THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PAMELA DISHMAN,	)	
Employee	)	OEA Matter No.: 2401-0028-11
	)	
v.	)	Date of Issuance: February 10, 2014
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	STEPHANIE N. HARRIS, Esq.
Agency	)	Administrative Judge
	)	

Mark Murphy, Esq., Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 13, 2010, Pamela Dishman ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") action of abolishing her position through a Reduction-in-Force ("RIF"). Employee's RIF notice was dated October 22, 2010, with an effective date of November 21, 2010. Employee's position of record at the time her position was abolished was a Program Manager at the DCPS Office of Special Education's ("OSE") Non-Public Unit ("NPU"). Employee was serving in Educational Service status at the time her position was abolished. On January 3, 2011, Agency filed an Answer to Employee's appeal.

I was assigned this matter on July 26, 2012. The undersigned held a Status Conference on October 11, 2012. Both parties were present; thereafter, the undersigned issued a Post Status Conference Order directing the parties to address specific issues regarding the RIF. After the undersigned granted Agency's request for an extension of time, Agency timely submitted its brief on January 11, 2012. Employee timely submitted its brief on January 17, 2013, as well as an additional appendix submission on March 12, 2013.

Upon further review of this matter, the undersigned issued an Order dated March 11, 2013 ("March 11th Order"), requiring Agency to submit a brief and additional documentation on

or before March 26, 2013. Employee was given an optional deadline to submit a response to Agency's submission on or by April 9, 2013. The undersigned is in receipt of Agency's brief; Employee did not submit an optional brief in response to the March 11th Order.

On August 30, 2013 ("August 30th Order"), the undersigned issued an Order requesting Agency to provide additional documentation because the Competitive Level Documentation Forms ("CLDF") provided by Agency were unsigned and undated, and could not serve as a fair and accurate basis for one round of lateral competition for the instant RIF. Agency was required, on or before September 20, 2013, to submit:

1. Signed and dated CLDF documentation for the instant RIF from the Program Manager competitive level;
2. A written statement explaining who conducted the CLDF for the Program Manager competitive level;
3. An affidavit from the author of the CLDF attesting to the truthfulness and accuracy of the signed and dated documentation; and
4. An explanation for why the originally submitted documentation does not contain dates or signatures from a Human Resources ("HR") Representative or The Non-Public Team Director (as substitution for the Principal position).

On October 8, 2013, the undersigned issued an Order of Good Cause for Agency's failure to submit a response to the August 30th Order by the prescribed deadline. On October 22, 2013, Agency submitted its Statement of Good Cause and Brief, which was accepted by the undersigned. On October 28, 2013, Employee submitted an optional Reply Brief. All required submissions have been received in this matter. After reviewing the record, I have determined that there are no material facts in dispute requiring further proceedings and therefore, an Evidentiary Hearing is not warranted. 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.

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 FACT, ANALYSIS, AND CONCLUSIONS OF LAW

On October 8, 2010, former D.C. School Chancellor Michelle Rhee ("Chancellor Rhee") authorized a RIF pursuant to D.C. Code § 1-624.02, Title 5 of the District of Columbia Municipal Regulations ("DCMR") Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was conducted to eliminate specific positions in NPU and was necessitated by budgetary reasons, curtailment of work and reorganization of functions.[1]

Although the instant RIF was authorized in part pursuant to D.C. Code § 1-624.02,[2] 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.

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,

[1] *See* Agency's Answer, RIF Authorization, Tab 2 (January 3, 2011).

[2] 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.

> 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 (emphasis added).
>
> (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."[3] 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."[4]

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, DCPS conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[5] The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act instead of "the regular RIF procedures found in D.C. Code § 1-624.02."[6] 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."[7]

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.[8] 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."[9] 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."[10]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[11] Moreover, the persuasive language of § 1-624.08, including the term 'notwithstanding', suggests that this is the more applicable statutory

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[3] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[4] *Id.* at p. 5.
[5] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[10] *Id.*
[11] *See Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

provision to conduct RIFs resulting from budgetary constraints. Therefore, I am primarily guided by § 1-624.08 for RIFs. 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 her separation from service; and/or
2. That she was not afforded one round of lateral competition within her competitive level.

Accordingly, the instant RIF will be analyzed under D.C. Code § 1-624.08, as well as the District Personnel Manual ("DPM") Chapter 24. In *Webster Rogers v. District of Columbia Public Schools,*[12] the District of Columbia Superior Court stated that D.C. Code §1-624.08 is the correct statute for RIFs conducted due to budgetary constraints and found that Chapter 24 of the DPM is the applicable criteria to be used, as opposed to Title 5 DCMR, Chapter 15.

