THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 2401-0241-10
OLIVE PALMER-CHALOBAB,	
Employee	
	Date of Issuance: September 21, 2012
v.	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	
Agency	STEPHANIE N. HARRIS, Esq.
	Administrative Judge

Taylor Lewis, Esq., Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 2, 2009, Olive Palmer-Chalobab ("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 terminating her employment through a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009. Employee's position of record at the time her position was abolished was an English Teacher at Wilson Senior High School ("Wilson"). Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter on February 6, 2012. On February 7, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations ("February 7th Order"). Both parties complied with the February 7th Order. On May 15, 2012, a Status Conference ("May 15th Status Conference") was held in this matter. On May 22, 2012, the undersigned issued a Post Status Conference Order ("May 22nd Order"), wherein the parties were ordered to submit written briefs and supporting documentation addressing the issues presented at the May 15th Status Conference. Agency was granted an extension of time to submit its brief on June 13, 2012. Both parties have timely submitted their briefs in response to the May 22nd Order.

Thereafter, upon further review of the record, on June 19, 2012, the undersigned issued an Order ("June 19th Order") directing the parties to submit written briefs, along with supporting documentation addressing the notice requirements for the instant RIF. The parties have timely submitted their responses to the June 19th Order. On July 9, 2012, the undersigned issued an

Order convening a second Status Conference to address issues surrounding Employee's competitive level. Employee and her representative were present at the July 26, 2012 Status Conference, but Agency's Representative did not appear. As a courtesy, the undersigned called Agency Representative to inquire about her non-appearance at the Status Conference. Agency Representative informed the undersigned that she did not receive any documentation for the July 26, 2012 Status Conference. Taking Agency Representative at her word, the undersigned agreed to reschedule the Status Conference. In response to the jurisdiction issue raised previously in the May 22, 2012 Order, the undersigned issued an Order on July 27, 2012, explaining OEA's jurisdiction over this matter. On August 7, 2012, the undersigned issued an Order rescheduling the Status Conference and requesting written briefs from the parties to address issues surrounding Employee's competitive level. Both parties timely submitted their briefs and a telephonic Status Conference was held on September 11, 2012. After reviewing the record, I have determined that there are no material facts in dispute and therefore a 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 FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. School Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, 5 DCMR Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was necessitated for budgetary reasons,

explaining that the 2010 DCPS fiscal year budget was not sufficient to support the current number of positions in the schools.[1]

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02,[2] which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

Specifically, 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.

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[1] *See* Agency's Answer, Tab 1 (January 7, 2010).

[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:
> (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.

> (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*,[3] 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." 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]

However, the Court of Appeals took a different position. In *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, [5] DCPS conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005." The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act ("the 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. Accordingly, I am primarily guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. 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.

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[3] No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[4] *Id.* at p. 5.
[5] 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] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

Probationary Employment Status

During the May 15, 2012 Status Conference, Employee raised the issue of jurisdiction concerning her status as a probationary Employee. In her brief regarding jurisdiction, Employee contends that as a probationary employee, she may appeal the RIF under District Personnel Manual (DPM) § 814.3 as a violation of public policy and under DPM § 814.1 as exceeding an Agency's unfettered discretion to terminate probationary employees.[12] Agency argues that DPM § 814.3 applies only to employees in the Career Service, and specifically excludes the Educational Service pursuant to DPM § 800.1(f) and D.C. Official Code § 1-608.01(a).[13]

OEA's jurisdiction is conferred upon it by law and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601.01, *et seq*. (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions not relevant to this case, of permanent employees in the Career and Education Service, who are not serving in a probationary period, or who have successfully completed their probationary period. However, D.C. Code §1-628.01(c) gives this Office limited jurisdiction over Career and Educational Service employees, in RIF cases, regardless of the employee's date of hire. Based on the above referenced section, although Employee was in a probationary employment status at the time of the RIF, she is still entitled to the RIF procedures found in D.C. Code §1-624.08, which includes one round of lateral competition and thirty (30) days written notice prior to the effective date of the RIF. As such, the undersigned finds that OEA has jurisdiction over Employee's appeal.

