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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Jerelyn Jones)	OEA Matter No. 2401-0053-10R13
Employee)	
)	Date of Issuance: June 16, 2014
v.)	
)	Joseph E. Lim, Esq.
D.C. Public Schools)	Senior Administrative Judge
Agency)	
)	
John Mercer, Esq., Employee Representative		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 21, 2009, Jerelyn Jones (Employee) filed a petition for appeal with this Office contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) action of terminating **her** employment through a Reduction-in-Force (“RIF”). The matter was assigned to the undersigned judge on December 2, 2011. After a December 28, 2011, prehearing conference and an order to the parties to submit a legal brief by the close of business on January 13, 2012, I issued an Initial Decision on January 27, 2012, dismissing the appeal for Employee’s failure to prosecute. Employee appealed, and on April 30, 2013, the OEA Board reversed and remanded the matter to the undersigned to consider the case on its merits.¹

On June 13, 2013, I held a conference and ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations. **Both parties submitted timely responses to the order. After reviewing the documents of record, I find that there are no material issues of fact in dispute. Therefore, I further find that an evidentiary hearing is unwarranted in this matter. The record is now closed.**

JURISDICTION

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

¹ *Jones v. DCPS*, OEA Matter No. 2401-0053-10, *Opinion and Order on Petition for Review* (Apr. 15, 2013).

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

1. On September 10, 2009, the Chancellor of the District of Columbia Public Schools authorized a reduction-in-force (RIF) due to budgetary reasons as soon as possible in the 2010 fiscal year. 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 See September 10, 2009 Memorandum from Michelle Rhee, Chancellor, District of Columbia Public Schools, to Kaya Henderson authorizing a Reduction-in-Force of School-Based Staff (RIF memo) attached to the District of Columbia Public Schools' Answer to Employee's Appeal (Agency's Answer) at Tab 1.
2. The RIF occurred on October 2, 2009.³ The effective date of the RIF was November 2, 2009.⁴
3. For the October 2, 2009 RIF, Woodson Senior High School was a determined to be a competitive area and ET-15 Special Education Teachers constituted a competitive level.

² See Agency's Answer, Tab 1 (December 16, 2009).

³ See Letter to Employee from Michelle Rhee, Agency Chancellor, dated October 2, 2009, attached to Agency's Answer at Tab 4.

⁴ Petition for Appeal, p.9 (October 21, 2009).

4. Employee's position of record at the time her position was abolished was an ET-15 Special Education Teacher at Woodson Senior High School (Woodson) on October 2, 2009. Employee was serving in Career/Educational Service status at the time she was terminated.
5. Ten other DCPS employees were ET-15 special education teachers at Woodson during the October 2, 2009 RIF.
6. Three ET-15 Special Education Teacher positions at Woodson were identified as positions that would be subject to the RIF.
7. Ms. Jones was provided with one round of lateral competition and was ranked the third lowest of ET-15 Special Education Teachers in her competitive area and competitive level.⁵
8. Ms. Jones received specific written notice on October 2, 2009 that she would be separated from service with Agency effective November 2, 2009.⁶

Employee's Position⁷

Employee submits that Agency and School Principal Phillip Robey were dishonest and inaccurate in their manipulative description of Employee's work and qualifications as narrated in the CLDF, and requests an evidentiary hearing for the purpose of determining the veracity of such allegations. Employee asserts that Principal Robey never observed her work or communicated with her. She disputes the narrative account made by Principal Robey in her CLDF. According to Employee, Agency failed to fairly administer, score, and rank her, thereby violating the Comprehensive Merit Personnel Act ("CMPA") and D.C. Regulations. Such manipulation and falsification of Employee's background, experience, and productivity destroyed her opportunity for continued employment with Agency.

Employee also alleges that she was improperly "excessed"⁸ by Agency at the end of the 2008-2009 School Year. Specifically, Employee asserts that Agency's failure to accommodate her request for an elementary school that is wheelchair accessible and barrier-free violated the American with Disabilities Act and Article IV of the Collective Bargaining Agreement. This failure to accommodate her resulted in her being excessed from Birney Elementary School ("Birney") and assigned to Hamilton Center. After complaining that Hamilton Center was also not wheelchair accessible and barrier-free, Agency then re-assigned Employee to Woodson Senior High School ("Woodson"). Employee insists that were it not for this late re-assignment to Woodson coupled with a dishonest school principal, her RIF would not have resulted.