Employee's Position

In her Petition for Appeal, Employee requests that she be reinstated to her former position and be given back pay for previous positions where she did not receive compensation. Employee challenges the procedure, process, and substance of the RIF. She claims that the RIF was procedurally and substantively flawed and it was conducted in a discriminatory and arbitrary manner. Employee further claims that the RIF was pre-textual, conducted for inappropriate statutory reasons, and was actually a disguised termination. She alleges that the work in her position was still being performed by other individuals in violation of the applicable Collective Bargaining Agreement ("CBA"). Employee claims that she was terminated as a Non-public Coordinator, when in fact she was working as a Non-public Manager since September 2009.[13]

In her brief, Employee also makes the following contentions:

1) Employee alleges that although her RIF Notice stated that she would be separated on November 21, 2010, she contends that the separation was actually effectuated on the date of the RIF Notice, October 22, 2010. She states that the RIF letter was sent overnight and informed her not to report to any assigned worksite or central administration office. Employee believes that due to these actions, Agency did not satisfy the thirty (30) day notice. She also indicates that the RIF Notice did not give any reasons or cause for the RIF.
2) She claims that Chancellor Rhee abused D.C. Code §1-624.08 and authorized the instant RIF to dismiss specific employees and avoid using adverse action procedures.
3) Employee alleges that Chancellor Rhee was not the head of Agency on the effective date of the RIF, November 21, 2010. Employee claims that Chancellor Rhee was not authorized to identify her position to be abolished because she announced her resignation on October 13, 2010, and there was no other indication of another resignation date.[14] She further alleges that because Chancellor Rhee was no longer employed by Agency, she improperly issued the RIF Notice dated October 22, 2010.

[12] No. 2012 CA 006364 (D.C. Super. Ct. December 9, 2013).
[13] *See* Petition for Appeal (November 29, 2010).
[14] Employee Brief, Tab 2 (March 12, 2013).

4) Employee questions the statement in the RIF Notice that there is a limited right to appeal a RIF to this Office, citing a portion of the *Washington Teacher's Union*[15] case, noting the following: "At the time of its creation, the Council described the OEA as an independent, personnel appeals authority which will hear all personnel related employee appeals", with Employee adding emphasis on the word 'all.'[16]

5) She also questions the use of, and reasons for contracting out the positions eliminated in the instant RIF, as described in the October 8, 2010, RIF Authorization submitted by Agency. Employee takes particular issue with Agency's assertion that it would now "be able to establish incentive structures that encourage contactors to address the needs of DCPS students without encouraging the contractors to act in such a manner as to preserve their jobs." She states that based on this intention, the RIF was not the appropriate action to be taken. Employee also suggests that if she was addressing the needs of students to preserve her job, "then the Chancellor was obligated to follow Title 5, Adverse Action Procedures of the CBA between the Council of School Officers and DCPS."[17]

6) She alleges that there was no true budgetary reduction because the NPU received a 7% increase according to the District of Columbia Annual Operating Budget/Capitol Plan for FY 2010.[18] Employee also claims that the costs associated with replacing Placement Specialists in NPU by hiring contractors exceeded the amount of money proposed to be saved by conducting the instant RIF. The undersigned notes that Employee was not employed as a Placement Specialist during the instant RIF.

7) Employee references an August 15, 2012 press release as evidence that Agency has not operated under a fiscal emergency in over ten years.[19] She claims that Agency has not offered any evidence 1) of budgetary constraints at the time of the RIF; 2) to support the reorganization of NPU; 3) to show that a curtailment of work was necessary; or 4) that the competitive level was eliminated.

8) Employee asserts that DCPS violated the provisions of the District of Columbia Privatization Act by using contractors from Fist Home Care to replace Placement Specialists. She explains that this law is applicable because it was prior to the Abolishment Act and was evaluated for compliance in the same year as the Abolishment Act.[20]

9) Employee argues against the use of contractors as Placement Specialists.[21]

10) She submits that work existed and there was no true curtailment of work. Referring to Chancellor Rhee's statement that NPU would function more properly by use of contractors, Employee argues that "if the unit is functioning, then the competitive area has not been eliminated." Employee argues that Agency still employs managers that were hired after the separation date to manage Placement Specialists

[15] 960 A.2d 1123.
[16] Employee Brief, p. 2; Tab 3 (March 12, 2013).
[17] *Id*., pp. 2-3.
[18] *Id*., Tab 7.
[19] *Id*., Tab 11.
[20] The undersigned notes that Employee was not employed as a Placement Specialist during the instant RIF.
[21] *Id*.

contractors.[22] Employee states that she did not get a chance to compete for any other positions that were retained in the NPU competitive area.[23] The undersigned notes that Employee was not employed as a Placement Specialist during the instant RIF.

