THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WEBSTER A. ROGERS,	)	OEA Matter No. 2401-0255-10R14
Employee	)	
	)	
v.	)	Date of Issuance: July 21, 2015
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

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

Employee contested the RIF action and filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 2, 2009. He argued that the RIF was a pre-text to terminate him without due process. Employee claimed that Agency failed to follow the rules of D.C. Official Code § 1-624.08. Therefore, he requested reinstatement with back pay and benefits.[2]

Agency filed its response to the Petition for Appeal on January 7, 2010. It explained that

[1] *Petition for Appeal,* p. 6 (December 2, 2009).
[2] *Id.* at 3.

the RIF was conducted pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It submitted that pursuant to 5 DCMR § 1501, Moten Elementary School was the competitive area, and under 5 DCMR § 1502, the ET-15 Music Teacher position was the competitive level subject to the RIF. Agency asserted that it provided Employee with one round of lateral competition within his competitive level and a written, thirty-day notice that his position was being eliminated. As a result, Agency believed the RIF action was proper.[3]

The OEA Administrative Judge ("AJ") ordered the parties to submit legal briefs addressing whether Agency followed the District's laws when it conducted the RIF. Agency was also ordered to submit a copy of the Retention Register used to conduct the RIF and Employee's Personnel File.[4] In its responsive brief, Agency reiterated its position and submitted that OEA is limited to determining whether it followed D.C. Official Code § 1-624.02, 5 DCMR §§ 1503 and 1506.[5]

Employee submitted his brief on April 27, 2012. He argued that Agency erred in using D.C. Official Code § 1-624.02 to conduct the RIF. He explained that because the RIF was conducted for budgetary reasons, Agency should have followed the rules provided in D.C. Official Code § 1-624.08. Furthermore, Employee opined that had Agency used the correct statute, he would have been retained.[6]

The AJ issued her Initial Decision on June 13, 2012. She found that although Agency conducted the RIF in accordance with D.C. Official Code § 1-624.02**,** D.C. Official Code § 1-

[3] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal* (January 7, 2010).
[4] *Order Requesting Briefs* (February 13, 2012).
[5] *District of Columbia Public Schools' Brief,* p. 8 (March 13, 2012).
[6] Employee explained that there were three ET Music Teachers positions, and one was selected to be eliminated. He provided that one of the employees was still serving a probationary period and had ". . . no creditable service, no veteran's preference and no District residency. . . ." Thus, Employee believed that had Agency applied the correct statute, he would have ranked second, and his position would not have been eliminated. *Employee's Response to Agency's Brief Related to the Reduction in Force and Motion for Summary Judgment,* p. 7-8 (April 27, 2012).

624.08 was the applicable statute to govern the RIF. The AJ cited to the District of Columbia Court of Appeals' holding in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools,* 960 A.2d 1123 (D.C. 2009) and ruled, *inter alia*, that D.C. Official Code § 1-624.08 or the "Abolishment Act" was the applicable statute because the RIF was conducted for budgetary reasons.[7] As a result, she held that D.C. Official Code § 1-624.08 limited her review of the appeal to determining whether Employee received a written, thirty-day notice prior to the effective date of his separation and one round of lateral competition within his competitive level. The AJ concluded that Employee received one round of lateral competition within his competitive level and a written, thirty-day notice prior to the RIF.[8] Accordingly, Agency's RIF action was upheld.[9]

On August 6, 2012, Employee filed a Petition for Review of the AJ's decision with the Superior Court for the District of Columbia. The petition provided that the AJ erred when she ruled that Agency followed all laws, regulations, and statutes. Specifically, Employee argued that 5 DCMR 1503.2 could not be applied to this case which is governed by D.C. Official Code § 1-624.08.[10]

The Court issued an Opinion on the matter on December 9, 2013. It found that although the AJ correctly determined that D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF, the AJ mistakenly applied the standards provided in 5 DCMR 1503. The Court

[7] *Initial Decision,* p. 2-4 (June 13, 2012).
[8] The AJ found that Employee competed with two other ET-Music Teachers within his competitive level and received the lowest score on his CLDF.
[9] *Id.* at 11.
[10] Employee also argued that the AJ erred when she ruled that Agency committed harmless error in its failure to provide the correct years of credible service and that Agency did not need to consider priority reemployment rights. *Webster Roger's Petition for Review of Agency Decision* (August 6, 2012).