Employee's Position

In her Petition for Appeal, Employee explains that she was unfairly RIF'd because she received a satisfactory evaluation at the end of the school year. She states that she is in the class of highly qualified teachers in her certification area. Employee alleges that DCPS did not follow proper procedures in conducting the instant RIF. She also claims that she was assigned as a co-teacher and was the only teacher observed and evaluated in the English Department. Employee further claims that she was given a letter stating that she would have guaranteed employment for the 2009/2010 school year. She also questioned why so many teachers were hired if there was a budget shortfall, noting that a new teacher was hired after the RIF.[14]

In her brief, Employee makes the following contentions:

1) Employee claims that she was supposed to be working as an English Teacher, but instead was assigned as a co-teacher, explaining that she was doing the work of an assistant and was not allowed to do any planning or significant instruction.
2) She alleges that during both a staff meeting and a parent community meeting, the principal of Wilson stated that only Employee and another teacher recently placed at Wilson would be chosen for the instant RIF.

[12] Employee Brief on Jurisdiction (June 1, 2012).
[13] Agency Brief on Jurisdiction (June 18, 2012).
[14] Petition for Appeal (December 2, 2009).

3) Employee states that the principal never conducted a formal observation of her.
4) She contends that Agency improperly completed her Competitive Level Documentation Form (CLDF) by not considering her professional degrees, including her Master's degree in International Business.
5) Employee further contends that Agency improperly completed Employee's CLDF when the principal's narrative focused on instructional observations even though Employee was never observed by the principal. She also claims that the narrative discussed duties that were not assigned to her.
6) Employee asserts that based on the improperly completed CLDF, she could not be properly compared to other Employees and properly given one round of competition.
7) Employee also contends that Agency failed to give her one round of competition when the principal publicly identified her position to be eliminated through the RIF before completing the CLDF, alleging that this proves that Employee was chosen to be eliminated by the RIF prior to receiving one round of lateral competition.
8) Employee also alleges that she received the RIF notice in the mail after the October 2, 2009 date.[15]

Agency's Position

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of her termination.[16] Agency further maintains that it utilized the proper competitive factors in implementing the RIF and, Employee, who was the lowest ranked English Teacher, was terminated as a result of the round of lateral competition.[17] Agency asserts that written notification was given to Employee on October 2, 2009 that her effective date of separation was November 2, 2009.[18] Further, Agency states that the RIF notice was also sent to Employee via overnight mail on October 2, 20009.[19] A delivery confirmation notice was provided by Agency, which shows that the RIF notice was delivered to Employee's home on October 3, 2009.[20]

RIF Procedures

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS is authorized to establish the competitive areas when conducting a RIF so 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." For the 2009-2010 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area.[21] In accordance with DCMR § 1502.1, competitive levels consisted of all

[15] Employee Brief (March 20, 2012).
[16] Agency Brief at pp. 3-7 (February 28, 2012).
[17] *Id*. at pp. 4-5. School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.
[18] *Id*. at p. 7.
[19] Agency Brief Addressing Notice Requirements (July 29, 2012).
[20] *Id*., Exhibit A.
[21] Agency Answer, Tab 1, RIF Authorization (January 7, 2010).

positions in the *same grade or occupational level that are sufficiently alike* in the following characteristics that a person could be assigned to any position without changing the terms of appointment or unduly interrupting the work program:

1. Qualifications;
2. Requirements;
3. Duties;
4. Responsibilities;
5. Pay schedules; and
6. Working Conditions.

Employee contends that Agency improperly placed her in the competitive level for English Teachers, noting that she did not perform the duties of an English Teacher because her required duties, responsibilities, and working conditions were not sufficiently like those of other English teachers, and was instead assigned as a Co-teacher.[22] Employee submits that Agency only used one of six characteristics, pay plan and grade, listed in DCMR § 1502.1.[23]

Agency argues that DCMR § 1502.1 gave the Chancellor the authority to identify particular position titles as separate competitive levels. During the instant RIF, the Chancellor defined competitive levels based on the (1) pay plan and pay grade for each employee; (2) job title for each employee; and (3) in the case of specialty elementary teachers, secondary teachers, middle school teachers and teachers who teach other specialty subjects, the subjects taught by the employee.[24] Agency also notes that Employee held a license to teach English, which was valid from February 23, 2009 until September 22, 2013.[25]