11) Employee also argues that Agency's RIF was improper because the Placement Specialist position is not defined by DCPS, but instead is defined by the Individual with Disabilities Education Improvement Act of 2004.[24]

12) Employee claims that Agency failed to 1) retain a retention roster for employees impacted by the instant RIF and 2) establish a mechanism to inform a Recruiting Officer that a RIF'd employee had applied for a position. She further claims that Agency "is now acting on the inappropriate RIFs in 2012. Our unit continues to be excluded."[25]

13) She alleges that Agency has engaged in unfair hiring practices, age discrimination, unfair labor practices, and race discrimination. She alleges that Agency uses "fraternization to select and promote employees" and that employees who do not attend mixers and networking events at bars are not considered for promotion or retention on current positions. Employee further alleges that many credentialed employees are passed over in favor of non-credentialed employees who fraternize and many positions are filled without ever being advertised.[26]

14) Employee claims that Agency's efforts to undermine the Council of School Officers ("CSO") have been well documented and constitutes an unfair labor practice in violation of section 7116 of an uncited Federal Labor Relations Authority statute. Employee also claims that Agency favors the Washington Teachers Union ("WTU") over the CSO and has changed positions within the NPU so that they will fall under the WTU.[27]

15) In regards to race discrimination, Employee contends that Agency "targeted [NPU] for elimination because all (100%) of the people in the identified positions were black, and a majority [were] over the age of 40. She also claims that the majority of OSE personnel are under the age of 40 and consist of races other than black, further noting that these individuals were not included on August and September 2010 trainings."[28]

16) Employee claims that DCPS did not compensate her as a Non-public Manager after more than two years of service in this position or as a Director of Student Assignment.

17) Employee contends that members of the NPU who were retained as Program Managers were not Programs Managers at the time of the instant RIF, claiming that their permanent position at the time of the RIF was one of the positions identified to be eliminated by Chancellor Rhee. Employee further argues that because competitive

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[22] *Id*.
[23] *Id*., p. 4-5.
[24] *Id*.
[25] Employee Brief, p. 5 (March 12, 2013).
[26] *Id*., pp. 5-6.
[27] *Id*., p. 6.
[28] *Id*., p. 6.

levels are based on the permanent position of the employee, not the acting or interim status, all displaced employees "should have been given one round of competitive level consideration."[29]

18) She argues that Agency failed to communicate with Union Representatives as it related to positions within the Central Office, noting that positions have been advertised on websites other than the DCPS official website in an effort to hide positions.

19) Employee contends that DCPS did not rely on any factual basis for her Competitive Level Documentation Form (CLDF). She submits that the allegations raised in her CLDF were not accurate and was not supported by any documentary or testimonial evidence. Employee claims that DCPS should be required to present evidence in support of the allegations that led to the low scoring in her CLDF, thus resulting in her removal via the instant RIF.

20) In conclusion, Employee ***stipulates*** that Chancellor Rhee "followed the procedures outlined in D.C. Code § 1-624.2," but asserts that the applicable provision is "D.C. Code §1-624.8." She states that if the "RIF was the intention, Agency should be held to the Abolishment Act." Employee claims that Agency's use of "D.C. Code §1-624.2" constitutes an unfair labor practice (emphasis added).[30]

Agency's Position

Agency submits that it followed RIF procedures in accordance with 5 DCMR § 1500.2,[31] and that former Chancellor Rhee authorized the RIF to eliminate specific positions from the NPU in order to address reorganization and elimination of functions, curtailment of work, and budgetary issues. Agency notes that in order to better meet its obligations to students, to reduce administrative complaints, and to promote compliance with the *Blackman/Jones v. District of Columbia*[32] consent decree, it reorganized NPU by outsourcing functions that could be performed more efficiently and effectively by a contractor under the oversight of DCPS employees. Agency contends that prior to the RIF, NPU consisted of twenty-five (25) DCPS staff positions and six (6) Program Manager positions. After the reorganization, under a new contract arrangement, only four (4) Program Managers were needed to manage the contract and all non-management staff positions were eliminated to reduce costs associated with NPU while improving performance.

