

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)
	)
BRENDA FOGLE	) OEA Matter No. 2401-0123-04
Employee	)
	) Date of Issuance: December 29, 2008
	)
v.	) Sheryl Sears, Esq.
	) Administrative Judge
D.C. PUBLIC SCHOOLS	)
Agency	)

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Omar Vincent Melehy, Esq., Employee Representative  
Harriet E. Segar, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

Employee was a Physical Education Teacher at Alice Deal Junior High School. Agency served her with notice of a reduction in force (RIF) and removed her effective on June 30, 2004. Employee filed an appeal with the Office of Employee Appeals (“the Office” or “OEA”). By decision issued on March 14, 2006, this Judge ruled in favor of Agency.

On May 17, 2007, Judge Judith E. Retchin of the Superior Court of the District of Columbia issued an order remanding the matter to OEA. The Court affirmed that the jurisdiction of this Office in Employee’s appeal is limited to the questions of whether Employee received “written notice of at least 30 days before the effective date of . . . her separation” and “whether [Employee] received one round of lateral competition per the statute.” The Court concluded, however, that this Judge erred in finding that Employee received adequate notice of the removal when “the record was ambiguous on this point.” The Court also found that this Judge erred in granting summary judgment against Employee on the question of whether she was provided a round of lateral competition in accordance with the statute “when there was a factual dispute that needed to be resolved.”

Employee contends that Agency did not actually abolish her position. According to Employee, within months of the date that she was removed, Agency hired a “Dance Teacher” who assumed all of the duties of the Physical Education Teacher and presented

no dance instruction at all. A hearing was scheduled to address the sole question, "Whether Agency abolished one Physical Education Teacher, ET-15 position at Alice Deal Junior High School." Employee proffered testimonial evidence to support her assertion. The parties were notified that, if the Judge found, as a fact, that Employee's position was abolished, another hearing would be conducted on the question of whether, in determining which employees to separate, Agency properly conducted staff evaluations in accordance with the guidelines set forth by the Competitive Level Documentation Form.

Agency contends that Employee was removed as part of a lawful reduction in force by using the Competitive Level Documentation (CLDF) process to select her for separation. According to Employee, the process was flawed in that she was only permitted to compete for one position. Employee acknowledges that the primary determinant of an employee's competitive level is their position of record. It is undisputed that Employee's position of record was Physical Education Teacher. However, Employee claims that, because she was also teaching Special Education classes, she was entitled to compete as a Special Education Teacher. This Judge found no merit to that claim. Employee's position of record is not officially altered by Agency's assignment to her of other duties. Therefore, this Judge concluded that, if the position was properly abolished, it was lawful for Agency to allow her to compete for retention with other Physical Education Teachers only. The hearing was scheduled for October 24, 2008. As will be explained below, the hearing was never convened.

Prior to the hearing, the parties entered into independent settlement negotiations. On October 21, 2008, as the parties continued negotiations, Employee requested, as a condition to agreeing to a joint motion to cancel the hearing, that Agency submitted a "Statement of Admission." Agency agreed and indicated that it did not intend to present any witnesses at the hearing and stated, "The Agency hereby admits that it does not contest the above-referenced matter." The parties continued negotiations.

On November 24, 2008, when the parties had not been able to agree on terms of settlement resolving all of the issues presented by the appeal, Employee presented a "Motion for Judgment on the Issue of Liability and the Right to Reinstatement, Lost Pay and Benefits." Employee's motion stated that Agency "conceded that it terminated the Employee's employment with the Agency unlawfully and she is entitled to reinstatement with full back pay and benefits." Agency responded to the motion on December 11, 2008, stating that, while it "does not dispute the conclusion that Employee would be entitled to reinstatement and other benefits consistent with a finding from the Office of Employee Appeals reversing the reduction in force," Agency "does not admit, nor has it ever admitted that the Agency acted in an unlawful manner, as stated in the Employee's motion."

## JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

## ISSUES

- 1) Whether Agency abolished the position of Physical Education Teacher.
- 2) If not, whether Agency acted lawfully in removing Employee pursuant to a reduction in force.

## FINDINGS OF FACT AND ANALYSIS AND CONCLUSIONS

The threshold factual question in this matter is whether Agency abolished the position of Physical Education Teacher. Employee proffered evidence that, if proven, would have supported a finding of fact that the position was not abolished. As agreed by the parties, there was no hearing and Agency did not present any evidence to support its assertion that the position was abolished. Agency has the burden of proving that fact. Without evidence from Agency otherwise, this Judge must find that Agency did not abolish the position of Physical Education Teacher.

OEA Rule 616 provides for summary judgment as follows:

- 616.1 If, upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material and genuine issues of fact, that a party is entitled to a decision as a matter of law, or that the appeal fails to state a claim upon which relief can be granted, the Administrative Judge may, after notifying the parties and giving them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings.
- 616.2 An Administrative Judge may render a summary disposition either *sua sponte*, after notice under Rule 616.1, or upon motion of a party.
- 616.3 An order granting summary disposition shall conform to the requirements for initial decisions set forth in Rule 632.

By virtue of Agency's admission, there are no material and genuine issues of fact on the question of whether Agency abolished Employee's position of Physical Education

Teacher. As there was no lawful basis upon which to conduct a reduction in force at all, this Judge must find that Employee was unlawfully removed.

ORDER

It is hereby ORDERED that Employee's removal is REVERSED.

Agency is ORDERED to reinstate Employee to her last position of record, reimburse the Employee all back-pay and benefits lost as a result of her removal and file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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SHERYL SEARS, ESQ.  
ADMINISTRATIVE JUDGE