⁵ See Affidavit of Peter Weber and Competitive Level Documentation Forms attached to the District of Columbia Public Schools' Prehearing Statement at Tabs A and B, respectively.

⁶ See Letter to Jerelyn Jones from then Chancellor Michelle Rhee dated October 2, 2009, attached to the Agency's Answer at Tab 4.

⁷ Employee Brief (August 16, 2013) and attached Employee Exhibit 1.

⁸ Excessing is a resource re-allocation method used by DCPS to reassign teachers or other personnel to a different school due to a decline in student enrollment at a particular school.

Next, Employee also argues that all of Woodson's thirteen ET-15 Special Education Teachers on site should have been included in the designated "competitive level" of ET-15 Special Education Teachers within the competitive area of Woodson.

Lastly, Employee asks for an evidentiary hearing as she believes it is needed to "fully determine facts and conclusions..."⁹

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. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that the lowest ranked **position**, Employee, was terminated as a result of the round of lateral competition.

Analysis

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02,¹⁰ 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.

⁹ Employee Brief (August 16, 2013) p. 9.

¹⁰ 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.

(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.”¹¹ 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.”¹²

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.”¹³ 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.”¹⁴ 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.”¹⁵

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.¹⁶ 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.”¹⁷ 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.”¹⁸

¹¹ *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

¹² *Id.* at p. 5.

¹³ *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1125.

¹⁷ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

¹⁸ *Id.*

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹⁹ 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/he did not receive written notice thirty (30) days prior to the effective date of his/her separation from service; and/or
2. That she/he was not afforded one round of lateral competition within his/her competitive level.

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS 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
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.²⁰

Here, Woodson Senior High School was identified as a competitive area, and Special Education Teachers 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 eleven (11) Special Education Teacher positions subject to the RIF. Of these positions, three (3) positions were identified to be abolished.²¹

Employee was not the only person within her competitive level and therefore, was required to compete with other employees in one round of lateral competition. According to Title 5, DCMR § 1503.2 *et al.*:

¹⁹ *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

²⁰ School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

²¹ See Agency’s Answer, Tab 4 (December 16, 2009).

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%)
- (b) Significant relevant contributions, accomplishments, or performance – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
- (d) Length of service – (5%)²²

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 Woodson was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed

²² 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).

appropriate, while the “length of service” category was completed by the Department of Human Resources (“DHR”).

Employee received a total of 26 points on her CLDF, and therefore, was ranked the third lowest in her respective competitive level. Employee’s CLDF stated, in pertinent part, the following:

“Ms. Jones has not taken on some of the tasks that other teachers readily volunteer for. She has also failed to engage other teachers and does not go out of her way to work with non-special education teachers on our staff. Because her teaching is marginal in relation to other teachers, the department chair and coordinator have been unable to assign her to the same number of caseloads as her colleagues. Ms. Jones does not reach out to parents and has not completed the task of calling parents whose children are absent, which is required of all of our teachers. She fails to bring energy to her teaching, nor has she worked toward student attainment of higher ordered thinking skills.”²³

Office or school needs

This category is weighted at 75% on the CLDF and includes: curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of three (3) points out of a possible ten (10) points in this category; a score much lower than other employee’s within her competitive level. Employee claims that Principal Robey never observed her work or communicated with her regarding her performance. She disputes the narrative account made by Principal Robey in her CLDF. The undersigned notes that the criteria Agency instructed principals to use in ranking employees did not require a formal observation of employees.²⁴ Specifically, in the Office or School Needs category, principals were instructed to assign scores “reflecting their best judgment of the extent to which the person meets the particular needs of the school.”²⁵

Employee failed to provide evidence that would bolster a score in this area, such as proof of degrees obtained pertinent to her work, licenses or other specialized education. Nonetheless, there is no evidence to show that the principal did not take these into account. Also, the principal of Woodson High School was given the discretion to complete Employee’s CLDF and determine how many points to award based on his observation and evaluation.

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.²⁶ Agency cites to *American Federation of Government Employees, AFL-CIO v. OPM*, 821 F.2d

²³ Agency Answer (December 17, 2009), Tab 3, page 2.

²⁴ Agency Answer (December 17, 2009), Tab 3, page 1.

²⁵ See Agency Answer (December 17, 2009), Tab 2, page 5 for examples of factors that could lead to a high or low score for an individual.

²⁶ Agency Brief at pp. 4-5 (January 26, 2012).

761 (D.C. Cir. 1987), 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.” 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.