Agency asserts that NPU was determined to be a competitive area and the Program Manager position constituted a competitive level. Agency further states that there were six (6) Program Manager and two (2) of these positions were identified to be eliminated via the instant RIF. DCPS argues that pursuant to DCMR §1503.2, when two or more employees are in the

[29] *Id*., pp.5-7, Tab 13.
[30] *Id*., pp. 2, 7. Additionally, it appears that Employee is referencing D.C. Code §§1-624.02, 10624.08, as there are no provisions for §§1-624.2 and 1-624.8.
[31] 5 DCMR § 1500.2 states in relevant part that a RIF is a process whereby the total number of positions is reduced for one of the following reasons:
(a) budgetary reasons;
(b) curtailment of work;
(c) reorganization of functions; or
(d) other compelling reasons.
[32] Civil Action Nos. 97-1629 (PLF) and 97-2402 (PLF) (D.D.C.).

same competitive area and same competitive level, employees are entitled to one round of lateral competition. In this case, Agency contends that it provided Employee with one round of lateral competition by utilizing a CLDF, which included a RIF-related evaluation of Employee's work performance in order to provide Employee with one round of lateral competition. Agency proffers that Employee had the lowest CLDF ranking of the six (6) Program Managers in her competitive level, and therefore, she was one (1) of the two (2) employees released. Agency also asserts that it provided Employee with the required specific written notice thirty (30) days prior to the effective date of the instant RIF. Moreover, Agency denies that the RIF was pretextual and disguised as a termination and notes that OEA lacks jurisdiction to address the alleged collective bargaining issues raised by Employee.[33]

Additionally, in response to Employee's allegations that Chancellor Rhee resigned from her position prior to the date of the instant RIF, October 22, 2010, Agency submits Chancellor Rhee's SF-50, which shows the effective date of her resignation as November 2, 2010.[34] In response to the undersigned's August 30, 2013 Order, Agency submitted its Statement of Good Cause along with its brief and supporting documentation on October 22, 2013 ("October 22nd Brief"). In its brief, Agency submits copies of signed CLDFs from Joshua Wayne, who was the Program Director of OSE NPU during the time of the instant RIF. Agency also submitted an affidavit from Mr. Wayne, where he asserted that he was the original author of the unsigned CLDFs in the record. Mr. Wayne asserted that he did not previously sign the CLDFs because he believed that they were his own work product, and therefore, he thought his signature and date were unnecessary. He also stated that based on his knowledge and familiarity with the work of the employees in the program Manager competitive level, he rated them on a scale of one (1) to ten (10) in the categories of office needs, relevant significant contributions, and relevant supplemental professional experience. Mr. Wayne further stated that there was a need to eliminate two (2) Program Managers and since Employee had the lowest ranking of the six (6) employee in her competitive level, she was separated from service.[35]

OEA's Jurisdiction over RIF Appeal

Employee questions whether OEA in fact has a limited right over RIF appeals and refers to a portion of the *Washington Teacher's Union*[36] case which references that at the time of OEA's creation, the D.C. Council described this Office as an "independent, personnel appeals authority which will hear all personnel related employee appeals." Employee's reliance on this statement is misguided. The Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA") amendments provide that employees separated via a RIF are entitled to one round of lateral competition within their competitive level and thirty (30) days advanced written notice of the effective date of the RIF.[37] Further, OEA's jurisdiction regarding RIFs is well established and this Office has consistently held that RIF appeals are generally limited to whether Agency 1) properly provided Employee with one round of lateral competition within her competitive level

[33] *See* Agency Answer (January 3, 2011); Agency Brief, Tabs 1-3 (December 11, 2012).
[34] Agency Brief, Tab 1 (March 28, 2013).
[35] *See* Agency Brief (December 11, 2012).
[36] 960 A.2d 1123.
[37] *Scott-Gilchrist v. D.C. Department of Human Service*, OEA Matter No. 2401-0177-09 (May 28, 2010).

and 2) gave Employee thirty (30) days specific written notice prior to the effective date of the RIF.[38]

RIF Procedures

Chapter 24 of the DPM has been found to be the governing RIF provision pursuant to D.C. Code §1-624.08. DPM § 2409 states that each agency shall constitute a single competitive area and lesser competitive areas within an agency may be established by the personnel authority. According to DPM §2409.4, the lesser competitive area should be no smaller than a major subdivision of an agency or an organizational segment that is clearly identifiable and distinguished from others in the agency in terms of mission, operation, function, and staff. DCPS, acting as its own personnel authority pursuant to Title 5 DCMR § 1501.1, established competitive areas 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. Here, Agency states that the competitive area for the instant RIF was defined as the Non-Public Unit in the Office of Special Education, which I find is a major subdivision of Agency and meets the requirements of DPM §2409.