Based on the evidence of record, the undersigned finds that DCPS properly placed Employee in the English Teacher competitive level. The undersigned also finds that Agency's classification of competitive levels by job title sufficiently encompasses the six (6) characteristics found in DCMR § 1502.1. Generally, employees with the same job title, pay plan and grade have the same duties, responsibilities, and working conditions, although they may not be exact in nature. Employee has provided no credible evidence to support her allegations that she worked as a Co-teacher and did not perform the duties or have the same responsibilities as an English Teacher. Additionally, Employee failed to rebut Agency's submission that she held a license to teach English at the time of the instant RIF, which Agency has presented as evidence that Employee worked as an English Teacher. Further, the competitive level that Employee claims that she should have been assigned to, Co-teacher, did not exist at the time of the instant RIF.[26] Moreover, Employee has acknowledged that she was assigned to work as an English teacher at Wilson.[27]

The undersigned also notes that according to the record Employee's SF-50 for the instant RIF shows that her title was Special Education Teacher.[28] During the Status Conference held on

[22] Employee Brief at p. 2 (March 20, 2012); Employee Brief at p. 2 (August 27, 2012).
[23] Employee Brief at p. 2 (August 27, 2012).
[24] Agency Answer, Tab 1, RIF Authorization (January 7, 2010).
[25] Agency Brief, p. 1 (August 22, 2012).
[26] *See* Post Status Conference Order (September 13, 2012).
[27] *See* Employee Brief, p. 2, Statement of Facts (March 20, 2012).
[28] Employee Brief Addressing Jurisdiction at p. 5 (June 1, 2012).

September 11, 2012, both parties stipulated that Employee was not working as a Special Education teacher at the time of the RIF.

Lateral Competition

During the instant RIF, Wilson was identified as a competitive area, and English Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were fourteen (14) English Teacher positions subject to the RIF.[29] Of the fourteen (14) positions, one (1) position was identified to be abolished. Because Employee was not the only English Teacher within her competitive level, she was required to compete with other employees in one round of lateral competition.

According to Title 5, DCMR § 1503.2 *et al.*:

> If a decision must be made between employees in the same competitive area and competitive level, the following factors, in support of the purposes, programs, and needs of the organizational unit comprising the competitive area, with respect to each employee, shall be considered in determining which position shall be abolished:
>
> (a) Significant relevant contributions, accomplishments, or performance;
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> (b) Relevant supplemental professional experiences as demonstrated on the job;
>
> (c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise; and
>
> (d) Length of service.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

> (a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)
>
> (b) Significant relevant contributions, accomplishments, or performance – (10%)
>
> (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
>
> (d) Length of service – (5%)[30]

[29] Agency Brief, Exhibit A, Retention Register (February 28, 2012).
[30] It should be noted that OEA has consistently held that DCPS is allowed discretion to accord different weights to the factors enumerated in § 1503.2. Thus, Agency is not required to assign equal values to each of the factors. *See*

Agency argues that nothing within the DCMR, applicable case law, or D.C. Official Code prevents it from exercising its discretion to weigh the aforementioned factors as it sees fit.[31] Agency cites *to American Federation of Government Employees, AFL-CIO v. OPM*,[32] wherein the Office of Personnel Management was given "broad authority to issue regulations governing the release of employees under a RIF…including the authority to reconsider and alter its prior balance of factors to diminish the relative importance of seniority."[33] I agree with this position and find that Agency had the discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

Competitive Level Documentation Form

Agency employs the use of a CLDF in cases where employees subject to a RIF must compete against each other in lateral competition. In conducting the instant RIF, the principal of Wilson was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the "length of service" category was completed by the Department of Human Resources ("DHR").