Regardless of Employee’s protestations to the contrary, there is no indication that any supplemental evidence would supplant the higher scores received by the remaining employee(s) in Employee’s competitive level who were not separated from service. With respect to Office and School Needs, I find that in this matter, I will not substitute my judgment for that of management, namely the principal of the school, as it relates to the score he accorded to Employee and her colleague(s) in the instant matter. I find that the Principal at Woodson had wide latitude to invoke his managerial discretion with respect to assessing the on-the-job performance and capabilities of his subordinates.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Per Title 5, DCMR §1503.2, this category requires Employee’s “significant relevant contributions, accomplishments, or performance (emphasis added). 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 received zero (0) points in this area and contends that the principal was dishonest in his evaluation statements contained within the CLDF.

The principal was given discretion to complete this area. This Office will not substitute its judgment for the managerial discretion of an agency in handling its personnel matters. The primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not to OEA.²⁷ Rather, this Office limits its review to determining if “managerial discretion has been legitimately invoked and properly exercised.”²⁸

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee received zero (0) points in this area. Employee has not provided any documentation to supplement additional points being awarded in this area. Considering as much, I again find that Employee’s arguments to the contrary are unconvincing.

Length of service

This category was completed by DHR and was calculated by adding the following: 1) years of experience; 2) military bonuses; 3) D.C. residency points; and 4) rating add—four years

²⁷ See *Huntley v. Metropolitan Police Dep’t*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994).

²⁸ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

of service was given for employees with an “outstanding” or “exceeds expectations” evaluation within the past year. The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

An outstanding performance rating in the previous year gets employee an extra four (4) points in the length of service category. Employee has not provided supporting documentary evidence to support any additional points being awarded in this category. Employee received a total of 3.5 points in this category. In her brief, she does not contest the points awarded and did not receive additional points for receiving “outstanding” or “exceeds expectations” performance ratings for the prior year. Therefore, I find that Agency properly calculated this number.

I shall now deal with each of the arguments raised by Appellant Employee:

1. Employee’s Request for an Evidentiary Hearing due to the school principal’s alleged dishonesty in completing Employee’s CLDF.

According to Employee, an evidentiary hearing is needed to validate the truthfulness of the principal’s statements contained within her CLDF. Apart from blanket generalizations that the school principal was untruthful in filling out Employee’s CLDF, Employee does not specifically dispute any of the statements written by the principal, does not cite any specific instances where the principal was lying, nor does she offer any evidence to support her allegations. Neither does Employee contend that the school principal had no substantial evidence for his statements on Employee’s CLDF. Apart from her disagreement with the CLDF score that she received, Employee does not proffer any evidence that would refute the score that she received. OEA Rule 619.2²⁹ states in part that an Administrative Judge (“AJ”) can “require an evidentiary hearing, if appropriate.” Additionally, OEA Rule 625.2 indicates that it is within the discretion of the AJ to either grant or deny a request for an evidentiary hearing based on whether or not the AJ believes that a hearing is necessary.³⁰ After reviewing the record, the undersigned has determined that there are no material facts in dispute and therefore Employee’s request for an evidentiary hearing is denied.³¹

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.”³² According to the CLDF, Employee received a total score of 26 after all of the factors

²⁹ 59 DCR 2129 (March 16, 2012); See also OEA Rule 619.2, 59 DCR 2129 (March 16, 2012).

³⁰ See *Gray-Avent v. D.C. Department of Human Resources*, OEA Matter No. 2401-0145-08, *Opinion and Order on Petition for Review* (July 30, 2010).

³¹ For a more complete discussion on when a school employee is entitled to an evidentiary hearing, see *Onuche Shaibu v. DCPS*, Case No. 2012 CA 003606 P (D.C. Super. Ct. January 29, 2013).

³² 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).

outlined above were tallied and scored. The next lowest colleague who survived the instant RIF received a total score of 52.5. Despite Employee's protestations to the contrary, there is no credible indication that any supplemental evidence would supplant the higher scores received by the remaining colleagues in Employee's competitive level who were not separated from service. Employee has only proffered unsubstantiated allegations and mere conjecture to support her contention that her position should have survived the instant RIF. Employee has not proffered any credible evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome in this case.³³

Accordingly, I find that the principal of Woodson had discretion in completing Employee's CLDF, as he was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. Moreover, it appears as though Employee's basis for requesting an evidentiary hearing is to be afforded an opportunity to explore and undoubtedly dispute "...interpretations of their worth against [the] principals' evaluations."³⁴ 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.

