Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No. 2401-0056-10
BEVERLY HOWARD,	)	
Employee	)	
	)	Date of Issuance: March 20, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Beverly Howard, Employee *Pro Se*
Sara White, Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 21, 2009, Beverly Howard ("Employee") filed a petition for appeal with the Office of Employee Appeals ("the OEA" or "the 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 a Special Education Teacher at Hamilton Education Center. Employee was serving in Educational service status at the time her position was abolished. Agency filed its Answer to Employee's appeal on December 17, 2009, requesting that this appeal be dismissed for lack of jurisdiction.

I was assigned this matter on December 12, 2011. Thereafter, I issued an Order on January 4, 2012, directing the parties to submit Prehearing Statements by January 26, 2012,[1] and to attend a Prehearing Conference for February 15, 2012, in order to assess the parties' arguments, and to determine whether an Evidentiary Hearing was necessary. Both parties were present at the February 15, 2012, Prehearing Conference. During the Prehearing Conference, Agency renewed its request for the appeal to be dismissed on jurisdiction grounds. Agency

[1] Employee did not submit a Prehearing Statement. Agency submitted a Prehearing statement on January 26, 2012, along with a Motion to Dismiss ("MTD") for failure to state a claim upon which relief may be granted and for lack of jurisdiction.

explained that Employee was a probationary Employee at the time her position was abolished, and as such, OEA lacked jurisdiction in this matter. Employee conceded to the fact that she was a probationary employee and made a request to withdraw her appeal. The undersigned Administrative Judge ("AJ") explained to Employee that her request to voluntarily withdraw her appeal has to be in a signed writing. Subsequently, Employee requested that she be given till February 29, 2012, to submit her signed notice of withdrawal. This request was granted. On February 16, 2012, this AJ issued an Order codifying the verbal agreement reached at the Prehearing Conference. Employee failed to submit her notice of voluntary withdrawal on February 29, 2012. Thereafter, this AJ issued an Order for Statement of Good Cause directing Employee to either provide: (a) a statement of good cause for her failure to submit a response to the February 16, 2012, Order, or (b) address the merits of the case, specifically, whether in conducting the RIF, Agency followed proper District of Columbia Statutes, regulations and laws. Employee had until March 16, 2012 to respond. As of the date of this decision, Employee has not responded to this Order. 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; and

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.[2]

In her petition for appeal, Employee submits that Agency failed to follow appropriate RIF procedures as required by D.C. Code § 1-624.08, and therefore, she should be reinstated.[3] Agency submits that because Employee was a probationary employee at the time the RIF was conducted, OEA lacks jurisdiction over Employee's appeal. Agency further 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 separation. Accordingly, Agency requests that, this matter be dismissed for Employee's failure to state a claim upon which relief may be granted.[4]

This Office'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 Career and Education Service who are not serving in a probationary period, or who have successfully completed their probationary period. However, D.C. Code § 1-628.08(c) gives this Office limited jurisdiction over Career and Educational service employees, in RIF cases, regardless of the employee's date of hire. Here, although Employee was still a probationary employee at the time of the RIF, based on the above referenced section, Employee is still entitled to the regular 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, I find that, OEA has jurisdiction over Employee's appeal, and Agency's MTD for lack of jurisdiction is denied.

Employee contends that Agency failed to follow D.C. Code § 1-624.08 in conducting the instant RIF. Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02,[5] which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act or the Act") is the more applicable statute to govern this RIF.

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[2] See *Agency's Answer*, Tab 1 (December 23, 2009); *Agency's Brief* dated February 24, 2012.
[3] Employee's *Petition for Appeal* (October 21, 2009).
[4] *Agency's Prehearing Statement,* p. 5. (January 26, 2012).
[5] 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.

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.
>
> (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."[6] 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."[7]

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[8] The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act ("the

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[6] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[7] *Id.* at p. 5.
[8] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008), at 1132.