The competitive level for the instant RIF was defined by former Chancellor Rhee, who acted as the personnel authority. The competitive level included all staff member performing the function of Program Manager. DPM §2410 states that each personnel authority shall determine the positions comprising the competitive levels that employees compete for retention. Further, DPM §2410 states in relevant part that a competitive level shall consist of all positions in the same grade, which are sufficiently alike in qualification requirements, duties, and responsibilities. Agency has submitted personnel documents showing that Employee's position of record was Program Manager.[39] Therefore, I find Employee's arguments that she was terminated as a Non-Public Coordinator, unpersuasive. I find that Agency fulfilled the requirements of DPM §2410 in establishing the Program Manager competitive level.

Agency created a Retention Register for the instant RIF to rank and rate the six (6) employees in the Program Manager competitive level. The Retention Register for the instant RIF includes an evaluation of Employee's service computation date, years of service, D.C. residency preference, veterans preference, seniority score, and performance evaluation per the CLDF. Agency's Retention Register meets the requirements set forth in the DPM, with the exception of a category for tenure groups. However, based on the service computation dates and CLDFs, it appears that the employees in the Program Manager competitive level all meet the requirements of Tenure Group I, which is defined as all employees who are not serving a probationary period.[40] Therefore, I find that not evaluating the competitive level employees by tenure groups, is harmless error.[41]

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[38] *Id*. *See also Gaddy v. District of Columbia Public Schools*, OEA Matter No. 2401-0036-10 (February 7, 2012); *Cooper v. District of Columbia Public Schools, OEA Matter No. 2401-0238-09 (February 24, 2011); Nelson v, Department of Employment Services*, OEA Matter No. 2401-0041-05 (March 14, 2006); *Gill v. District of Columbia Public Schools*, OEA Matter No. 2401-0074-04 (February 23, 20005).
[39] Agency Brief, Tab 1 (December 11, 2012).
[40] *See* DPM §2413.5.
[41] *See* OEA Rule 631.3, 59 DCR 2129 (March 16, 2012). Harmless error, which is defined as "an error in the application of the agency's procedures, which did not cause substantial ham or prejudice employee's rights and did not significantly affect the agency's final decision to take the action."

For the CLDF, Agency gave the following weights to each of the 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%)[42]

Here, OSE NPU was identified as a competitive area, and Program Manager was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were six (6) Program Manager positions subject to the RIF. Of the six (6) positions, two (2) position were identified to be abolished. Because Employee was not the only Program Manager within her competitive level, she was required to compete with other employees in one round of lateral competition.

Competitive Level Documentation Form

Agency employs the use of a CLDF in cases where employees subject to a RIF must compete against each other in lateral competition. The rankings from the CLDF are then used in the Retention Register to determine the retention standing of the competing employees. Employee argues that Agency did not rely on any factual basis for her CLDF and submits that the allegations raised were inaccurate and not supported by any documentary or testimonial evidence.[43] She also asserts that Agency should be required to present evidence to support the allegations made in her CLDF.

However, apart from bare allegations that her CLDF is inaccurate, Employee has not provided any credible evidence that would bolster a score in her CLDF. Further, there is no indication that any supplemental evidence would supplant the higher scores received by the remaining employees in Employee's competitive level who were not separated from service. Moreover, this Office cannot substitute its judgment for that of Agency's Non-Public Team Director, who was given discretion to complete Employee's CLDF and had wide latitude to invoke managerial discretion. With respect to the aforementioned CLDF categories, I find that I will not substitute my judgment for that of the Non-Public Team Director as it relates to the scores accorded to Employee and her colleagues in the instant matter.

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[42] 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).
[43] Employee Brief, p. 5 (March 12, 2013).

Moreover, in reviewing the documents of record, Employee does not offer any statutes, case law, or other regulations to refute Agency's position regarding its 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*,[44] the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that performance evaluations are "subjective and individualized in nature."[45] According to the CLDF, Employee received a total of three hundred-seventy (370) points on her CLDF, and was, therefore, ranked the lowest in her respective competitive level. The next lowest scored Program Manager in Employee's competitive level who was retained in service, received a total score of seven hundred eighty (780) points.[46] 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.[47]

Additionally, the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.[48] This Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."[49] Accordingly, I find that the Program Director of OSE NPU had discretion in completing Employee's CLDF, as he was in the best position to observe and evaluate employees in the Program Manager competitive level when implementing the instant RIF. Therefore, the undersigned finds 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.