2. *Improper Excessing of her position*

Employee complains that the excessing of her position at her former school of Birney indirectly caused the loss of her job due to the RIF. I note that Employee does not allege the excessing directly caused the loss of her job due to the RIF, as according to Employee's own account, Agency was able to secure her a new teaching position at two different schools, the second transfer on account of her own request for a transfer.

This Office's jurisdiction over RIF appeals is clearly stated by the provisions of D.C. Official Code § 1-624.08 (d) and (e) (2001), and limited to determining whether the Employees have each received one round of lateral competition for positions in each Employee's respective competitive level, and at least 30 days prior written notice before the effective date of his or her separation.

With regards this particular argument, Employee has not alleged that Agency violated her right to a single round of lateral competition within her competitive level, or that she was denied at least 30 days advance written notice prior to the effective date of the RIF. The allegation of improper excessing which she does make is pre-RIF, and outside of the scope of my jurisdiction over RIF appeals, pursuant to D.C. Official Code § 1-624.08 (2001). Therefore, I find that Employee has made no claim of relief cognizable before this Office. The action separating her must, therefore, be upheld.

³³ 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.)

³⁴ *Washington Teachers' Union* at 780.

The issue of whether pre-RIF conditions at an employee's former agency can be addressed by this Office has been raised previously, and likewise long ago decided. *In the Matter of Teteja*, 2405-0013-91, (7-2-92), 39 D.C.Reg. 7213, a seminal case in the subject area, the Temporary Appeals Panel (the "TAP") determined that the TAP does not have jurisdiction to hear a claim of a prior job misclassification in the process of adjudicating an employee's RIF appeal, and that permitting job classifications to be challenged under the guise of a RIF appeal, would be incompatible with the limited scope of review of RIF determinations. Further, TAP emphasized that its role is limited to reviewing the validity of matters covered by the RIF regulations. *See also Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (December 11, 1998), which held that this Office's authority is narrowly prescribed, and did not have jurisdiction to determine whether the RIF at the agency was bona fide or violated any law, other than the RIF regulations themselves.

In *David A. Gilmore v. University of the District of Columbia*, 695 A.2d 1164, (D.C. 1997), the court held that Gilmore could not use the RIF process to belatedly contest the process utilized in his job being reclassified, which position was subsequently abolished during a RIF. The court further noted that Gilmore could have filed a timely grievance with his employer, challenging what he believed was a misclassification of his position. Had he done so, the grievance would have afforded his employer the opportunity to redefine the duties the position entailed, so as to remove uncertainty about its classification and the grounds for any future legal disputes that might arise. As well and depending upon the outcome of the grievance process, a timely grievance would have enabled Gilmore to decide whether to accept the "good" with the "bad", i.e., the increased vulnerability of his new job reclassification and the promotion that came with it, rather than accepting the benefits when given, and challenging his status only later when the burdens of the higher position, including the ultimate RIF, materialized. *Id* at 1168.

In maintaining this position, this Office is adhering to prior determinations previously made by the federal courts. In *Menoken v. Department of Health and Human Services*, 784 F.2d 365, 368-369 (Fed.Cir.1986), the court held that:

In determining the retention rights of the former employees of the Community Services Administration, the [Merit Systems Protection] Board necessarily had to look at the situation as it actually existed in that agency when the reduction in force took place on September 30, 1981, and not to the situation that might or should have existed on that date. It would be almost impossible to determine the retention rights of employees affected by a reduction in force or transfer of function if the correctness of the classification of the positions the employees held had to be reexamined. Reductions in force deal with actual and not theoretical or possible situations.

See also Biddle v. United States, 195 U.S.App.D.C. 263, 602 F.2d 441 (1979), holding that complaints of pre-RIF treatment are not a proper issue of RIF appeal subject to review of the Federal Employee Appeals Authority. Instead, those issues had to be raised within the agency's own grievance procedures.³⁵

³⁵ For further discussion of this same issue, see *Wharton v. District of Columbia Public Schools*, OEA Matter J-0111-02 (Mar. 3, 2003); *Levitt v. District of Columbia Office of Personnel*, OEA Matter No. 2401-0001-00, *Opinion*

3. Agency's violation of the Americans with Disabilities Act.

Employee's specific complaint that Agency's failure to accommodate her request for an elementary school that is wheelchair accessible and barrier-free violated the American with Disabilities Act and Article IV of the Collective Bargaining Agreement is likewise beyond the scope of this Office's jurisdiction over RIF appeals.