Thereafter, Agency filed a document with the OEA Board captioned "The Board of the Office of Employee Appeals for the District of Columbia . . . District of Columbia Public Schools' Response to the Petition for Review.*"* The filing asserts that Employee's Petition for Review was untimely and that the appeal was insufficient because it was not supported by the record, law, or legal arguments. *District of Columbia Public Schools' Response to the Petition for Review* (September 10, 2012).

held that because the Abolishment Act applied to this RIF, the AJ should have reviewed the RIF utilizing D.C. Official Code § 1-624.08 and the regulations of Chapter 24 of the District Personnel Regulations ("DPM"). Furthermore, the Court held that Employee had a right to be placed on Agency's priority reemployment list. As a result, it reversed the AJ's Initial Decision and remanded the matter for further findings.[11]

Following the Court's reversal and remand, the AJ scheduled a Status Conference and subsequently issued an Order requiring the parties to address whether Agency conducted the RIF in accordance with the Abolishment Act.[12] Agency responded to the Order on May 29, 2014. Rather than address the issue presented by the AJ and in accordance with the Court's directive, Agency reiterated that its use of D.C. Official Code § 1-624.02 and 5 DCMR 1503 was proper. Agency reasoned that the Mayor gave the Chancellor authority to issue the RIF, and the Chancellor implemented the RIF pursuant to D.C. Official Code § 1-624.02. Agency provided that it was impossible for it to conduct the RIF under D.C. Official Code § 1-624.08 because the Abolishment Act did not apply to Employee, who was an Educational Service employee at the time of the RIF.[13]

In Opposition to Agency's Brief, Employee submitted that OEA could not consider Agency's arguments because they are outside of the Court's remand instructions. He opined that Agency failed to meet its burden of proof. Moreover, since Agency did not follow the Abolishment Act's procedure, Employee argued that reinstatement with back pay and benefits

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[11] *Webster Rogers v. District of Columbia Public Schools*, Case No. 2012 CA 006364 (D.C. Super. Ct. December 9, 2013).
[12] *Order Requiring the Parties to Submit Briefs* (April 4, 2014).
[13] Furthermore, Agency opined that the Abolishment Act only applied to employees with the Office of the State Superintendent of Education. Agency believed that the "regular RIF procedures" applied to this case and not the procedures pursuant to the Abolishment Act. Agency concluded that *assuming arguendo* that the Abolishment Act applied to Employee, he would have still been terminated. *District of Columbia Public Schools' Brief,* p. 2-11 (May 29, 2014).

was warranted.[14]

Agency subsequently submitted a reply brief that presented many of its previous arguments.[15] Thereafter, the AJ held a telephonic conference to discuss Agency's Reply Brief, and the parties were subsequently ordered to brief whether Agency could apply Chapter 24 of the DPM to the RIF.[16] Employee submitted a Sur-Reply Brief which provided that Agency lacked authority to retroactively apply the Abolishment Act; it could not prove that Employee was an "Inadequate Performer" because it did not utilize the DPM's procedures for determining whether he was an "Inadequate Performer;" and his termination could not stand because he was on approved sick leave at the time of the evaluation.[17]

The Initial Decision on Remand was issued on February 27, 2015. The AJ agreed with Employee and held that OEA does not have jurisdiction to overturn the Court's findings and consider Agency's arguments regarding the Abolishment Act. The AJ found that one round of lateral competition was not provided to Employee. She reasoned that Agency failed to conduct the RIF under the Abolishment Act and failed to prove that Employee was rated as an "Inadequate Performer." The AJ also held that Agency did not prove that Employee was considered for priority reemployment. Furthermore, she opined that Agency failed to consider Employee for the Displaced Employee Program. Therefore, Agency's action was reversed and it was ordered to reinstate Employee with all back pay and benefits.[18]

Agency filed a Petition for Review with the OEA Board on April 3, 2015. It argues that

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[14] *Complainant's Brief in Opposition to the District's Response to Employee's Petition for Review,* p. 4-7 (July 22, 2014).
[15] Additionally, Agency provided that Employee received one round of lateral competition and because he received the lowest score on his CLDF, he was separated from service. It also contended that because Employee was deemed an "Inadequate Performer," he would not have retained his position over the two other Music teachers. *District of Columbia Public Schools' Reply to Complainant's Response* (July 31, 2014).
[16] *Order Requiring the Parties to Submit Briefs* (August 19, 2014).
[17] *Webster's Sur-Reply Brief in Opposition to the District's Reply,* p. 3-8 (September 8, 2014).
[18] *Initial Decision on Remand,* p. 5-10 (February 27, 2015).

the Initial Decision on Remand is based on an erroneous interpretation of statute, regulation, and policy. Agency provides that the Administrative Judge's interpretation of the Abolishment Act's applicability to the 2009 RIF exceeded the boundaries of OEA's jurisdiction.[19] Additionally, it claims that the "unsatisfactory" rating that Employee received pursuant to the rules of D.C. Official Code § 1-624.02 is equivalent to the rating "Inadequate Performer," as provided in the rules of the Abolishment Act. It is Agency's position that ". . . an employee is provided with one round of lateral competition when a CLDF is completed for that Employee."[20] Finally, Agency argued that the AJ did not have jurisdiction to consider whether Employee was provided consideration for the Priority Re-employment or Displaced Employee programs.[21] Thus, Agency believes that its RIF action was proper.[22]

