

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 2401-0164-10
MELISSA GILL,	)	
Employee	)	
	)	Date of Issuance: June 5, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	STEPHANIE N. HARRIS, Esq.
_____	)	Administrative Judge
Taylor N. Lewis, Employee Representative		
W. Iris Barber, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On November 24, 2009, Melissa Gill (“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 terminating her employment through a Reduction-in-Force (“RIF”). The effective date of the RIF was November 2, 2009. Employee’s position of record at the time her position was abolished was an Elementary School Teacher at Barnard Elementary School (“Barnard”). Employee was serving in Educational Service status at the time she was terminated. Agency submitted its Answer on December 29, 2009.

I was assigned this matter on February 7, 2012. On February 17, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations (“February 17<sup>th</sup> Order”). Both parties have timely submitted their briefs. After reviewing the record, I have determined that there are no material facts in dispute and therefore, a 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 FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. School Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") 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.<sup>1</sup>

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02,<sup>2</sup> 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:

---

<sup>1</sup> See Agency's Answer, Tab 1 (December 29, 2009).

<sup>2</sup> 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.

(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, 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*,<sup>3</sup> 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.” 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.”<sup>4</sup>

However, the Court of Appeals took a different position. In *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*,<sup>5</sup> DCPS conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.” 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.”<sup>6</sup> 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.”<sup>7</sup>

---

<sup>3</sup> No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

<sup>4</sup> *Id.* at p. 5.

<sup>5</sup> 960 A.2d 1123, 1125 (D.C. 2008).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

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.<sup>8</sup> 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.”<sup>9</sup> 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.”<sup>10</sup>

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.<sup>11</sup> 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 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.

### ***Employee’s Position***

In her Petition for Appeal, Employee states that Agency failed to follow appropriate procedures as required by D.C. Code § 1-624.08. Employee claims that Agency sent her to Barnard to be RIFd, resulting in her being placed in an environment where she was ostracized. She claims that the principal of Barnard was unaware of her credentials, training, or professional development experience, noting that the “[c]ompetitive leveled [sic] documentation represents that she was not aware of my abilities, and had a limited amount of time to make her inappropriate and unwarranted comments.”<sup>12</sup>

In her amended Petition for Appeal, Employee states that she is appealing the adverse action in the form of removal, noting that the RIF was a pretext for insufficient cause. Employee asserts that the RIF was based on false, inaccurate, and unreliable information. Employee also requests an evidentiary hearing in this matter.<sup>13</sup>

### ***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

---

<sup>8</sup> *Id.*

<sup>9</sup> *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

<sup>10</sup> *Id.*

<sup>11</sup> *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

<sup>12</sup> See Petition for Appeal (November 24, 2009).

<sup>13</sup> See Amended Petition for Appeal (December 2, 2009).

competition and thirty (30) days written notice prior to the effective date of her termination.<sup>14</sup> Agency further maintains that it utilized the proper competitive factors in implementing the RIF and Employee, who was one of the lowest ranked Elementary Teachers, was terminated as a result of the round of lateral competition.<sup>15</sup>

### ***Motions***

On March 27, 2012, Employee filed a Motion for Judgment as a Matter of Law on the grounds that Agency did not submit a brief that addresses whether Employee received proper notice and one round of lateral competition. Specifically, Employee states that she is entitled to judgment as a matter of law because (1) the record in the instant matter contains no legal argument explaining how Employee received a round of lateral competition and (2) the parties were given an opportunity to present additional evidence and legal arguments in briefs and Agency failed to submit any legal arguments pertaining to Employee. Additionally, Employee explains that Agency submitted a brief that solely addresses how another employee received proper notice and one round of lateral competition.

On March 29, 2012, Agency submitted a Motion to File a Corrected Brief, explaining that the previously submitted brief contained one major typographical error throughout by referencing a different teacher who was also subject to the instant RIF. The previously submitted brief also contained an erroneous reference to the number of ET-15 elementary school teachers against whom Employee competed with during the one round of lateral competition. Agency maintains that all of the other factual allegations and legal arguments presented in the prior brief were accurate with respect to Employee, including the exhibits filed, which included the correct Retention Register and CLDF for Employee.<sup>16</sup> Further, Agency asserts that the substitution of the corrected brief will not prejudice Employee since the prior brief's factual and legal arguments with respect to Employee are unchanged.

