THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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| In the Matter of: | |
| BRENDA FOGLE<br>Employee | OEA Matter No. 2401-0123-04 |
| v. | Date of Issuance: March 14, 2006 |
| | Sheryl Sears, Esq.<br>Administrative Judge |
| D.C. PUBLIC SCHOOLS<br>Agency | |

Omar Vincent Melehy, Esq., Employee Representative
Harriet E. Segar, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION

Employee was a Physical Education Teacher at Alice Deal Junior High School. Agency removed her as part of a reduction in force (RIF) on June 30, 2004. Employee filed an appeal with this Office and the parties convened for a pre-hearing conference on May 11, 2005. Employee has moved for summary judgment on the grounds detailed below.

### JURISDICTION

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

### ISSUES

I. Whether Employee is entitled to summary judgment on the ground that Agency filed an untimely answer to this appeal.

II. Whether Employee is entitled to summary judgment on the ground that RIF was not properly authorized,

III. Whether Employee is entitled to summary judgment on the ground that Agency failed to give her proper notice of the RIF.

## FINDINGS OF FACT AND ANALYSIS AND CONCLUSIONS

According to the D.C. Official Code § 1-624.08 (2001), which sets forth the standards for review of a RIF appeal, the grounds upon which an employee can challenge a RIF are limited as follows:

> 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 as follows—
>
> (1) an employee may file with the Office of Employee Appeals an appeal contesting that separation procedures of subsections (d) and (f) were not properly applied.
>
> > 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. . .
> >
> > (f) 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).

On June 28, 2004, Employee filed an appeal with this Office. By motion for summary judgment, Employee has challenged the RIF action as unlawful and harmful to her. OEA Rule 616 provides for summary judgment as follows:

> 616.1 If, upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material and genuine issues of fact, that a party is entitled to a decision as a matter of law, or that the appeal fails to state a claim upon which relief can be granted, the Administrative Judge may, after notifying the parties and giving them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings.

> 616.2 An Administrative Judge may render a summary disposition either *sua sponte*, after notice under Rule 616.1, or upon motion of a party.
>
> 616.3 An order granting summary disposition shall conform to the requirements for initial decisions set forth in Rule 632.

The questions then are whether Employee has presented undisputed facts that show that Agency denied her either one round of lateral competition or proper notice and, if so, whether that warrants the reversal of the RIF action as a matter of law.

Untimely Answer from Agency

By letter dated August 27, 2004, Warren M. Cruise, Executive Director, notified Agency that Employee had filed an appeal. Agency was directed to file an answer within 30 days. In accordance with OEA Rule 608.2, 42 D.C. Reg. 9297 (1999), the due date was September 29, 2004. However, when Stephanie Ramjohn Moore filed an answer for Harriet Segar, Agency's Representative, it was twenty-six days late. Attorney Segar acknowledged the late filing and explained that Agency was responding to numerous orders from this Office at the time.

At the pre-hearing conference, convened on May 11, 2005, this Judge concluded that the adjudication of the appeal was not unduly delayed or otherwise adversely impacted by Agency's failure to timely file. The sanction against Agency of a summary decision in favor of Employee, who suffered no harm as a consequence of the delay, would be excessively harsh. The motion for summary judgment on the ground of Agency's untimely filing of an answer is denied.

Lack of Authorization to Conduct the RIF

Employee also moved for summary judgment on the ground that the D.C. School Board did not have proper authorization to conduct the RIF. DC Official Code § 1-624.08 provides as follows:

> (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 . . .each agency is authorized . . . to identify positions for abolishment.
>
> (b) Prior to February 1 of each fiscal year, each personnel authority . . . shall make a final determination that a position within the personnel authority is to be abolished.

According to Employee, Agency did not authorize the abolishment of her position before February 1 of the fiscal year in which it occurred. However, as noted above, the sole authority of this Office is to determine whether Agency conducted the RIF properly. By this challenge, Employee has not claimed that she was denied proper notice of a round of lateral competition and, therefore, has stated no claim for which relief can be granted.

Therefore, the motion for summary judgment on the ground of improper authorization of the RIF is also denied.

Improper Notice of the RIF

Employee also claims that she did not get legally sufficient notice of her removal. Instead, Employee claims that she heard about the RIF from a co-worker in late May or early June, 2004, while she was on paid administrative leave. According to Employee, she contacted the Office of Human Resources on June 4, 2004, to inquire about her employment status and picked up the notice of the abolishment of her position on June 28, 2004. The letter was dated May 27, 2004, and the removal was effective on June 30, 2004.

Section 1506.1 of Title 5, Chapter 5 of the D.C. Municipal Regulations provides for advance notice of the RIF action as follows: "[A]n employee selected for separation shall be given specific written notice of at least thirty (30) days prior to the effective date of separation." Agency's deadline for serving notice upon Employee was May 31, 2006. While there is no evidence in the record that Agency delivered the notice to Employee before that date, she acknowledged receiving it. Because she received the notice before May 31, 2006, Employee cannot claim to have suffered any harm from the delay. Therefore, the motion for summary judgment on this ground is also denied.

Other Relief

Employee has asked that if "summary judgment is denied. . .the Office of Employee Appeals authorize an extension of discovery." Agency evaluated Employee in accordance with the guidelines of a Competitive Level Documentation Form (CLDF) in effecting the removal. Employee raised no challenge to that evaluation. The only other challenge that Employee has raised in pursuit of this appeal is that she was "notified that she would not be able to reapply for a position at DCPS because a notation was put in her file that she was not eligible for rehire."

As noted above, the grounds upon which an employee may challenge a RIF before this Office are strictly limited. Employee's complaint that Agency has barred her reemployment does not fall within the parameters of the applicable provisions. It is neither a challenge to her access to a round of lateral competition or her right to proper notice. As such, even assuming for the sake of discussion that it is true, this Office does not have the authority to provide relief. Therefore, this line of discovery will not be permitted.

ORDER

It is hereby ORDERED that Employee's motion for summary judgment is DENIED and Agency's action removing Employee from service pursuant to the RIF is UPHELD.

FOR THE OFFICE:

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE