THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RICKY WILLIAMS,	)	OEA Matter No. 2401-0211-10
Employee	)	
	)	Date of Issuance: March 4, 2014
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Ricky Williams ("Employee") worked as a Special Education Teacher with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was November 2, 2009.[1]

Employee challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 1, 2009. In it, he asserted that Agency did not follow appropriate procedures when it conducted the RIF and that his competitive level was too narrow. Employee also contended that Agency denied his right to priority reemployment consideration. Therefore, he requested an evidentiary hearing.[2]

In Agency's response to the Petition for Appeal, it explained that the RIF was conducted

[1] *Petition for Appeal,* p. 7 (December 1, 2009).
[2] *Id.,* 4-6.

pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It submitted that in accordance with 5 DCMR § 1501, Eaton Elementary School ("Eaton") was determined to be the competitive area, and under 5 DCMR § 1502, the Special Education Teacher position was the competitive level subject to the RIF. Accordingly, Employee was provided one round of lateral competition where the principal utilized Competitive Level Documentation Forms ("CLDF") to rate each employee, as defined in 5 DCMR § 1503.2.[3] After discovering that Employee was ranked the lowest in his competitive level, Agency provided him a written, thirty-day notice that his position was being eliminated. As a result, it believed the RIF action was proper.[4]

Prior to issuing the Initial Decision, the OEA Administrative Judge ("AJ") ordered the parties to submit briefs addressing whether Agency followed the District's laws when it conducted the RIF.[5] In its brief, Agency reiterated its position and submitted that OEA is limited to determining whether it followed D.C. Official Code § 1-624.02, 5 DCMR §§ 1503 and 1506.[6] Employee's brief provided that he should not have been subjected to the RIF because he was placed in an incorrect competitive area. He explained that although Agency placed him at Eaton, his competitive area should have been Bunker Hill Elementary School ("Bunker Hill").[7] Employee further provided that the lateral competition procedure was flawed because Agency failed to accord him the proper credit for Veteran's preference.[8] Therefore, he requested that

[3] Agency explained that when it conducted the RIF, its Office of Human Resources computed Employee's length of service, including credit for District residency, Veteran's preference, and any prior outstanding performance rating.
[4] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal* (December 31, 2009).
[5] *Amended Order Requesting Briefs* (February 16, 2012).
[6] *District of Columbia Public Schools' Brief,* p. 8 (March 8, 2012).
[7] Additionally, Employee contested his CLDF rating for the Office or School Needs category because he was employed at Eaton for only one month and was not given an opportunity to address the school's needs or contribute to the overall school program. *Brief of Employee Ricky Williams,* p. 9-10 (April 13, 2012).
[8] Employee reiterated that Agency failed to consider him for the Reemployment Program and the Displaced Employee Program.

Agency's action be reversed.[9]

The Initial Decision was issued on June 22, 2012. The AJ found that although the RIF was authorized pursuant to D.C. Official Code § 1-624.02**,** D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF.[10] As a result, he ruled that D.C. Official Code § 1-624.08 limited his review of the appeal to determining whether Employee received a written, thirty-day notice prior to the effective date of his separation and if Agency provided one round of lateral competition within his competitive level. The AJ found that Employee's competitive area was Eaton and that he was afforded one round of lateral competition within his competitive level.[11] He also explained that Agency considered all of the factors enumerated in DCMR § 1503.2 when it conducted the RIF. With regard to Employee's arguments concerning Agency's Reemployment Priority Program and Displaced Employee Program, the AJ held that Employee's complaints were grievances that OEA lacked jurisdiction to consider.[12] Finally, the AJ held that Agency provided Employee the required thirty-day notice. Accordingly, the RIF action was upheld.[13]

On September 4, 2012, Employee filed a Petition for Review with the OEA Board. He argues that the Initial Decision was not based on substantial evidence and that the AJ failed to consider his substantive and procedural arguments. Employee states that the AJ did not consider

