on administrative leave during the thirty (30) day notice period for a RIF and based on the record, I find that Employee was properly placed on paid administrative leave from October 22, 2010 until November 21, 2010.⁵² Moreover, I find that Employee's RIF was properly effectuated on November 22, 2010, as stated in her RIF Notice.⁵³

Agency Compliance with D.C. Code §1-624.08

Employee argues that D.C. Code §1-624.08 should have been used instead of D.C. Code §1-624.02 and that the use of the latter constitutes an unfair labor practice violation. Employee has also *stipulated* that Agency followed the procedures of D.C. Code § 1-624.02 (emphasis added). As noted in the analysis above, the undersigned finds that D.C. Code §1-624.08 is the more applicable provision for the instant RIF. Further, Agency's initial use of D.C. Code §1-624.02 does not constitute an error since the relevant provisions of D.C. Code §1-624.08 granting employee one round of lateral competition and thirty (30) days written notice prior to the effective date of the RIF are wholly encompassed within D.C. Code §1-624.02.⁵⁴ Therefore, Employee's stipulation that Agency followed the procedures of D.C. Code §1-624.02 essentially means that Agency also followed the provisions of D.C. Code §1-624.08.

Employee also alleges that Chancellor Rhee abused D.C. Code §1-624.08 and authorized the RIF as a disguised termination to dismiss specific employees without having to follow adverse action procedures. Based on a review of the record, the undersigned finds that there is no evidence suggesting that the instant RIF was in fact an adverse action, which resulted in Employee's termination. Employee has failed to provide any direct evidence to corroborate this allegation, especially in light of the fact that several positions in the corresponding competitive area and level were eliminated via the instant RIF. Further, Agency met its burden of proof by providing official documentation showing that entire competitive level was eliminated, and Employee acknowledged that she received thirty (30) days written notice prior to the effective date of her separation, which are the two provisions that this Office is charged with addressing.⁵⁵

As noted in the above headings, I find that Employee was properly separated via the instant RIF after her entire competitive level was eliminated and thirty (30) days written notice prior to the effective date of the RIF. Further, Agency has submitted Chancellor Rhee's SF-50, which shows the effective date of her resignation as November 2, 2010.⁵⁶ Therefore, I find that Chancellor Rhee was still employed with Agency prior to the authorization of the instant RIF.

Although Employee's ancillary arguments do not appear to be directly related to whether Agency properly followed D.C. Code §1-624.08, and could be characterized as pre-RIF or collateral issues, they will be addressed in the following sections.⁵⁷

⁵² See District Personnel Manual ("DPM") § 2422.11, which states in part that an employee who receives written notice of release from his or her competitive level due to reduction in force may be placed on administrative leave at the discretion of the agency head.

⁵³ Agency Answer, Tab 1 (January 24, 2011).

⁵⁴ See D.C. Code §§1-624.02(a(2)); (d) (2001).

⁵⁵ See Petition for Appeal, p. 3 (December 21, 2010); Agency Answer, Tab 2 (January 24, 2011).

⁵⁶ OEA Order (March 22, 2013); OEA Scanned Document (February 10, 2014).

⁵⁷ See *Mezile*, No. 2010 CA 004111.

RIF and Budget Rationale

Employee alleges that the RIF was procedurally and substantively flawed. She questions the reasons for, and Agency's use of contractors to handle the workload of the positions eliminated by the instant RIF. She argues that there was no true budgetary reduction or curtailment of work and that the costs associated with using contractors as Placement Specialists exceeded the amount of money saved by conducting the instant RIF. Employee also claims that Agency has not offered any evidence 1) of budgetary constraints at the time of the RIF; 2) to support the reorganization of NPU; 3) to show that a curtailment of work was necessary; or 4) that the competitive level was eliminated.

In *Anjuwan v. D.C. Department of Public Works*,⁵⁸ the D.C. Court of Appeals ruled that OEA's authority over RIF matters is narrowly prescribed. The Court ruled that OEA lacked authority to determine whether an Agency's RIF was *bona fide* and explained that OEA's authority is to determine whether the RIF complied with applicable District personnel statutes and regulations dealing with RIFs (emphasis added).⁵⁹ The Court further noted that OEA does not have the "authority to second guess ... management decisions about which position should be abolished in implementing the RIF."⁶⁰ OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issues of whether an Agency's budgetary shortfall, curtailment of work, or RIF was *bona fide*, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services or chooses which position are subject to a RIF. In this case, how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.⁶¹

Further, while issues of Agency's *bona fide* budgetary constraints are outside of OEA's jurisdiction, Employee has provided various editorial documents purportedly showing that there was no true budgetary shortage. However, none of these documents fully corroborate that there were no budgetary constraints at Agency *during the time of the instant RIF* (emphasis added).⁶² The editorial documents presented by Employee merely express an opinion on various issues surrounding Agency and as stand-alone documents, do not serve to substantiate Employee's allegations. Additionally, while Agency's use of contractors as Placement Specialists does show that there was work to perform as suggested by Employee, it also corroborates Agency's reasons given for curtailment of work and reorganization of NPU. The undersigned also notes that Employee has not alleged that contractors were used for her former position, Compliance Specialist. Further, Agency has provided sufficient supporting documentation in the form of the October 8, 2010, RIF Authorization, which describes the reasons for the RIF.⁶³

⁵⁸ 729 A.2d 883 (December 11, 1998).