The undersigned agrees with the Agency's position that while the previously submitted brief contained typographical errors, the factual and legal arguments with respect to Employee are unchanged. I find that Agency's typographical error does not rise to the level of harmful error which is defined as an error with "such magnitude that in its absence, the employee would not have been released from his or her competitive level."<sup>17</sup> Thus, Agency's Motion to File a Corrected Brief has been granted and Employee's Motion for Judgment as a Matter of Law is denied.

### ***RIF Procedures***

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS is authorized to establish the 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

---

<sup>14</sup> Agency's Corrected Brief, Exhibit A at pp. 2-7 (March 29, 2012).

<sup>15</sup> *Id.* at pp. 2-5. School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

<sup>16</sup> See Agency Brief, Exhibits A, B (March 6, 2012).

<sup>17</sup> 6 DCMR § 2405.7, 47 D.C. Reg. 2430 (2000).

separate competitive area.<sup>18</sup> 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.<sup>19</sup>

Here, Barnard was identified as a competitive area, and Elementary Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were thirteen (13) elementary teacher positions subject to the RIF.<sup>20</sup> Of the thirteen positions, two (2) positions were identified to be abolished. Because Employee was not the only Elementary Teacher within her competitive level, she was required to compete with other employees in one round of lateral competition.

According to Title 5, DCMR § 1503.2 *et al.*:

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%)

---

<sup>18</sup> Agency Answer, Tab 1, RIF Authorization (December 29, 2009).

<sup>19</sup> *Id.*

<sup>20</sup> Agency Brief, Exhibit A, Retention Register (March 6, 2012).

- (b) Significant relevant contributions, accomplishments, or performance – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
- (d) Length of service – (5%)<sup>21</sup>

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.<sup>22</sup> Agency cites *to American Federation of Government Employees, AFL-CIO v. OPM*,<sup>23</sup> 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.”<sup>24</sup> 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.

### ***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 Barnard was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the “length of service” category was completed by the Department of Human Resources (“DHR”).

Employee received a total of eleven (11) points on her CLDF and was the lowest ranked employee in her respective competitive level. Employee’s CLDF stated in pertinent part, the following:

“Ms. Gill has not demonstrated support for the vision and mission of Barnard Elementary School. During her tenure at Barnard, Ms. Gill has been frequently absent. She has not adhered [to] the procedures put in place for taking leave of absence. On more than one occasion, leave slips were backdated in order to give the impression that they were submitted during the required timeline. Leave has been taken on several occasions without authorization.

Ms. Gill’s planning for instruction has been minimal. She has been unable to produce her plans when requested, and when produced, they do not reflect a date for instruction. Plans do

---

<sup>21</sup> 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).

<sup>22</sup> Agency Brief at pp. 5-6 (March 6, 2012).

<sup>23</sup> 821 F.2d 761 (D.C. Cir. 1987).

<sup>24</sup> *Id.*

not reflect the diversity of student abilities represented in her class, and instruction is delivered in a 'one size fits all' manner. There is no differentiating of instruction, which is contrary to the instructional model of the school. She has not utilized instructional time for student achievement, but on occasions has carried out her own agenda. She has not developed any long or short term plans for implementation of the standards based curriculum required by DCPS. Classroom time is ineffectively used with students continually doing worksheets, as opposed to direct instruction.

