

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:	)	
	)	
EMPLOYEE <sup>1</sup>	)	
	)	
v.	)	OEA Matter No.: 2401-0041-21
	)	
	)	Date of Issuance: July 13, 2023
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Employee worked as a Custodian Supervisor with D.C. Public Schools (“Agency”). On June 4, 2021, Agency notified Employee that his position at Johnson Middle School was being abolished because of a Reduction-in-Force (“RIF”). The effective date of the RIF was July 11, 2021.<sup>2</sup> Employee subsequently filed a Petition for Appeal with the Office of Employee Appeals on August 11, 2021. He argued that the RIF was inconsistent with the law because his name was not on the priority reemployment list. Therefore, Employee requested that Agency rehire him and place him in an equivalent position at any D.C. Public School.<sup>3</sup>

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<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

<sup>2</sup> On June 22, 2021, Agency changed the effective date of the RIF notice from June 25, 2021, to July 11, 2021, in order to ensure that Employee was provided the proper written notice.

<sup>3</sup> *Petition for Appeal* (August 11, 2021).

In its Answer and Motion to Dismiss, Agency contended that the RIF was conducted in accordance with all applicable laws. Additionally, it clarified that Employee's appeal was moot because he was rehired as a Custodian at Takoma Elementary School in lieu of separation. As a result, it requested that Employee's appeal be dismissed.<sup>4</sup>

An OEA Administrative Judge ("AJ") was assigned to the matter in November of 2021. The AJ held a prehearing conference on March 4, 2021 to assess the parties' arguments. After concluding that an evidentiary hearing was not warranted, the parties were ordered to submit briefs addressing whether Agency conducted the RIF in accordance with all applicable laws, rules, and regulations.<sup>5</sup>

In its brief, Agency explained that the Chancellor of D.C. Public Schools had the authority to conduct the RIF and establish competitive areas – in this case Johnson Middle School – in accordance with D.C. Code § 1-624.02, § 1-624.03, and Section 5-E, Chapter 15 of the D.C. Municipal Regulations ("DCMR"). It provided that Employee was placed in a competitive group of two RW-5 Custodians at Johnson Middle School. As part of the RIF, the Custodians were rated in four areas: (1) relevant significant contributions, accomplishments, or performance as determined by their IMPACT performance/evaluation score; (2) office or school needs/other contributions or experience; (3) relevant supplemental professional experience; and (4) length of service. Agency went on to provide that after the school principal completed the RIF rubrics, Employee received an overall score of thirty-one, whereas the other Custodian, T.M., received a score of seventy.<sup>6</sup> It noted that in accordance with D.C. Code § 1-624.02(a)(2), Employee was

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<sup>4</sup> *Answer to Petition for Appeal* (January 20, 2022).

<sup>5</sup> *Post-Prehearing Conference Order* (March 8, 2022).

<sup>6</sup> *Agency Brief* (March 25, 2022).

provided with one round of lateral competition and that his position was eliminated after receiving the lower score within his competitive level.

Agency also contended that it complied with § 1-624.02(a)(3) of the Code because the RIF notice provided that Employee would be given priority for selection into any 2021-2022 D.C. Public Schools vacancies. Regarding job sharing, Agency submitted that it considered alternatives, including reduction of hours but ultimately concluded that those options were not viable because of the school's operation practices. Lastly, Agency stated that Employee was provided with written notice of the RIF as required by D.C. Code § 1-624.02(a)(5). Consequently, it opined that the RIF was conducted in accordance with the governing laws and statutes.<sup>7</sup>

In his brief, Employee contended that the RIF was inconsistent with the law. He argued that Agency failed to prioritize his reemployment after working as a Custodian for more than five years. Employee also believed Agency conducted the RIF unfairly because his position at Johnson Middle School was subsequently filled after he was separated from service. According to Employee, Agency should have offered him an RW-5 Custodian Foreman position at Whittier Education Campus or another school instead of rehiring him at the RW-3 level. Therefore, he requested to be rehired to the appropriate job position and that Agency reimburse him for the difference in back pay and benefits lost as a result of the RIF.<sup>8</sup>

The AJ issued an Initial Decision on February 16, 2023. First, he provided that the instant RIF was conducted pursuant to D.C. Code §§ 1-624.02 and 1-624.03; 5-E DCMR, Chapter 15; and the authority delegated to the Chancellor by Mayor's Order 2007-186 (Aug. 10, 2007). He explained that under the RIF, each school was identified as a separate competitive area and each position title was considered a competitive level. The AJ noted that pursuant to D.C. Code § 1-

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

<sup>8</sup> *Employee Brief* (March 30, 2022).