⁵⁹ The applicable RIF regulations are contained in D.C. Code §§ 1-624.08(d)-(f).

⁶⁰ *Anjuwan*, 729 A.2d at 885.

⁶¹ *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

⁶² See Employee Brief (March 8, 2013): Tab 9 (undated Washington Post Editorial describing layoff of twenty-four special education staffers, but also noting DCPS projected overspending of \$30 million); Tab 11 (August 15, 2012 Press Release by District of Columbia Mayor's Office describing an *unanticipated* surplus used to repay employees for furloughs).

⁶³ Agency Answer, p. 5; Tab 2 (January 24, 2011).

Post-RIF Activity

Employee alleges that Agency still employs managers that were hired after separation to manage Placement Specialists and there were Program Managers retained after the RIF who were not previously Program Managers.⁶⁴

As noted above, OEA's authority over RIF matters is narrowly prescribed and this Office has consistently held that it lacks jurisdiction to entertain any post-RIF activity, which may have occurred at an agency.⁶⁵ Further, Employee has failed to set forth adequate material evidentiary facts or provide direct evidence to corroborate this contention. The fact that there are current employees in management positions at NPU, who may have been employed during the instant RIF, alone, does not equate to reasoning that these employees should have been subject to the instant RIF or could not have been employed by Agency at a later date.

Violation of CBA

Regarding Employee's contention that Agency's RIF constituted various unfair labor practices, the undersigned notes that 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 and CBA violations have been committed. While OEA may assess any applicable CBA violations to help determine whether Agency had cause to institute an adverse action, it cannot singularly assess whether Agency violated provisions of its CBA.⁶⁶ In this case, the alleged CBA violation raised by Employee does not have any bearing on whether Agency provided Employee with one round of lateral competition or received thirty (30) days notice. 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.⁶⁷ Therefore, I find that Employee's allegations regarding Agency's alleged unfair labor practices are outside of OEA's jurisdiction.

Discrimination Claims

Employee alleges that the instant RIF was pre-textual and conducted in a discriminatory and arbitrary manner. Claims of race and age discrimination are generally outside of this Office's purview of jurisdiction. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR").⁶⁸ 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." Moreover, the Court in *Anjuwan*⁶⁹ held that OEA's authority over RIF matters is narrowly prescribed and 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

⁶⁴ Employee Brief, pp. 5, 7 (March 8, 2013).

⁶⁵ *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); see also *Anjuwan v. D.C. Department of Public Works*, 729 A.2d 883.

⁶⁶ *Brown v. Watts*, 933 A.2d 529, 533-34 (D.C. 2010). The Court of Appeals held that OEA is not jurisdictionally barred from considering claims that an adverse action violated the express terms of an applicable CBA.

⁶⁷ See also *Anjuwan v. D.C. Department of Public Works* 729 A.2d 883 (December 11, 1998).

⁶⁸ See also *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111, p.6 (D.C. Super. Ct. February 2, 2012)(Superior Court stated that OEA was the wrong venue for discrimination claims).

⁶⁹ 729 A.2d 883.

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."⁷⁰ The undersigned notes that Employee has failed to submit or set forth any adequate material or evidentiary facts to support her allegations of discrimination.

The undersigned also notes that the Court in *El-Amin v. District of Columbia Dept. of Public Works*⁷¹ stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that [she] was targeted for whistleblowing activities outside the scope of the equal opportunity laws, or that [her] complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation..."⁷² 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.

Collateral Issues

Employee asserts that Agency violated the provisions of the District of Columbia Privatization Act, explaining that this law is applicable because it was evaluated for compliance and enacted prior to the Abolishment Act. She also asserts that the instant RIF was improper because the Placement Specialist position is not defined by Agency, but instead is defined by the Individuals with Disabilities Education Improvement Act of 2004.

OEA has no jurisdiction to hear claims regarding the enforcement of the Privatization Act or Individuals with Disabilities Education Improvement Act of 2004, which are collateral issues in terms of this RIF appeal. The undersigned reiterates the District of Columbia Court of Appeals' finding in *Anjuwan*, which states 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."⁷³

Further, employee has failed to provide any statutory or case law requirement, or any credible analysis showing how enforcement of the Privatization Act or the Individuals with Disabilities Education Improvement Act of 2004 falls within the purview of this Office's jurisdiction. This Office has held that an "employee raising collateral issues when challenging a RIF does not confer additional authority upon [this] Office to enforce all laws and regulations, as such would clearly exceed both the limited statutory authority and jurisdiction of this Office."⁷⁴ Furthermore, OEA has long held that the jurisdiction for RIF appeals is limited to the authority granted by the plain language of the OPRAA statute, and particularly the specific provisions of D.C. Code §§1-624.08(d)-(e).⁷⁵

⁷⁰ See *Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

⁷¹ 730 A.2d 164 (May 27, 1999).

⁷² *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

⁷³ See also *Gilmore*, 695 A.2d 1164.

⁷⁴ *Scott-Gilchrist v. D.C. Department of Human Services*, OEA Matter No. 2401-0177-09 (May 28, 2010).

⁷⁵ *Id.*

Grievances

Additionally, it is an established matter of public law that as of October 21, 1998, pursuant to OPRAA, D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Complaints regarding compensation errors, maintenance of a retention roster for RIF employees, advertisement of positions, training, and Agency hiring practices are generally considered grievances and do not fall within the purview of OEA's scope of review. 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 was properly separated via the instant RIF after her entire competitive level was abolished and she 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