D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.³⁶ Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, the Court in *Anjuwan v. D.C. Department of Public Works* held that OEA's authority over RIF matters is narrowly prescribed.³⁷ This Court explained that, OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied...the rules and regulations issued pursuant thereto." This court further explained that OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs." Citing *Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997). However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*³⁸ stated that, OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation..."³⁹ Here, Employee's claims as described in her submissions to this Office do not allege any whistle blowing activities as defined under the Whistleblower Protection Act nor does it appear to be retaliatory in nature.

In the instant case, Employee has failed to provide any credible evidence to substantiate these bare assertions. Considering as much, I find that Employee's claims fall outside the scope of OEA's jurisdiction.

Therefore, I find that an Employee raising collateral issues when challenging a RIF does not confer additional authority upon the Office to enforce all laws and regulations, as such would clearly exceed both the limited statutory authority and the AJ's jurisdiction, which is solely to determine whether the RIF complied with applicable District personnel statutes and regulations addressing an employee's right to a single round of lateral competition within his/her

and Order on Petition for Review (Nov. 21, 2002); *Powell v. Office of Property Management*, OEA Matter No. 2401-0127-00 (Feb. 3, 2003); *Booker v. Department of Human Services*, OEA Matter No. 2401-0190-97 (Oct. 11, 2000).

³⁶ D.C. Code §§ 1-2501 *et seq.*

³⁷ 729 A.2d 883 (December 11, 1998).

³⁸ 730 A.2d 164 (May 27, 1999).

³⁹ *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

competitive level, and whether the employee received at least 30 days advance written notice prior to the effective date of the RIF.

Having reviewed the current status of the RIF law and governing regulations, I conclude that the jurisdiction of this Office in conducting RIF appeals is limited to the authority granted by the plain language of the statute, and particularly the provisions of D.C. Official Code § 1-624.08 (d) (one round of lateral competition which shall be limited to positions in his/her competitive level), and (e)(at least 30 days written notice before the effective date of his/her separation). Anything else is beyond both the statute's and this Office authority to address.

4. *Employee's argument that all Woodson's thirteen ET-15 special education teachers on site should have been included in the designated "competitive level" of ET-15 Special Education Teachers within the competitive area of Woodson.*

I note that there are eleven ET-15 Special Education Teachers in Employee's competitive level. Based on the record and the parties' own submissions, it is unclear who the additional two ET-15 Special Education Teachers that Employee asserts **should have been** included in her competitive level. Employee fails to name them and did not submit any documentation to support **her** allegation. Employee did not give any reason why these two unidentified teachers should have been included in her competitive level. Employee does not present their qualifications, position title, work assignment, or any other detail that would mandate their inclusion in her competitive level. Thus, I am unable to address this allegation.

5. *Employee's Request for additional time for Discovery.*

Coupled with her request for a hearing, Employee appears to ask for additional time for discovery.⁴⁰ OEA Rule 617.6 states that "Discovery may be commenced after the Office notifies the agency that the employee has filed the petition. Unless the Administrative Judge directs otherwise, discovery shall be completed by the date of the pre-hearing conference." Therefore, from the date an employee files a petition for appeal with this Office, and when Agency is notified of such Appeal, the parties can begin discovery. This process has to be completed prior to the date the Administrative Judge schedules a pre-hearing conference.

It should be noted that Employee was afforded ample time to engage in discovery since she filed her appeal on October 21, 2009. The first pre-hearing conference in this matter was held on December 28, 2011, more than two years after Agency was notified of their appeal. The next conference was held on June 13, 2013. Thus, Employee had almost five years to complete any discovery needed. Employee does not allege that Agency has hindered her discovery or was otherwise uncooperative.

Additionally, OEA Rule §617.4... further provides that, the Administrative Judge may limit the frequency or use of discovery if:

⁴⁰ Employee's Brief, pg. 9. Specifically, Employee concludes that, "...Employee respectfully requests that OEA institute a hearing in the present matter to fully determine facts and conclusions in order to determine whether Employee shall have to have sufficient time to conduct discovery, allow her to examine essential witnesses..."

- a. The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- b. *The party seeking discovery has had ample opportunity by discovery in the appeal to obtain the information sought;* (emphasis added) or
- c. The discovery is unduly burdensome or expensive, in light of the nature of the case, the relief sought, the limitations on the parties' resources, and the importance of the issues involved in the case.

I find that Employee has had ample time to conduct discovery and thus I do not find it necessary to further delay the processing of this case.

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 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* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (Emphasis added).

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 **her** 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.

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 **her** 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:

Joseph E. Lim, Esq.
Senior Administrative Judge