624.02, a RIF required a prescribed order of separation; one round of lateral competition limited to positions within the employee's competitive level; priority reemployment consideration for employees separated; consideration of job sharing and reduced hours; and appeal rights.<sup>9</sup>

As it related to the lateral competition requirement, the AJ held that Agency complied with D.C. Code § 1-624.02(a)(2) after considering the four identified areas of evaluation, including relevant significant contributions, school needs, relevant supplemental professional experience, and length of service. He opined that Employee failed to provide any credible argument to prove that the competitive level and area in this matter were improperly constructed or scored. Since there were two RW-5 Custodians at Johnson Middle School, and Employee received the lower ranking of the two, the AJ held that Employee was properly provided with one round of lateral competition.<sup>10</sup>

Regarding priority reemployment, the AJ held that Agency acted in accordance with D.C. Code § 1-624.02(a)(3) since Employee was rehired at a different school as an RW-3 Custodian. Because the rehire was part of Employee's job search as a result of the RIF, he concluded that Agency more than satisfied the priority reemployment rights afforded under the Code. Concerning the job sharing and reduced work hours requirement, the AJ considered the affidavit of former school principal, Dwan Jordan, who explained that neither job sharing nor reduced work hours would correct the budgetary and programmatic concerns that necessitated the RIF. The AJ also relied on the holding in *Johnson v. D.C. Dept. of Health*<sup>11</sup> in which the D.C. Court of Appeals held that when conducting a RIF, an agency may arguably be assumed to have found lesser measures such a job sharing and reduced hours as inadequate to address the need and that OEA's authority

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<sup>9</sup> *Initial Decision* (February 16, 2023).

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

<sup>11</sup> 162 A.3d, 808 (D.C. 2017).

to look behind that agency judgment would be open to significant question. In light of the Court's ruling, the AJ reasoned that it may be assumed, based on Agency's explanation, that job sharing, and reduced hours would not have adequately addressed Agency's needs.<sup>12</sup>

Additionally, the AJ found that Agency provided Employee with proper notice of his appeal rights. He explained that under D.C. Code § 1-624.02(a)(5), Employee was entitled to written notice of at least thirty days prior to the RIF effective date. In this case, the AJ assessed that Agency's initial notice provided less than thirty days' written notice of the impending RIF; however, a supplemental letter was provided to Employee on June 22, 2021, which updated the effective RIF date to July 11, 2021. As a result, the AJ concluded that Agency's failure to initially provide Employee with thirty days' notice was harmless because both notices informed Employee of his right to appeal to the OEA and included the Office's rules and appeal form. Therefore, the AJ held that the RIF was conducted in accordance with all applicable laws, rules, and regulations.<sup>13</sup>

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on March 20, 2023. He reiterates his previous argument that Agency failed to properly prioritize his reemployment after conducting the RIF based on his tenure and experience as a RW-5 Custodian Supervisor. Employee asserts that he was mistreated and demoted to a RW-3 Custodian position in 2021. He states that Agency issued him a temporary Custodian Foreman badge on July 12, 2021, but he was never officially offered that position even with the requisite experience. In support of his petition, Employee highlights what he believes to be a similar OEA matter in which Agency entered into a settlement agreement to rehire the employee after she was

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<sup>12</sup> *Initial Decision* at 4.

<sup>13</sup> *Id.*

separated from service pursuant to a RIF. Consequently, he requests that Agency rehire him as a Custodian Foreman and reimburse him for any back pay that he could have made as a foreman.<sup>14</sup>

In response, Agency submits that the Initial Decision was based on substantial evidence. It avers that Employee's argument related to his years of service as a Custodian is misplaced. Agency maintains that it did take into consideration Employee's years of service as required by D.C. Code § 1-624.02(a). According to Agency, points were assigned for service years as follows: 10 points for more than 20 years; 5 points for 10-19 years and 1 point for 0-9 years. Based on the former, Employee received one point in this category. Thus, it reasons that the AJ did not err concluding that Employee's length of service was correctly considered. Therefore, Agency requests that Employee's Petition for Review be denied.<sup>15</sup>

In accordance with OEA Rule 637.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal

Additionally, the D.C. Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to

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<sup>14</sup> *Petition for Review* (March 20, 2023).

<sup>15</sup> *Answer to Petition for Review* (April 7, 2023).

support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.<sup>16</sup> After reviewing the record, this Board believes that the AJ's assessment of this matter was based on substantial evidence.

### Discussion

None of the arguments raised in Employee's submission to this Board serve as a basis for granting his Petition for Review in accordance with OEA Rule 637. Additionally, the issues raised by Employee regarding Agency's decision to rehire him as a RW-3 Custodian constitute grievances which fall outside of OEA's purview. Notwithstanding, we believe that the AJ's conclusions of law are supported by the record. In *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883 (D.C. 1998), the D.C. Court of Appeals held that OEA's authority regarding RIF matters is narrowly prescribed, and it may not determine whether the RIF was bona fide or violated any law, other than the RIF regulations. A RIF initiated pursuant to D.C. Code § 1-624.02, shall include the following:

- (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. D.C. Official Code g 1-624.02 (a)

### Lateral Competition

D.C. Code § 1-624.02(a)(2) provides for one round of lateral competition within an employee's competitive level. Here, Employee was placed in the Custodian Supervisor RW-5 competitive level within the competitive area of Johnson Middle School. Employee's competitive