Employee received a total of thirty-eight (38) points on her CLDF and was therefore, ranked the lowest employees in her respective competitive level. Employee's CLDF stated in pertinent part, the following:

> "While Ms. Palmer-Chalobah has a positive attitude and some teaching skill, she is not at a level that is needed for this school's English Department. For example, during an observation she did not seem organized and the transitions within the lesson were very abrupt. As a result, the students were not engaged during the lesson and were off task.
>
> In addition, her lessons are more activity-driven than objective-driven, which reduces their overall effectiveness in promoting the standards. The pacing of her lesson did not enable her students to spend adequate time on guided practice nor master the entire objective. Her lessons do not include an appropriate level of rigor to fully challenge her students…[s]he has made no effort to reach out to the community or the parents of her students. Previous evaluation showed that [Employee] lacks the content knowledge required for the level of instruction needed at Wilson SHS."[34]

White v. DCPS, OEA Matter No. 2401-0014-10 (December 30, 2001); *Britton v. DCPS*, OEA Matter No. 2401-0179-09 (May 24, 2010).

[31] Agency Brief at pp. 4-5 (February 28, 2012).

[32] 821 F.2d 761 (D.C. Cir. 1987).

[33] *Id*.

[34] Agency Answer, Tab 3 (January 7, 2010).

Needs of the School

This category is weighted at 75% on the CLDF and accounts for any factor that may have an impact on the success of the school or the achievement of the students at school. Some of the factors used in consideration for this category include: student learning skills, training, experience, school culture contributions, teaching and learning framework, leadership roles, licensure or certifications, and advanced degrees that pertain specifically to the needs of the school. Employee received a total of five (5) points out of a possible ten (10) points in this category, resulting in a weighted score of thirty-seven and a half (37.5) points. Employee received a score much lower than the other employees within her competitive level.[35]

Employee argues that the documentary evidence does not support the score afforded to her and that her Master's degree in International Business administration was not considered. She also argues that her CLDF was not properly completed because it failed to give credit for required factors. However, Employee has failed to provide any evidence to highlight how her degree or certification translates into how she meets the needs of the school as an English Teacher. As noted above, while advanced degrees is one of the factors considered in this category, there is no specific point designation for any of the multitude of factors that could be considered. Further, Agency did not develop an exhaustive list of factors to be considered, but rather listed examples that could be considered by principals.[36] Moreover, because Employee did in fact receive points in this category, it can reasonably be assumed that her degree was taken into consideration for awarding points.

Additionally, in her Petition for Appeal, Employee claims that she was the only teacher "observed and evaluated" in the English department.[37] In her brief, Employee also contradictorily claims that she was never observed by the principal.[38] However, the undersigned notes that the criteria Agency instructed principals to use in ranking employees did not require a formal observation of employees.[39] Specifically, in the Needs of the School category, principals were instructed to assign scores "reflect[ing] [the] best judgment of the extent to which the person meets the particular needs of [the] school."[40] With respect to this category, I find that in this matter, I will not substitute my judgment for that of the principal of Wilson as it relates to the score she accorded to Employee and her colleagues in the instant matter.

Relevant significant contributions, accomplishments, or performance

Employee received zero (0) points in this category, which is weighted at 10% on the CLDF. This category evaluates any clear, significant contributions made by employees, above what would normally be expected of an employee in his or her competitive level. Employee has not provided any supplemental evidence suggesting that she should have earned a higher score in this category.

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[35] *Id.*
[36] *Id.*
[37] Petition for Appeal at p. 4 (December 2, 2009).
[38] Employee Brief at p. 5 (February 28, 2012).
[39] Agency Answer, Tab 2, Attachment B (January 7, 2010).
[40] *Id.*

Relevant supplemental professional experiences as demonstrated on the job

Employee also received zero (0) points in this category, which is weighted at 10% on the CLDF, and awards points to employees for any additional training or professional experiences outside standard training required by Agency or required to maintain licensure; and application of said training or experience at the school in a way that positively impacted student or school performance. Employee has not provided any documentation to supplement additional points being awarded in this area.

Employee further claims that although she was classified as an English Teacher, she did not have the same duties as other English teachers, and instead performed the separate duties of a Co-teacher. However, Employee has failed to submit any credible evidence or supporting documentation to corroborate that she did not perform the same duties as other English Teachers in her competitive level. She also has not provided any credible evidence that would bolster a score in any of the aforementioned categories completed by the principal of Wilson and there is no indication that any supplemental evidence would supplant the higher scores received by the remaining employees in Employee's competitive level who were not separated from service. This Office cannot substitute its judgment for that of the principal at Wilson, who was given discretion to complete Employee's CLDF and had wide latitude to invoke her managerial discretion.[41] Thus, with respect to the aforementioned CLDF categories, I find that I will not substitute my judgment for that of the principal of Wilson as it relates to the scores she accorded Employee and her colleagues in the instant matter.