Ms. Gill's delivery of instruction is lacking in academic rigor. Her low-level questioning leads to regurgitation of information without any demonstration of student understanding. Expectations for students, based on the type of instruction delivered is low level. Ms. Gill has not strived to foster the collegial, collaborative spirit that is continuously nurtured at Barnard.<sup>25</sup>

### Office or school needs

Employee received a total of one (1) point out of a possible ten (10) points in this category, resulting in a weighted score of seven and a half (7.5) points; a score much lower than the other employees within her competitive level who were retained in service.<sup>26</sup> This category is weighted at 75% on the CLDF and accounts for any factor that may have an impact on the success of the school or the achievement of the students at school. Some of the factors used in consideration for this category include: student learning skills, training, experience, school culture contributions, teaching and learning framework, leadership roles, licensure or certifications, and advanced degrees that pertain specifically to the needs of the school. Specifically, in the Office or School Needs category, principals were instructed to assign scores "reflect[ing] [the] best judgment of the extent to which the person meets the particular needs of [the] school."<sup>27</sup>

Employee alleges that her CLDF was not properly completed because it failed to give credit for required factors and submits that she has a Master's degree in Curriculum and Instruction from National Louis University that was not considered. However, Employee has failed to provide any evidence to highlight how her degree translates into how she meets the needs of the school. As noted above, while advanced degrees are one of the factors considered in this category, there is no specific point designation for any of the multitude of factors that could be considered. Further, Agency did not develop an exhaustive list of factors to be considered, but rather listed examples that could be considered by principals.<sup>28</sup> Moreover, because Employee did in fact receive points in this category, it can reasonably be assumed that her advanced degree was taken into consideration for awarding points.

---

<sup>25</sup> Agency Answer, Tab 3 (December 29, 2009).

<sup>26</sup> Agency Brief, Exhibit A, Retention Register (March 6, 2012).

<sup>27</sup> Agency Answer, Tab 2, Attachment B (December 29, 2009).

<sup>28</sup> *Id.*



**Relevant significant contributions, accomplishments, or performance**

Employee received zero (0) points in this category, which is weighted at 10% on the CLDF. 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 has not provided any supplemental evidence suggesting that she should have earned a higher score in this category.

**Relevant supplemental professional experiences as demonstrated on the job**

Employee also received zero (0) points in this category, which is weighted at 10% on the CLDF, and awards points to employees for any additional training or professional experiences outside standard training required by Agency or required to maintain licensure; and application of said training or experience at the school in a way that positively impacted student or school performance. Employee has not provided any documentation to supplement additional points being awarded in this area.

Employee contends that her CLDF was not properly completed because it was based on false, inaccurate, and unreliable information. However, Employee has not submitted any credible evidence to support this contention. Employee further claims that although she was classified as an Elementary Teacher, she did not have the same duties as other teachers, noting that Agency improperly completed her CLDF when the principal's narrative discussed duties that were not assigned to Employee. Employee has failed to submit any credible evidence or supporting documentation to corroborate that she did not have the same duties as other elementary teachers in her competitive level. Further, this Office cannot substitute its judgment for that of the principal at Barnard, who was given discretion to complete Employee's CLDF and had wide latitude to invoke her managerial discretion.<sup>29</sup> Employee has not provided any credible evidence that would bolster a score in any of the aforementioned categories completed by the principal of Barnard. 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. Thus, with respect to the aforementioned CLDF categories, I find that I will not substitute my judgment for that of the principal of Barnard as it relates to the scores she accorded Employee and her colleagues in the instant matter.

**Length of service**

The Length of Service category, which was completed by DHR, includes credit for years of service, District residency, veterans' preference, and prior outstanding or exceeds expectation performance rating 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. Employee received a total of three and a half (3.5) points in this category and has not contested that additional points should have been awarded. Additionally, Agency has provided an affidavit from Peter Weber, who served as the Interim Director of Human Resources during the time of the instant RIF.<sup>30</sup> Mr. Weber states that he was responsible for computing employees' length of service for the instant RIF and used the DHR official Peoplesoft system to obtain data for the calculations, which appear in Employee's CLDF. Further, a review of Employee's personnel file, which was submitted

---

<sup>29</sup> See *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).

<sup>30</sup> Agency Brief, Exhibit B (March 6, 2012).

by Agency, does not reveal any evidence that would necessitate a recalculation of the points awarded in this category.<sup>31</sup> Therefore, based on the evidence of record, I find that Agency properly calculated this number.