[9] *Brief of Employee Ricky Williams,* p. 12 (April 13, 2012).
[10] The AJ cited the District of Columbia Court of Appeals' position in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools,* 960 A.2d 1123 (D.C. 2009) and reasoned that D.C. Official Code § 1-624.08 or the "Abolishment Act" was the applicable statute because the RIF was conducted for budgetary reasons, and the statute's 'notwithstanding' language is used to override conflicting provisions of any other section. *Initial Decision,* p. 2-4 (June 22, 2012).
[11] The AJ noted that assuming that Employee's competitive area was Bunker Hill, there is nothing in the statute, regulation, or case law that would preclude Agency from placing him at Eaton. With regard to Employee's concerns with the Office or School Needs category, the AJ found that the principal of Eaton was given the discretion to complete his CLDF, and the criteria used for ranking employees did not require formal observations. *Id.,* 5-7.
[12] Although Employee contended that he was not given the opportunity to address the school's needs or contribute to the overall school program, the AJ found that Employee did not cite any statute, regulation, or case law that required this. The AJ also held that even though Employee was not properly provided Veteran's preference credit, Agency's error was harmless because Employee received the maximum points for the Length of Service category. *Id,* 8-10.
[13] *Id.*

the Notification of Personnel Action which documented that his official placement was at Bunker Hill. Ultimately, Employee believes that the RIF action was improper because he was compared to employees at Eaton, even though he was officially assigned to Bunker Hill. As a result, he does not believe that he received one round of lateral competition.[14] Finally, Employee alleged that Agency did not prove that he was given consideration for priority reemployment. Therefore, he requests reinstatement with back pay and attorney fees.[15]

In response, Agency submitted that Employee failed to meet his burden on Petition for Review. Agency states that Employee's arguments amount to no more than disagreements with the AJ's findings and the relevant weight he gave to the evidence in the record. With regard to Employee's concerns with his competitive area, Agency argued that Employee was placed at the school at which he taught, and its submission of the Interim Director's affidavit confirmed that he taught at Eaton.[16] Furthermore, Agency contends that the Initial Decision addressed all issues of law and fact properly raised on appeal. Thus, Agency requests that the OEA Board affirm the Initial Decision, dismiss the Petition for Review, and declare that its action was in accordance with the appropriate laws and regulations.[17]

Competitive Area

Employee's first argument is that his competitive area was improper. District Personnel Manual ("DPM") Section 2409 specifically addresses competitive areas for RIF actions. It provides the following:

> 2409.1 Except as provided in this section, each agency shall constitute a single competitive area.

[14] Employee, again, argued that because he was RIFed after one month at Eaton, he was not given an opportunity to contribute to the school programs. Similarly, Employee claimed that he did not receive credit for his Veteran's preference.
[15] *Employee's Petition for Review of Initial Decision* (September 4, 2012).
[16] Agency further provides that its Retention Register also confirmed that Employee taught at Eaton.
[17] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 2-4 (October 5, 2012).

2409.2 Lesser competitive areas within an agency may be established by the personnel authority.

2409.5 Employees in one competitive area shall not compete with employees in another competitive area.

Thus, in accordance with the above-mentioned regulations, Agency was within its authority to make each school its own competitive area. However, Employee contends that he was employed at Bunker Hill, not Eaton, at the time of the RIF. He relies on a Personnel Action Form which he claims indicates that his position of record was at Bunker Hill. However, the Personnel Action Form upon which he relies was not properly executed; the form does not bear a signature of an approving official and lacks an approval date.[18] Even if we rely on the document Employee suggests, the mere chronological dates of the documents in the record show that Eaton was the final school at which Employee was placed.[19] Accordingly, Employee's claim that he was employed at Bunker Hill lacks merit.

