THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BETTY THAMES,	)	OEA Matter No. 2401-0144-10
Employee	)	
	)	Date of Issuance: December 17, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Betty Thames ("Employee") worked as a Business Manager with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that she was being separated from her position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was November 2, 2009.[1]

Employee challenged the RIF action by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 13, 2009. She contended that Agency did not follow the RIF procedures and falsified information to conduct the RIF.[2] Therefore, she requested reinstatement to her position with back-pay, attorney fees and tort damages.[3]

[1] *Petition for Appeal,* p. 7 (November 13, 2009).
[2] Employee claimed that the principal told her she could not continue to work in her position because her salary was too high. She argued that the principal explained that in order for her to remain in her position, she would have had to take a pay cut. Further, she argued that because Agency provided false information during the RIF process, she could not compete with other employees. *Id.*, 3-5.
[3] *Id.*

Agency explained in its answer to the Petition for Appeal that the RIF was conducted pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It submitted that pursuant to 5 DCMR § 1501, Transition Academy was determined to be the competitive area, and under 5 DCMR § 1502, the Business Manager position was the competitive level subject to the RIF. Accordingly, Employee was provided one round of lateral competition where the principal utilized Competitive Level Documentation Forms ("CLDF") to rate each employee, as defined in 5 DCMR § 1503.2.[4] After discovering that Employee was ranked the lower of two positions within her competitive level, Agency provided her a written, thirty-day notice that her position was being eliminated. Thus, it believed the RIF action was proper.[5]

After the matter was assigned to the OEA Administrative Judge ("AJ"), he ordered the parties to submit legal briefs addressing whether Agency followed the District's laws when it conducted the RIF.[6] Agency reiterated its previous arguments and submitted that OEA is limited to determining whether it followed D.C. Official Code § 1-624.02, 5 DCMR §§ 1503 and 1506 in conducting the RIF.[7] Employee provided that the negative information that the principal provided in her CLDF was untruthful. She reasoned that in her 2008-2009 evaluation, the principal ". . . describes [her] as an excellent and outstanding employee."[8] Therefore, she requested, *inter alia*, that the RIF action be set aside.[9]

The Initial Decision was issued on May 21, 2012. The AJ found that although the RIF

[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* (December 9, 2010).
[6] *Amended Order Requesting Briefs* (February 15, 2012).
[7] *District of Columbia Public Schools' Response to Brief of Employee in Support of Appeal*, p. 8 (March 7, 2012).
[8] Employee also noted that in 2009, the principal gave her a Certificate of Appreciation for her dedication to the students of Transition Academy and that he offered to recommend her to prospective employers. With regard to the CLDF ranking factors, Employee provided that her credentials proved that she made relevant contributions to Agency. *Appellant's Brief*, p. 7-8 (May 8, 2012).
[9] *Id.* at 9.

was authorized pursuant to D.C. Official Code § 1-624.02**,** D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF.[10] As a result, he ruled that § 1-624.08 limited his 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. The AJ found that Employee was afforded one round of lateral competition and explained that Agency properly considered all of the factors enumerated in DCMR § 1503.2 when it conducted the RIF.[11] He also found that Agency provided Employee the required thirty-day notice. Accordingly, the AJ upheld Agency's RIF action.[12]

Employee filed a document titled "Appellant's Brief" on August 24, 2012.[13] The document sets forth the same arguments as the brief that was submitted to the AJ on May 8, 2012. Employee argues that the Principal's statements in the CLDF were untruthful.[14] She requests that the RIF action be set aside; the RIF information be removed from her file; tort damages, back-pay, and attorney fees be awarded; and that she be reinstated to her position.[15]

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

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[10] 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. 3-4 (May 21, 2012).

[11] In reviewing the CLDF ranking factors, the AJ held that Employee provided little evidence to enhance her score for the Office or School Needs category, and even if she was accorded the full amount of points for the Significant Relevant Contributions, Accomplishments, or Performance category, her ranking would still be lower than the other Business Manager in her competitive level. Furthermore, the AJ held that the principal had managerial discretion in affording her points for the Relevant Supplemental Professional Experience as Demonstrated on the Job category. *Id.*, 7-8.

[12] *Id.* at 9.

[13] This document serves as Employee's Petition for Review to the Board.

[14] *Appellant's Brief,* p. 7-8 (August 24, 2012).

[15] *Id.*

with determining if Agency afforded Employee one round of lateral competition within her competitive level and if it provided a thirty-day notice. The Superior Court of the District of Columbia held in *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA), p. 4 (D.C. Super. Ct. March 14, 2013), 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."[16] After reviewing the record, this Board believes that the CLDF and the AJ's assessment of this matter were not based on substantial evidence.

In her Petition for Appeal, Employee provided a performance evaluation for the 2008-2009 school year. The evaluation was rated by Alonzo Randall, the principal who also prepared her CLDF. The 2008-2009 evaluation was signed and dated by Mr. Randall on June 5, 2009. Employee received an overall rating of "outstanding," and the evaluation provided the following:

> Above employee has the ability and capability to motivate her colleagues[;] she is a stickler for protocol[] and procedures. Her work ethic[] and morals are evident in her work performance. A true asse[t] and great employee.[17]

Additionally, on June 17, 2009, Agency presented Employee with a Certificate of Appreciation for her "dedicated efforts to the students of the Transition Academy @ Shadd." The certificate was also signed by Principal Randall.[18]

Less than three months after receiving an "outstanding" evaluation and Certificate of Appreciation, Principal Randall had the following to say about Employee's performance on her

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[16] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. See *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). 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.