Length of service

This category, which was completed by DHR, includes credit for years of service, District residency, veterans' preference, and prior outstanding or exceeds expectation performance rating within the past year. Employees were granted an additional five (5) years of service for D.C. residency, four (4) years of service for veterans' preference, and four (4) years of service for performance evaluations of 'outstanding' or 'exceeds expectations' for the last school year.[42] The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

Here, the record shows that Employee's tenure with DCPS began in 2008, resulting in one (1) full year of service being credited in this category.[43] She received zero (0) points for D.C. residency and veterans preference. The record shows that Employee resided in Maryland during the instant RIF.[44] Employee states that she received a 'meets expectation' rating for the 2008/2009 school year performance evaluation.[45] Because Employee did not receive an 'exceeds expectations' for the 2008/2009 school year, she was not entitled to the extra four (4) years of service. Employee received a total weighted score of one-half (0.5) points in this category and has not contested that additional points should have been awarded. Further, Agency has provided

[41] *See Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia,* 109 F.3d 774 (D.C. Cir. 1997).
[42] Agency Answer, Tab 2, Attachment B at p. 4 (January 7, 2010).
[43] *See* Agency Brief, Employee Personnel File (February 28, 2012).
[44] *Id*.; *see also* Agency Answer, Tab 4 (January 7, 2010).
[45] *See* Petition for Appeal

an affidavit from Peter Weber, who served as the Interim Director of Human Resources during the time of the instant RIF.[46] Mr. Weber states that he was responsible for computing employees' length of service for the instant RIF and used the DHR official Peoplesoft system to obtain data for the calculations, which appear in Employee's CLDF. Moreover, a review of Employee's personnel file, which was submitted by Agency, does not reveal any evidence that would necessitate a recalculation of the points awarded in this category.[47] Therefore, based on the evidence of record, I find that Agency properly calculated this number.

Moreover, in reviewing the documents of record, Employee does not offer any statutes, case law, or other regulations to refute Agency's position regarding the principal's authority to utilize discretion in completing an employee's CLDF during the course of the instant RIF. In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia,*[48] the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that "school principals have total discretion to rank their teachers" and noted that performance evaluations are "subjective and individualized in nature."[49] According to the CLDF, Employee received a total score of thirty-eight (38) points after all of the factors outlined above were tallied and scored. The lowest scoring English teacher in Employee's competitive level, who was retained in service, received a total score of fifty-two and a half (52.5) points.[50] Employee has not proffered any evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome in this case.[51]

Employee also claims that Agency improperly completed her CLDF when the principal's narrative discussed duties that were not assigned to Employee. However, the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.[52] This Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."[53] Accordingly, I find that the principal of Wilson had discretion in completing Employee's CLDF, as she was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. Therefore, I find that Agency did not abuse its discretion in completing the CLDF, and Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

Thirty (30) Days Written Notice

Title 5, §1506 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 1506.1 states that "an employee selected for separation shall be

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[46] Agency Brief, Exhibit B (February 28, 2012).
[47] *Id*., Employee Personnel File.
[48] 109 F.3d 774 (D.C. Cir. 1997).
[49] *See also American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).
[50] Agency Brief, Exhibit A, Retention Register (February 28, 2012).
[51] See *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986) (stating that a material fact is one which might affect the outcome of the case under governing law).
[52] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).
[53] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

given specific written notice at least thirty (30) days prior to the effective date of the separation. The notice shall state specifically what action is taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights." 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).

Agency has previously asserted that Employee received written notification of the RIF on October 2, 2009. Agency also claims that the RIF notice states that Employee's position was eliminated as part of a RIF and provided Employee with information about her appeal rights. Employee, however, alleges that she received the RIF notice in the mail after October 2, 2009.