Notice Requirements

DPM, Chapter 24 provides the notice requirements that must be given to an employee affected by a RIF. Section 2422.1 states that "each competing employee selected for release from his or her competitive level…shall be entitled to written notice at least thirty (30) full days before the effective date of the employee's release." The specific notice shall specify the effective date of an employee's release from his or her competitive level. Additionally, 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, the record shows that Employee's RIF notice was dated October 22, 2010 and the effective date for the RIF was November 21, 2010.[50] The notice states that Employee's position was eliminated as part of a RIF and also provided Employee with information about her appeal rights. Moreover, Employee acknowledged that she received her RIF notice on October 22,

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[44] 109 F.3d 774 (D.C. Cir. 1997).
[45] *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).
[46] *Id*.
[47] 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).
[48] *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).
[49] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
[50] Agency Answer, Tab 1 (January 3, 2011).

2010, which equates to thirty (30) days written notice.[51] Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the instant RIF.

Employee also contends that she was not properly given thirty (30) days notice because the RIF was actually effectuated on the date of the RIF Notice, October 22, 2010 and she was told not to report to any assigned worksites or the central administration offices. She also states that the RIF Notice did not give any reasons or cause for the RIF. I disagree with Employee's contention. DPM §2423 does not require Agency to provide a reason or cause for the RIF.

Additionally, in its Answer, Agency provided a copy of the RIF Authorization, dated October 8, 2010, which detailed the specific reasons and legal basis for the instant RIF.[52] In response to Employee's allegations that her RIF was effectuated on the date of the RIF Notice because she was asked not to report to any worksites, I find that it is within Agency's discretion to place an employee on administrative leave during the thirty (30) day notice period for a RIF. [53] Based on the record, I find that Employee was properly placed on paid administrative leave from October 22, 2010 until November 21, 2010. Moreover, I find that Employee's RIF was properly effectuated on November 22, 2010, as stated in her RIF Notice.[54]

Agency Compliance with D.C. Code §1-624.08

Employee argues that D.C. Code §1-624.08 should have been used instead of D.C. Code §1-624.02 and that the use of the latter constitutes an unfair labor practice violation. Employee has also ***stipulated*** that Agency followed the procedures of D.C. Code § 1-624.02 (emphasis added). As noted in the analysis above, the undersigned finds that D.C. Code §1-624.08 is the more applicable provision for the instant RIF. Further, Agency's initial use of D.C. Code §1-624.02 does not constitute an error since the relevant provisions of D.C. Code §1-624.08 granting employee one round of lateral competition and thirty (30) days written notice prior to the effective date of the RIF are wholly encompassed within D.C. Code §1-624.02.[55] Therefore, Employee's stipulation that Agency followed the procedures of D.C. Code §1-624.02 essentially means that Agency also followed the provisions of D.C. Code §1-624.08.

Employee also alleges that Chancellor Rhee abused D.C. Code §1-624.08 and authorized the RIF as a disguised termination to dismiss specific employees without having to follow adverse action procedures. Based on a review of the record, the undersigned finds that there is no evidence suggesting that the instant RIF was in fact an adverse action, which resulted in Employee's termination. Employee has failed to provide any direct evidence to corroborate this allegation, especially in light of the fact that several positions in the corresponding competitive area and level were eliminated via the instant RIF. Further, Agency met its burden of proof by providing official documentation showing that Employee was given one round of lateral competition, and Employee acknowledged that she received thirty (30) days written notice prior

[51] Petition for Appeal, p. 3 (November 29, 2010).
[52] Agency Answer, Tab 2 (January 3, 2011).
[53] *See* District Personnel Manual ("DPM") § 2422.11, which states in part that an employee who receives written notice of release from his or her competitive level due to reduction in force may be placed on administrative leave at the discretion of the agency head.
[54] Agency Answer, Tab 1 (January 3, 2011).
[55] *See* D.C. Code §§1-624.02(a(2)); (d) (2001).

to the effective date of her separation, which are the two provisions that this Office is charged with addressing.[56]

As noted in the above headings, I find that Employee was properly separated via the instant RIF after she was given one round of lateral competition and thirty (30) days written notice prior to the effective date of the RIF. Further, Agency has submitted Chancellor Rhee's SF-50, which shows the effective date of her resignation as November 2, 2010.[57] Therefore, I find that Chancellor Rhee was still employed with Agency prior to the authorization of the instant RIF.