[17] It should be noted that this particular evaluation was missing from Employee's personnel records provided by Agency on March 7, 2012.

[18] *Employee Brief*, Exhibit 4A (April 24, 2012).

CLDF:

> Ms. Thames has poor "people skills" as demonstrated by confrontational relationships with multiple staff members, administrators, students and parents. She does not have a positive attitude and does not work toward being a team player. This interferes with the school's needs for an effective Business Manager.
>
> She is often careless in regards to the organization of the business office. Our school frequently ran out of a particular supply item because of an absence of a spending plan.
>
> She lacks the initiative to improve her work ethic or her work product.
>
> She has been tardy on several occasions, with no regard on how this affects her colleagues or the school.

The Superior Court for the District of Columbia held in *Onuche David Shaibu v. D.C. Public Schools*, 2012 CA 003606 P(MPA), p. 6 (D.C. Super. Ct. January 29, 2013) 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 facts in question. The Court ruled that factual assertions that are incorrect in a principal's evaluation cannot constitute substantial evidence. As a result, the round of lateral competition would be a sham if predicated on literal falsehoods.

The contradictions provided in Employee's evaluation, her Certificate of Appreciation, and CLDF are numerous. In the June 5, 2009 evaluation, Employee was a great motivator for her colleagues. However, on the CLDF, the principal claims that she lacks people skills; is not a team player; and is confrontational with staff. In the June evaluation, Employee was described as being a stickler for procedure, having a good work ethic and morals, and being an asset to Agency. Three months later, she is described as careless and lacking initiative to improve her work ethic in her CLDF. Based on these contradictions shown by Employee, the AJ should have conducted a more thorough review of the evidence through a hearing because a material

fact was raised.

As for Employee's argument regarding her salary, she provided a copy of an email that was sent to her from Principal Randall.[19] The email appears to offer evidence, as Employee contends, that Principal Randall removed her because her salary was too high and that she would need to take a pay cut to remain employed. The email provides the following:

> Please be informed that I had an extensive conversation with HR this morning an[d] they will not grant me permission to keep you. I have tried everything in my power[,] but they are adamant about all employees working in a capacity in which their pay grade matches.
>
> I do not believe in fixing things that are not broken[;] however[,] they seem to feel otherwise. They will be sending me 2 employees to fill your positions on Monday or Tuesday to complete paperwork[,] but they will not report until August 17th. They stated that if you do not fill an opening on your own[,] they will place both of you by August 1st to report on August 17th also, with August the 14th being your last day here at Shadd.
>
> Whatever recommendations you may need[,] please let me know and I will be more than happy to write one for you both. I thought we would have been a great team as this would truly have been our test year.
>
> I will miss you both.
>
> Respectfully,
>
> Alonzo[20]

It should be noted that the Retention Register provided by Agency indicates that Employee was an EG Grade 12, Step 1. The Business Manager who was retained was an EG Grade 11, Step 1.[21] Therefore, the person retained had a much lower salary than Employee.

The Court in *Shaibu* held that "once a principal identified each competitive level, the

[19] The email was sent on June 26, 2009, nine days after Employee received her Certificate of Appreciation.
[20] *Employee Brief,* Exhibit 5 (April 24, 2012).
[21] *District of Columbia Public Schools' Response to Brief of Employee in Support of Appeal,* Exhibit A (March 7, 2012).

principal would identify how many staff positions within each competitive level needed to be eliminated, and then would terminate employees based on their *performance* in a 'lateral competition' (emphasis added)."[22] Therefore, an employee's salary should not be considered as a basis for removal. This was explained to principals in Agency's instructions on conducting the RIF. Specifically, Agency provided the following: "the amount of budget savings that will be credited to you is the *average* salary for the position cut. Therefore, you should not be concerned with, nor should you consider, the individuals who are in the various positions or their particular salaries when determining which positions to cut."[23] Based on Employee's argument and the email, it appears that Agency may have used her salary to remove her instead of allowing a true competition between her and the other Business Manager based on performance.

This Board believes that Employee has provided contradictory evidence to allegations raised in her CLDF. Additionally, Agency may have used Employee's salary as a basis to RIF her. Therefore, we believe that an evidentiary hearing should have been conducted to determine if there was substantial evidence to support the CLDF and to address Employee's salary claims. Accordingly, this matter is REMANDED to the AJ to consider the merits of Employee's case.

[22] *Onuche David Shaibu v. D.C. Public Schools*, 2012 CA 003606 P(MPA), p. 1 (D.C. Super. Ct. January 29, 2013)
[23] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, Tab #2, p. 2 (December 9, 2010).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**; the matter is **REMANDED** to the Administrative Judge to determine if there was substantial evidence to support the CLDF and to address Employee's salary claims.

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

_____
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.