In *Aygen v. District of Columbia Office of Employee Appeals*,[54] the D.C. Superior Court found that where an employee is in duty status, "the notice of final decision must [be] delivered to the employee on or before the time the action is effective, *with a request for employee to acknowledge it*" (emphasis added). The Court noted that if the employee refused to acknowledge receipt, a signed written statement by a witness may be used as evidence of service.[55] Additionally, the Court found that where an employee is not in duty status, the notice "must be sent to employee's last known address by courier, or by certified or registered mail, *return receipt requested*, before the time of the action becomes effective" (emphasis added).[56] The court further explained that "a dated cover letter, by itself, was insufficient evidence" of a mailing date or proof of receipt by an employee.[57]

Agency submitted documentation showing that it sent Employee's RIF notice via overnight mail on October 2, 2009.[58] The delivery confirmation notice corroborates that the RIF notice was delivered to Employee's home on October 3, 2009.[59] Agency concedes that Employee was only given twenty-nine (29) days notice of the RIF, but contends that this was a procedural and ultimately harmless error.[60]

Accordingly, I find that Employee was not given the required thirty (30) days written notice prior to the effective date of the RIF. Agency's failure to provide Employee with thirty (30) days written notice is considered procedural error, and thus calls for a reconstruction of this process as opposed to a retroactive reinstatement of Employee.[61] A retroactive reinstatement of employee is only allowed where there is a finding of harmful error in the separation of employee.[62] The DCMR defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level."[63] I find that Agency's

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[54] No. 2009 CA 006528; No. 2009 CA 008063 at p. 9 (D.C. Superior Ct. April 5, 2012).
[55] *Id*.
[56] *Id*.
[57] *Id*. at pp. 10-11.
[58] Agency Brief regarding Notice Requirements (June 29, 2012).
[59] *Id*. (Exhibit A).
[60] Agency Brief on Notice (June 29, 2012).
[61] *See* District of Columbia Municipal Regulations ("DCMR") § 2405.6, 55 DCR 12899, 12902 (2008), which states in relevant part:

> An action which was found by…the Office of Employee Appeals to be erroneous as a result of procedural error shall be reconstructed and a re-determination made of the appropriate action under the provisions of this chapter.

[62] *See* DCMR § 2405.7, 55 DCR 12899, 12902 (2008).
[63] *Id*.

failure to provide Employee with thirty (30) days written notice prior to the RIF effective date was a procedural error, as Employee would have still been released from her competitive level based on the one round of lateral competition procedures. The undersigned finds that Agency's error will not serve to negate or overturn Employee's termination and does not constitute harmful error.

Lack of Budget Crisis

Employee alleges that Agency was not facing a budget crisis because they continued to hire teachers. This Office has previously held that it lacks jurisdiction to entertain any post-RIF activity that may have occurred at an agency.[64] Further, in *Anjuwan v. D.C. Department of Public Works*,[65] the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court of Appeals explained that as long as a RIF is "justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF…"[66] The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds…[or] management decisions about which position should be abolished in implementing the RIF."[67]

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds on personnel services or how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.[68]

Grievances

Employee also claims that she was guaranteed employment for the 2009/2010 school year. However, Employee has provided no credible evidence to support this contention, which renders it a generalized unsupported allegation. Employee also argues that she was not assigned her own classroom or allowed to perform any lesson planning. Complaints of this nature are considered grievances and do not fall within the purview of OEA's scope of review. Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. 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.

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[64] *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).
[65] 729 A.2d 883 (December 11, 1998).
[66] *Id*. at 885.
[67] *Id*.
[68] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

CONCLUSION

Based on the foregoing, I find that Employee's position was correctly abolished after she properly received one round of lateral competition. However, I find that Agency did not provide Employee with thirty (30) days written notice prior to the effective date of the instant RIF, resulting in a procedural error which can be corrected through a reconstruction of the notice period. Therefore, in light of the correctable procedural error, I find 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:

1. Agency reimburse Employee one (1) day pay and benefits commensurate with her last position of record; and
2. Agency's action of abolishing Employee's position through a Reduction-In Force is **UPHELD**; and
3. Agency shall file with this Office, within thirty (30) 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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STEPHANIE N. HARRIS, Esq.
Administrative Judge