Although Employee's ancillary arguments do not appear to be directly related to whether Agency properly followed D.C. Code §1-624.08, and could be characterized as pre-RIF or collateral issues, they will be addressed in the following sections.[58]

RIF and Budget Rationale

Employee alleges that the RIF was procedurally and substantively flawed. She questions the reasons for, and Agency's use of contractors to handle the workload of the positions eliminated by the instant RIF. She argues that there was no true budgetary reduction or curtailment of work and that the costs associated with using contractors as Placement Specialists exceeded the amount of money saved by conducting the instant RIF. Employee also claims that Agency has not offered any evidence 1) of budgetary constraints at the time of the RIF; 2) to support the reorganization of NPU; 3) to show that a curtailment of work was necessary; or 4) that the competitive level was eliminated.

In *Anjuwan v. D.C. Department of Public Works*,[59] the D.C. Court of Appeals ruled that OEA's authority over RIF matters is narrowly prescribed. The Court ruled that OEA lacked authority to determine whether an Agency's RIF was ***bona fide*** and explained that OEA's authority is to determine whether the RIF complied with applicable District personnel statutes and regulations dealing with RIFs (emphasis added).[60] The Court further noted that OEA does not have the "authority to second guess … management decisions about which position should be abolished in implementing the RIF."[61] OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issues of whether an Agency's budgetary shortfall, curtailment of work, or RIF was bona fide, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services or chooses which position are subject to a RIF. In this case, how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.[62]

Further, while issues of Agency's bona fide budgetary constraints are outside of OEA's jurisdiction, Employee has provided various editorial documents purportedly showing that there

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[56] *See* Petition for Appeal, p. 3 (November 29, 2010); Agency Answer, Tab 2 (January 3, 2011); Agency Brief, Tab 1 (December 11, 2012).
[57] Agency Brief, Tab 1 (March 28, 2013).
[58] *See Mezile*, No. 2010 CA 004111.
[59] 729 A.2d 883 (December 11, 1998).
[60] The applicable RIF regulations are contained in D.C. Code §§1-624.08(d)-(f).
[61] *Anjuwan*, 729 A.2d at 885.
[62] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

was no true budgetary shortage. However, none of these documents fully corroborate that there were no budgetary constraints at Agency *during the time of the instant RIF* (emphasis added).[63] The editorial documents presented by Employee merely express an opinion on various issues surrounding Agency and as stand-alone documents, do not serve to substantiate Employee's allegations. Additionally, while Agency's use of contractors as Placement Specialists does show that there was work to perform as suggested by Employee, it also corroborates Agency's reasons given for curtailment of work and reorganization of NPU. The undersigned also notes that Employee has not alleged that contractors were used for her former position, Program Manager. Further, Agency has provided sufficient supporting documentation in the form of the October 8, 2010, RIF Authorization, which describes the reasons for the RIF.[64]

Post-RIF Activity

Employee alleges that the work in her former position is still being performed by other individuals in violation of the CBA. She also contends that Agency still employs managers that were hired after separation to manage Placement Specialists and there were Program Managers retained after the RIF who were not previously Program Managers.[65] Employee has provided several documents in support of this contention including 'LinkedIn' profiles[66] for current employees in management positions at NPU.[67]

As noted above, OEA's authority over RIF matters is narrowly prescribed and this Office has consistently held that it lacks jurisdiction to entertain any post-RIF activity, which may have occurred at an agency.[68] Further, Employee has failed to set forth adequate material evidentiary facts or provide direct evidence to corroborate this contention. The fact that there are current employees in management positions at NPU, who may have been employed during the instant RIF, alone, does not equate to reasoning that these employees should have been subject to the instant RIF or could not have been employed by Agency at a later date. Further, the record shows that four (4) Program Managers were retained in Employee's competitive level.[69]

Violation of CBA

Regarding Employee's contention that Agency's RIF constituted various unfair labor practices, the undersigned notes that D.C. Code §1-605.02, specifically reserves resolution of unfair labor practice allegations to the Public Employee Relations Board ("PERB"). According to the preceding statute, PERB is tasked with deciding whether unfair labor practices and CBA violations have been committed. While OEA may assess any applicable CBA violations to help determine whether Agency had cause to institute an adverse action, it cannot singularly assess whether Agency violated provisions of its CBA. [70] In this case, the alleged CBA violation raised