Moreover, 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*,<sup>32</sup> 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."<sup>33</sup> According to the CLDF, Employee received a total score of eleven (11) points after all of the factors outlined above were tallied and scored. The lowest scoring elementary teacher in Employee's competitive level who was retained in service received a total score of thirty-three and a half (33.5) points.<sup>34</sup> 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.<sup>35</sup>

Employee claims that her CLDF was not properly completed because it focused on "subpar lesson planning of a teacher who was never assigned or allowed to plan lessons."<sup>36</sup> Employee acknowledges that the principal conducted an observation where she was asked to submit lesson plans, but she maintains that she was not the lead teacher of the class and thus was not responsible for the content of any lesson plans. However, the primary responsibility for managing Agency's work force is a matter entrusted to the Agency, not to OEA.<sup>37</sup> 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."<sup>38</sup> Accordingly, I find that the principal of Barnard had discretion in completing Employee's CLDF, as she was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. Therefore, I 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.

### ***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

---

<sup>31</sup> *Id.*, Employee Personnel File.

<sup>32</sup> 109 F.3d 774 (D.C. Cir. 1997).

<sup>33</sup> 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).

<sup>34</sup> Agency Brief, Exhibit A, Retention Register (March 6, 2012).

<sup>35</sup> 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).

<sup>36</sup> Employee Brief at p. 5 (March 27, 2012).

<sup>37</sup> 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).

<sup>38</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

necessary information regarding the employee's status and appeal rights." 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 received her RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009.<sup>39</sup> The RIF notice states that Employee's position was eliminated as part of a RIF. The RIF notice also provided Employee with information about her appeal rights. Further, Employee has not alleged that she did not receive thirty (30) days notice prior to the effective date of the RIF. Accordingly, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

### ***Evidentiary Hearing***

According to Employee, an evidentiary hearing is needed to validate the truthfulness of the principal's statements contained within her CLDF. OEA Rule 619.2<sup>40</sup> states in part that an Administrative Judge ("AJ") can "require an evidentiary hearing, if appropriate." Additionally, OEA Rule 624.2 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.<sup>41</sup> 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.

Further, it appears that 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."<sup>42</sup> While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record to corroborate that the RIF was conducted unfairly.

### ***RIF Rationale***

Employee alleges that the RIF was a pretext for insufficient cause and that she was sent to Barnard to be RIFd, based on the former Chancellor Rhee's desire to terminate the staff from Employee's previous school. However, Employee has provided no credible evidence to support this contention, which renders it a generalized unsupported allegation. In response to Employee's assertion that the RIF was conducted for reasons other than budgetary constraints, The D.C. Court of Appeals in *Anjuwan v. D.C. Department of Public Works*,<sup>43</sup> ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court of Appeals explained that as long as a RIF is "justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF..."<sup>44</sup> The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds...[or] management decisions about which position should be abolished in implementing the RIF."<sup>45</sup>

---

<sup>39</sup> Agency Answer, Tab 4 (December 29, 2009).

<sup>40</sup> 59 DCR 2129 (March 16, 2012); *See also* OEA Rule 619.2, 59 DCR 2129 (March 16, 2012).

<sup>41</sup> *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).

<sup>42</sup> *Washington Teachers' Union* at 780.

<sup>43</sup> 729 A.2d 883 (December 11, 1998).

<sup>44</sup> *Id.* at 885.

<sup>45</sup> *Id.*

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds on personnel services or how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.<sup>46</sup>

### *Grievances*

Employee also argues that she did not have the same duties as a lead teacher, was never assigned her own classroom, and was not assigned or allowed to perform any lesson planning. A complaint of this nature, regarding Employee's work duties, is considered a grievance and does not fall within the purview of OEA's scope of review. Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. 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 hear Employee's other claims.

### CONCLUSION

Based on the foregoing, I find that Employee's position was abolished after she properly received one round of lateral competition and was given 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

<sup>46</sup> *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).