After a review of the record, this Board found only two properly executed documents, and only one of which specifically notes Employee's competitive area. First, there is an employment action form that indicates that Employee was "rehired/reinstated" as a teacher with Agency. The document does not provide at which school he was placed, but it is signed by a Human Resources specialist and dated August 28, 2009.[20] Additionally, there is a document from Agency which clearly provides Employee's placement at Eaton Elementary. The document is addressed to Employee and provides, *inter alia*, the following: "in order to maintain your active employment status with D.C. Public Schools (DCPS), you are expected to report for duty on August 17[ ], 2009. You are placed at Eaton Elementary School. . . . You are being reinstated

[18] *Employee Personnel Record*, p. 2 (March 8, 2012) and *Brief of Employee Ricky Williams*, Exhibit #9 (April 13, 2012).
[19] *Employee Personnel Record* (March 8, 2012) and *Brief of Employee Ricky Williams* (April 13, 2012).
[20] *Employee Personnel Record*, p. 3 (March 8, 2012).

into the system on an ET-15/10 Monthly Salary Schedule. . . ." This document is also dated August 28, 2009, and is signed by an Agency Human Resource Specialist.[21] This is consistent with Employee's notice of termination and CLDF which list Eaton as the competitive area.[22] Therefore, despite Employee's contention, the record proves that Eaton was the proper competitive area for the RIF action.

Substantial Evidence

Employee argues that he did not receive one round of lateral competition because he was RIFed after one month at Eaton and not given an opportunity to contribute to the school's programs. Additionally, he claimed that he did not receive credit for his Veteran's preference. In *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883 (D.C. 1998), the D.C. Court of Appeals held that OEA's authority regarding RIF matters is narrowly prescribed, and it may not determine whether the RIF was bona fide or violated any law, other than the RIF regulations. According to D.C. Official Code § 1-624.08(d) and (e), OEA is tasked with determining if Agency afforded Employee one round of lateral competition within his competitive level and if they provided a thirty-day notice. The Superior Court of the District of Columbia held in *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA), p. 4 (D.C. Super. Ct. March 14, 2013) that "implicit in the authority to determine whether an employee has been given one round of lateral competition is the jurisdiction to decide whether an employee's CLDF is supported by substantial evidence."

Substantial evidence is defined as evidence that a reasonable mind could accept as

[21] *Employee Personnel Record*, p. 6 (March 8, 2012) and *Brief of Employee Ricky Williams*, Exhibit #8 (April 13, 2012).
[22] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, Tabs # 3 and 4 (December 31, 2009).

adequate to support a conclusion.[23] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. After reviewing the record, this Board believes that the CLDF and the AJ's assessment of this matter were based on substantial evidence.

Employee offers nothing more than conjecture about Agency's scoring his CLDF. His argument focused on his inability to engage in school programs. However, he neglected to address any of the specific allegations made against him on his CLDF.[24] The Superior Court in *Sligh* held that when the record contains no evidence that would raise a material issue as to the veracity of the CLDF, employee's contentions amount to mere allegations. This Board finds that there is substantial evidence in the record that Employee was provided with one round of lateral competition.

Veteran's Preference

As for Employee's argument regarding Veteran's preference, this Board also finds that the AJ's ruling on this issue was also based on substantial evidence. It is clear from the record that Agency neglected to include Employee's preference on his CLDF. However, even after calculating this preference, Employee still would have been removed because his ranking remained the lowest within his competitive level. Employee should have received an additional

[23] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

[24] The CLDF provided the following:

> Mr. Williams comes to work on time every day. Mr. Williams also participates in scheduled IEP meetings. However, Mr. Williams has made minimal contribution to the overall school program. Mr. Williams demonstrates limited ability to differentiate as evidenced by how he uses ditto sheets for all students in his class. Mr. Williams demonstrates little or no ability to use technology or creativity during instruction as evidenced by his lack of effective materials and strategies observed. Mr. Williams demonstrated little or no use of manipulatives and other materials as evidenced by observations where he used only paper, pencil or copied work sheets. There was no evidence of special education best practices during observations.

four years of service under the length of service category for his Veteran's status. However, as the AJ provided, Employee already received the maximum number of points in this category; therefore, his overall score would remain unchanged.