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[63] *See* Employee Brief (March 12, 2013): Tab 9 (undated Washington Post Editorial describing layoff of twenty-four special education staffers, but also noting DCPS projected overspending of $30 million); Tab 11 (August 15, 2012 Press Release by District of Columbia Mayor's Office describing an *unanticipated* surplus used to repay employees for furloughs).
[64] Agency Answer, p. 5; Tab 2 (January 3, 2011).
[65] Employee Brief, pp. 5, 7 (March 12, 2013).
[66] Undated; purportedly retrieved on October 19, 2012.
[67] Employee Brief, Tabs 13,14 (March 12, 2013).
[68] *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *see also Anjuwan v. D.C. Department of Public Works*, 729 A.2d 883.
[69] Agency Brief, Tab 3 (December 11, 2012).
[70] *Brown v. Watts*, 933 A.2d 529, 533-34 (D.C. 2010). The Court of Appeals held that OEA is not jurisdictionally bared from considering claims that an adverse action violated the express terms of an applicable CBA.

by Employee does not have any bearing on whether Agency provided Employee with one round of lateral competition or received thirty (30) days notice. Moreover, this Office has held that complaints relating to Employee's union activities are considered grievances and do not fall within the purview of OEA's scope of review.[71] Therefore, I find that Employee's allegations regarding Agency's alleged unfair labor practices are outside of OEA's jurisdiction.

Discrimination Claims

Employee alleges that the instant RIF was pre-textual and conducted in a discriminatory and arbitrary manner. Claims of race discrimination are generally outside of the this Office's purview of jurisdiction. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR").[72] Per this statute, the purpose of OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Moreover, the Court in *Anjuwan*[73] held that OEA's authority over RIF matters is narrowly prescribed and 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."[74] The undersigned notes that Employee has failed to submit or set forth any adequate material or evidentiary facts to support her allegations of discrimination.

The undersigned also notes that the Court in *El-Amin v. District of Columbia Dept. of Public Works*[75] stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that [she] was targeted for whistleblowing activities outside the scope of the equal opportunity laws, or that [her] complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation…"[76] Here, Employee's claims, as described in her submissions to this Office do not allege any whistleblowing activities as defined under the Whistleblower Protection Act. Thus, I find that Employee's claims of discrimination fall outside the scope of OEA's jurisdiction.

Collateral Issues

Employee asserts that Agency violated the provisions of the District of Columbia Privatization Act, explaining that this law is applicable because it was evaluated for compliance and enacted prior to the Abolishment Act. She also asserts that the instant RIF was improper because the Placement Specialist position is not defined by Agency, but instead is defined by the Individuals with Disabilities Education Improvement Act of 2004.

OEA has no jurisdiction to hear claims regarding the enforcement of the Privatization Act or Individuals with Disabilities Education Improvement Act of 2004, which are collateral issues in terms of this RIF appeal. The undersigned reiterates the District of Columbia Court of Appeals' finding in *Anjuwan*, which states that OEA lacks the authority to determine broadly

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[71] *See also Anjuwan v. D.C. Department of Public Works* 729 A.2d 883 (December 11, 1998).
[72] *See also Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111, p.6 (D.C. Super. Ct. February 2, 2012)(Superior Court stated that OEA was the wrong venue for discrimination claims).
[73] 729 A.2d 883.
[74] *See Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).
[75] 730 A.2d 164 (May 27, 1999).
[76] *El-Amin*; *citing Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

whether the RIF violated any law except whether "the Agency has incorrectly applied…the rules and regulations issued pursuant thereto."[77]

Further, employee has failed to provide any statutory or case law requirement, or any credible analysis showing how enforcement of the Privatization Act or the Individuals with Disabilities Education Improvement Act of 2004 falls within the purview of this Office's jurisdiction. This Office has held that an "employee raising collateral issues when challenging a RIF does not confer additional authority upon [this] Office to enforce all laws and regulations, as such would clearly exceed both the limited statutory authority and jurisdiction of this Office."[78] Furthermore, OEA has long held that the jurisdiction for RIF appeals is limited to the authority granted by the plain language of the OPRAA statute, and particularly the specific provisions of D.C. Code §§1-624.08(d)-(e).[79]

Grievances

Additionally, it is an established matter of public law that as of October 21, 1998, pursuant to OPRAA, D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Complaints regarding compensation errors, maintenance of a retention roster for RIF employees, advertisement of positions, training, and Agency hiring practices are generally considered grievances and do not fall within the purview of OEA's scope of review. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

CONCLUSION

Based on the foregoing, I find that Employee was properly separated via the instant RIF after she was given one round of lateral competition and thirty (30) days written notice prior to the effective date of the RIF. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08.

ORDER

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

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge

[77] *See also Gilmore*, 695 A.2d 1164.
[78] *Scott-Gilchrist v. D.C. Department of Human Services*, OEA Matter No. 2401-0177-09 (May 28, 2010).
[79] *Id.*