Act") instead of "the regular RIF procedures found in D.C. Code § 1-624.02."[9] 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."[10]

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.[11] 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."[12] 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."[13]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[14] 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 their separation from service; and/or

2. That she was not afforded one round of lateral competition within their competitive level.

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS Schools is authorized to establish 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. In accordance with Title 5, DCMR § 1502.1, competitive levels in which employees subject to the RIF competed were based on the following criterion:

1. The pay plan and pay grade for each employee;

2. The job title for each employee; and

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[13] *Id.*
[14] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

> 3. In the case of specialty elementary teachers, secondary teachers, middle school teachers and teachers who teach other specialty subjects, the subject taught by the employee.[15]

Here, Hamilton Education Center was identified as a competitive area, and Special Education Teacher on the ET-15 pay plan was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were sixteen (16) Special Education Teachers subject to the RIF. Of the sixteen (16) Special Education Teacher positions, two (2) positions were identified to be abolished.

Employee was not the only (Special Education Teacher) within her competitive level and was, therefore, 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;
>
> (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%)

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[15] Agency's Prehearing Statement at p. 2. (January 26, 2012). School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

(b) Significant relevant contributions, accomplishments, or performance – (10%)

(c) Relevant supplemental professional experiences as demonstrated on the job – (10%)

(d) Length of service – (5%)[16]

Competitive Level Documentation Form

Agency employs the use of a Competitive Level Documentation Form ("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 Hamilton Education Center 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 0 points on her CLDF, and was, therefore, ranked the lowest in her respective competitive level.[17] 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*, 109 F.3d 774 (D.C. Cir. 1997), 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."[18] According to the Retention Register, Employee received a total score of 0.5 after all of the factors outlined above were tallied and scored. The next lowest colleague received a total score of 1.5, and they too were separated pursuant to the RIF. 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.[19]

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.[20] This Office will not substitute its judgment for that of an

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

[17] In its Preheating Statement at p.3, Agency notes that Employee was ranked the second lowest of the sixteen employees, however, according to the retention register, Employee had the lowest total score (0.5), and the next employee separated had a total score of 1.5.

[18] *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).

[19] 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).

[20] *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).

agency when determining whether a penalty imposed against an employee should be sustained. Rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."[21] A penalty will not be disturbed if it comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[22]

Accordingly, I find that the Principal of Hamilton Education Center had discretion in completing Employee's CLDF, as they were in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that would lead the Undersigned to believe that the RIF was conducted unfairly. I, therefore, 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.

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 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, the D.C. Official Code § 1-624.08(e) which governs RIFs provides that an Agency *shall* (emphasis added) give an employee thirty (30) days notice *after* such employee has been *selected* (emphasis added) for separation pursuant to a RIF.

Here, Employee received her RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice states that Employee's position is being abolished as a result of a RIF. The Notice also provides Employee with information about their appeal rights. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

In addition, OEA rule 621.1 grants an AJ the authority to impose sanctions upon the parties as necessary to serve the ends of justice. The AJ "in the exercise of sound discretion may dismiss the action or rule for the appellant" if a party fails to take reasonable steps to prosecute or defend an appeal. *Id.* at 621.2. This Office has held that, failure to prosecute an appeal includes a failure to submit required documents after being provided with a deadline for such submission.[23] Here, Employee was warned in the February 16, 2012, and March 5, 2012, Orders that failure to comply could result in sanctions, including dismissal. Employee did not provide a written response to either Order. Both were required for a proper resolution of this matter on its merit. I conclude that, Employee's failure to prosecute her appeal is consistent with the language of OEA rule 621. Employee violated this rule when she did not submit a required document after

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[21] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
[22] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915 (1985).
[23] *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).

receiving notice in both the February 16, 2012, and March 5, 2012, Orders. Employee was notified of the specific repercussions of failing to submit the required documents. Accordingly, I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office, and this represents another reason why Agency's action should be upheld.

CONCLUSION

Based on the foregoing, I find that Employee's position was abolished after she properly received one round of lateral competition and a timely thirty (30) day legal notification was properly served. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in their removal is upheld.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

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MONICA DOHNJI, ESQ.
ADMINISTRATIVE JUDGE