Reemployment Rights

In his Petition for Review, Employee claims that Agency failed to prove that he was given consideration for priority reemployment. D.C. Official Code § 1-624.08(h) provides that separation pursuant to a RIF action, "shall not affect an employee's rights under either the Agency Reemployment Priority Program or the Displaced Employee Program established pursuant to Chapter 24 of the District Personnel Manual." DPM section 2427 discusses the District's priority reemployment program and it provides the following:

> 2427.1 The personnel authority shall establish and maintain a reemployment priority list for each agency in which it separates group I and II employees.
>
> 2427.2 As appropriate, when a reduction in force is conducted in a lesser competitive area established pursuant to section 2409 of this chapter, the personnel authority may:
> (a) Limit the agency reemployment priority list to group I and group II employees separated from the lesser competitive area in which the reduction in force was conducted; and
> (b) Limit referrals pursuant to this section and section 2428 of this chapter to positions within the lesser competitive area in which the reduction in force occurs.
>
> 2427.4 A group I employee's name shall remain on the reemployment priority list for two (2) years, and a group II employee's name for one (1) year, from the date he or she was separated from his or her competitive level.
>
> 2427.5 An employee covered under the provisions of this section shall be entered automatically on the reemployment priority list immediately after it has been determined that the employee is to be adversely affected by the reduction in force and not later than issuance of the notice of reduction in force.
>
> 2427.6 Except as provided in subsection 2426.1 of this chapter, the employee's name shall be entered on the appropriate agency reemployment priority list for all positions for which qualified as follows:

(a) At his or her grade level at the time of separation; and
(b) At any lower grade acceptable to the employee.

2427.7 The agency may delete an employee's name from the list when he or she declines a non-temporary position with a tour of duty similar to the position from which separated that is at the same grade level from which he or she was separated or at any lower grade acceptable to the employee.

Moreover, the Superior Court for the District of Columbia held in *Webster v. District of Columbia Public Schools*, 2012 CA 006364 P(MPA), p. 8 (D.C. Super. Ct. December 9, 2013) that in accordance with D.C. Official Code § 1-624.08(h) and DPM section 2427.5, employees ". . . have a right to be added to the priority reemployment list . . . in light of the criteria under the procedures set forth in chapter 24 of the DCPM."

Agency clearly complied with the above-mentioned statutory and regulatory requirements.[25] It provided in its RIF notice that "employees separated pursuant to a reduction in force receive priority re-employment consideration [ ] but are not guaranteed reemployment."[26] Because D.C. Official Code § 1-624.08(f)(2) limits the issues OEA can consider in RIF matters, this Board lacks the authority to compel Agency to provide its reemployment lists, as Employee suggests.[27]

Although there were some mistakes made by Agency in this case, there is substantial evidence to support its RIF action against Employee. We find that Eaton was the proper competitive area. Moreover, calculating Employee's Veteran's preference would not have changed his CLDF score. Finally, Agency did comply with the Priority Reemployment

[25] It should be noted for the record that although Agency improperly relied on D.C. Official Code § 1-624.02 to conduct its RIF, this statute also requires priority reemployment for RIFed employees. Specifically, D.C. Official Code § 1-624.02(a)(3) provides that "reduction-in-force procedures . . . shall include . . . priority reemployment consideration for employees separated." Therefore, even under its improper statutory adherence, Agency still accurately considered Employee for priority reemployment.
[26] *Petition for Appeal*, p. 7 (December 1, 2009).
[27] As the AJ properly held, in accordance with D.C. Official Code §§ 1-624.08(d) and (e), OEA can only determine if Employee was provided one round of lateral competition and a thirty-day notice. *Initial Decision*, p. 9 (June 22, 2012).

requirements. Therefore, we must DENY Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED.**

FOR THE BOARD:

_____
William Persina, Chair

_____
Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.