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<sup>16</sup> Black's Law Dictionary, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

level consisted of two Custodians, which entitled him to one round of lateral competition. As previously stated, Agency identified four areas of consideration in its scoring rubric. Area 1 of the rubric was weighted at fifty percent and considered the employee's relevant significant contributions, accomplishments, or performance, as determined by their IMPACT performance/evaluation score. Employee was rated lower in this area because he received a "Developing" IMPACT rating, and the other employee, T.M., received an "Effective" rating. Employee received a score of zero for Area 2, which was weighted at twenty percent, because there was no evidence that he received additional licenses, skill sets, or degrees. Area 3 of the rubric was also weighted at twenty percent. Employee received zero points in this section because the school principal indicated that he had not improved any business process, as it related to Johnson Middle School. Lastly, Employee received a score of 1 point in Area 4, which was weighted at ten percent, since his length of service with Agency was less than ten years.<sup>17</sup>

After completing the rubric for the RW-5 Custodian competitive level, Agency concluded that Employee's final score was thirty-one, and T.M.'s final score was seventy-one. Since Employee received the lower score within his competitive level, his position was identified for abolishment under the RIF. Accordingly, we find that Employee received one round of lateral competition within his competitive level. We further conclude that the AJ's conclusions of law related to lateral competition are supported by the record.

#### Priority Reemployment

Under D.C. Code § 1-624.02(a)(3), employees separated pursuant to a RIF are afforded consideration for priority reemployment. Agency's RIF notice to Employee stated in part that "...you may apply for any job vacancies at DCPS or within the District government that arise in

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<sup>17</sup> *Agency Brief* at p. 2.



the future. Note, however, that while you will receive some priority consideration, you are not guaranteed reemployment.”<sup>18</sup> The notice also stated the following:

As a member of the Teamsters union, you will be given priority for selection into any 2021-22 vacancies available at schools throughout DCPS. Principals will be given a complete list of reduced staff from the Teamsters union for priority selection on June 4 and will make selections exclusively from this list during the week of June 7-11. This will provide you with an opportunity for selection before any external or non-reduced internal candidates.<sup>19</sup>

After being notified of the impending RIF, Employee was rehired to a Custodian position at Takoma Elementary School. While Employee understandably takes issue with being rehired at a lower level than his previous Custodian Supervisor position, this Board nonetheless finds that Agency complied with D.C. Code § 1-624.02(a)(3) since the record reflects that it provided Employee with priority reemployment consideration. Therefore, the AJ’s finding is supported by substantial evidence.

#### Job Sharing and Reduced Hours

Under D.C. Code § 1-624.02(a)(4), when a RIF is conducted, an agency may consider job sharing and reduced hours for employees separated pursuant to the RIF. Here, an affidavit submitted by former Johnson Middle School principal, Dwan Jordan, reflects that the school considered job sharing and reduced work hours prior to conducting the RIF.<sup>20</sup> Jordan noted that job sharing and/or reduced work hours would not correct the budgetary and programmatic concerns that necessitated the RIF. In its May 28, 2021 RIF Memorandum, Agency stated that the reason for the instant RIF was predicated upon reorganization of functions and budgetary reasons.<sup>21</sup> Consistent with the Court’s holding in *Anjuwan supra*, OEA has indicated that it does

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<sup>18</sup> *Petition for Appeal*, Attachment 1.

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

<sup>20</sup> *Agency Brief*, Affidavit of Dwan Jordan (March 25, 2023).

<sup>21</sup> *Agency Brief* at Exhibit 3.

not have the authority to determine whether an agency's RIF was bona fide, as Agency, and not OEA, is responsible for deciding whether to retain or abolish particular positions during a RIF. The Court further reasoned that "when [a]gency has been shown to have invoked a Reduction-in-Force...for reasons stated in [the] regulation[s]...this Office has no authority to review management considerations that underlay Agency's exercise of its discretion."<sup>22</sup> Based on the foregoing, the record supports a finding that job sharing or reduced hours were adequately considered in conducting the RIF action. Therefore, this Board finds no basis for disturbing the AJ's ruling on this issue.

#### Notice

Employee does not contest the merits of the RIF notice requirements in this case. Agency issued its initial notice to Employee on June 4, 2021. The notice provided that Employee's separation from service would be effective on June 25, 2021.<sup>23</sup> However, on June 22, 2021, Agency emailed a second notice to reflect that the new effective date of Employee's separation was July 11, 2021. As the Initial Decision discusses, both notices provided appeal rights to OEA as well as the designated appeal form. Since the RIF notice and the effective date of the RIF were more than thirty days apart, the AJ was correct in concluding that Employee was afforded the requisite notice under D.C. Code § 1-624.02(a)(5).

#### Conclusion

Employee has failed to provide a compelling basis for disturbing Agency's RIF action in this case. Agency provided Employee with thirty days' written notice of the RIF. It also provided him with priority reemployment and considered job sharing and reduced hours. After conducting a round of lateral competition, Employee received the lower number of points within his

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<sup>22</sup> See *Waksman v. Department of Commerce*, 37 M.S.P.R. (1988).

<sup>23</sup> *Petition for Appeal*, Attachment 1.

competitive level; therefore, he was properly identified for separation under the RIF. Accordingly, we must deny Employee's Petition for Review.

**ORDER**

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

**FOR THE BOARD:**

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Clarence Labor, Jr., Chair

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.