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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
Harriet Cowan	)	OEA Matter No. 1601-0048-07
Employee	)	
	)	Date of Issuance: March 26, 2008
v.	)	
	)	Sheryl Sears, Esq.
	)	Administrative Judge
D.C. Public Schools	)	
Agency	)	
_____	)	

Harriet Cowan, Employee, *Pro Se*  
Sara White, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION

By letter dated December 1, 2006, Agency notified Employee that she would be separated from her position as a Business Manager at Ballou School to Aid Youth (STAY) Senior High School as part of a staff reduction effective January 5, 2007. Agency advised Employee of her right to file an appeal with the Office of Employee Appeals (“the Office” or “OEA”). She filed her petition on February 5, 2007.

This appeal presented no factual disputes that required resolution by a hearing. Therefore, none was convened. This decision is based upon the record of documentary evidence and written legal arguments by the parties.

JURISDICTION

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

ISSUES

Whether Employee was lawfully separated.

### BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” Pursuant to OEA Rule 629.1, *id.*, the applicable standard of proof is a “preponderance of the evidence.” OEA Rule 629.1 defines a preponderance of the evidence as “[t]hat 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.” Accordingly, Agency has the burden of proving, by a preponderance of the evidence, that the separation of Employee was legal.

### FINDINGS OF FACT AND ANALYSIS AND CONCLUSION

According to Agency, in the spring of 2006, each school in the D.C. public school system projected student enrollment and allocated a budget for the 2006 – 2007 school year. Schools then determined staffing needs based upon the projections. At the beginning of the school year, each school conducted a count of student enrollees. Where student enrollment varied from the projections, the school made a budget adjustment. Agency refers to this process as “budget reconciliation” performed in accordance with the District of Columbia Board of Education’s Resolution R07-04. That resolution provides as follows:

### **RESOLUTION**

#### **R07-04**

#### **MEMBERS OF THE D.C. BOARD OF EDUCATION PRESENT THE FOLLOWING RESOLUTION ON**

#### **LOCAL SCHOOL BUDGET RECONCILIATION FOR SCHOOL YEAR 2006 - 2007**

WHEREAS, the Board of Education (Board) is committed to a per pupil funding methodology for local schools, known as the weighted student formula, which will provide the funding allocations for schools each Spring of the preceding school year based on projected enrollment;

WHEREAS, the Board recognizes the need to adjust local school budgets in the Fall based upon the difference between the projected enrollment and actual enrollment to ensure equitable per pupil funding across all schools;

WHEREAS, the process for making such budgetary adjustments is known as Reconciliation;

WHEREAS, reconciliation should occur close to the opening of school to allow for minimal disruption to teaching and learning;

WHEREAS, schools with significant enrollment changes will result in adjustment of assignments for teachers and other school staff; and

WHEREAS, schools with minimal enrollment changes should, to the extent possible, be held harmless from making budget adjustments;

BE IT RESOLVED, the Board of Education approves that Reconciliation will occur based on an enrollment count taken on September 8, 2006 and be concluded prior to the start of the second advisory beginning October 30, 2006.

BE IT FURTHER RESOLVED, that for Reconciliation purposes the per pupil base shall remain at \$4,921.74, the same per pupil used during the preliminary allocations and the per pupil amount and weighting by grade shall remain the same. The exact weighting and per pupil amounts are listed in the chart below. Any excess funding resulting from Reconciliation will be held in reserve for the purpose of making any necessary additional teacher hires; or shall be use to augment funding for the implementation of the Master Education Plan.

<b>Grade Levels</b>	<b>Weight</b>	<b>Per Pupil</b>
Pre-School/Pre-K	1.19	\$5,857
Kindergarten - 2	1.19	\$5,857
Elementary (3 – 6)	1.10	\$5,414
Middle School (7 – 8)	1.08	\$5,311
High School (9 – 12)	1.08	\$5,311
Non-Graded	1.08	\$5,217

Agency also presented the entire Budget Development and Staffing Guide for D.C. Public Schools for the Year 2006-2007. Agency maintains that the separation was not part of a reduction-in-force and, therefore, did not require adherence to the laws, rules and regulations governing that process. Agency contends that, as a budget conciliation, the removal was proper.

Agency also argues that Employee's twenty year tenure did not entitle her to any further consideration or legal process than she received because 1) this was not a reduction-in-force subject to laws, rules and regulations that grant priority consideration based, in part, upon seniority; and 2) the collective bargaining agreement between Agency and the Council of School Officers (Employee's union) sets forth no guidelines for the way Agency conducts a "reconciliation."

Employee was granted two years on a retention register pursuant to which she is eligible for reemployment with Agency (presumably) until January 5, 2009. Agency considers this to be a reasonable provision for employee in light of the fact that she was

not separated for cause. However, Agency maintains that this does not negate Employee's affirmative responsibility to seek other employment.

Employee, on the other hand, seeks the reversal of the action, retroactive reinstatement to the position of Business Manager and back pay on the grounds that the process of removal was unlawful. Employee reported that she is currently serving as an Administrative Assistant at Burch School. According to Agency, she was appointed to that position on February 7, 2007. Employee has stated her belief that there is also a vacant Business Manager position at that school.

As a full-time, career service employee, the appellant had the right to lawful process before being deprived of her right to employment. It is Agency's burden to prove that she received it. However, Agency claims exemption from any law, rule or regulation that would have guided its actions in removing Employee. According to Agency, because there was authorization from the highest level of management to adjust the budget, it follows that Agency also had the authority to effect a removal without reference to any personnel laws that would normally apply.

However, this Office has found that a removal for budgetary reasons is tantamount to a reduction-in-force and, therefore, subject to the requirements thereof. E.g., in the matter of *R. Jamal Johnson v. D.C. Public Schools*, OEA Matter No. 1601-0011-07 (February 8, 2007), Judge Joseph Lim held that a removal for budgetary reasons that was not conducted in accordance with lawful procedures for a RIF or for cause was improper. He reversed the Agency's action and ordered Employee's reinstatement. The Board of this Office upheld that determination in its *Opinion and Order on Petition for Review* issued on June 20, 2007.

In the instant matter, Agency determined to reduce staff for budgetary reasons. Once that was decided, Agency officials should have turned to the applicable legal provisions for effecting reductions in force. D.C. Official Code § 1-624.08 (d), (e) and (f) clearly sets forth the legal requirements for such actions.

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 *1 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. (Emphasis added).

(f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific

position is to be abolished, nor separation pursuant to this section shall be subject to review except that. . .

(2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (f) were not properly applied.

Agency maintains that, even if there had been a RIF, Employee would have been assigned to a one-person competitive level and removed. Thus, according to Agency, the result would have been the same. However, Agency's mere statement that the outcome would have been the same if the legal process had been followed does not excuse Agency from complying with the requirements of the law.

In separating Employee, Agency failed to comply with either the law for conducting an adverse action or that set forth for removing an employee by reduction in force (RIF). Agency relies solely upon its authority to make managerial decisions in accordance with budgetary needs to justify its action. While this Office does not contest an Agency's authority to determine its budget and staffing needs, it does hold firmly that in making adjustments to personnel, it must follow the law. As Agency has failed to do so, the separation of Employee must be ruled as unlawful and reversed.

#### ORDER

It is hereby ORDERED that:

- 1) Agency's action removing Employee is REVERSED; and
- 2) Agency reinstate Employee and reimburse all back pay and benefits lost as a result of the removal; and
- 3) Agency file documents with this Office that show compliance with the terms of this Order within thirty days of the day upon which the decision becomes final.

FOR THE OFFICE:

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SHERYL SEARS, ESQ.