In Employee's Answer to the Petition for Review, he provides that Agency's ". . . claim that the [AJ] exceeded the jurisdictional bounds of the OEA is . . . a thinly-veiled attempt to circumvent the Abolishment Act, the District of Columbia Court of Appeals[,] and Judge Mott's Opinion. . . ."[23] Employee argues that Agency must prove that he received a meaningful round of lateral competition in accordance with the requirements of Chapter 24 of the DPM. Moreover, he submits that OEA is required to follow the directives of the Remand Order. He provides that Agency committed harmful error when it terminated him without one round of lateral competition. Furthermore, he argues that Agency failed to prove that he was rated as an "Inadequate Performer."[24] Therefore, Employee requests that the Board reinstate him with back-

[19] It is Agency's position that OEA does not have jurisdiction to consider one round of lateral competition pursuant to the enumerated rules of Chapter 24 of the DPM. *District of Columbia Public Schools' Petition for Review,* p. 3 (April 3, 2015).
[20] *Id.* at 9.
[21] Agency reiterated that the Mayor gave the Chancellor authority to issue the RIF, and the Chancellor implemented the RIF pursuant to D.C. Official Code § 1-624.02.
[22] *Id.* at 15.
[23] *Employee's Answer to the District's Petition for Review,* p. 8 (May 8, 2015).
[24] Employee explains that Agency applied an incorrect rating system. He reasons that Chapter 24 of the DPM had a

pay and benefits.[25] In the alternative, he submits that if the Board rules that he was properly separated, it should direct Agency to place him on the reemployment register and award him damages.[26]

On May 8, 2015, Employee filed a Motion to Expedite Agency's Petition for Review. He submitted that Agency's Petition for Review lacks legal and factual support. He explained that Agency did not defend its action before the AJ and instead requested that the AJ refuse to follow the Superior Court's order. Lastly, Employee provides that it has been nearly six years since he was terminated from his position and he deserves a speedy resolution.[27] The OEA Board granted Employee's Motion to Expedite on June 9, 2015.

D.C. Official Code §1-624.02 versus §1-624.08 and RIF for Budgetary Reasons

On remand, Agency made it very clear that it believed that D.C. Official Code §1-624.02 was the applicable statute in this case and not D.C. Official Code § 1-624.08. Although, D.C. Official Code § 1-624.08 was relied upon by the OEA Administrative Judge and Superior Court Judge in this matter, Agency continues to argue that the AJ's reliance on D.C. Official Code §1-624.08 exceeded OEA's jurisdiction and was erroneous.[28]

The Superior Court for the District of Columbia specifically addressed the conflict between the two statutes in its remand decision as well as in a previous case it decided. On remand, the Superior Court held in *Webster Rogers, Jr. v. District of Columbia Public Schools,*

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five-tier rating system, while Employee was rated under a four-tier system. He explained that under the DPM's five-tier rating system, an "Inadequate Performer" rating is the lowest tier, while the "unsatisfactory" rating he received under Agency's four-tier system was based on different criteria. Furthermore, because Agency used the wrong system, Employee opines that his rating under the correct system results in a default rating of "valued performer." Employee reiterates that had Agency used the proper criteria for the RIF, he would not have been terminated. Lastly, he argues that Agency did not provide proper notice and reiterates that he is entitled to consideration for the Priority Re-employment and Displaced Employee programs.

[25] Employee also requests the opportunity to file a motion for attorney's fees.

[26] *Employee's Answer to the District's Petition for Review,* p. 21-22 (May 8, 2015).

[27] *Employee's Motion to Expedite the District's Petition for Review* (May 8, 2015).

[28] *District of Columbia Public Schools' Petition for Review,* p. 3 (April 3, 2015).

Civil Case No. 2012 CA 006364 P(MPA) (D.C. Super. Ct. Dec. 9, 2013) the following:

> It is undisputed that the 2009 RIF in question was conducted for budgetary reasons. Respondent states in its brief in opposition that, "Chancellor Rhee authorized the RIF to eliminate positions within DCPS that the final school-based budgets for the 2010 fiscal year could not support." Opposition at 2. Respondent argues in its opposition that 5 DCMR § 1500.2 also lists "budgetary reasons" as grounds for DCPS conducting a RIF. However, respondent cites no legal authority that gives reason to supersede the clear precedent set forth in Washington Teachers' Union. The 2009 RIF was conducted in order to ensure a balanced budget. Therefore, OEA was correct in relying on the precedent set in Washington Teachers' Union and determining that the Abolishment Act, rather than D.C. Code § 1-624.02, applies to the present case.

Moreover, the Court in *Sheila Gill and Rhonda Robinson v. District of Columbia Office of Employee Appeals and District of Columbia Public Schools*, 2012 CA5844 and 5883 (MPA) (D.C. Super. Ct. October 23, 2013), affirmed OEA's holding and ruled that although Agency conducted the RIF actions pursuant to D.C. Official Code §1-624.02, D.C. Official Code §1-624.08 was the appropriate statute for the 2009 RIF matters. The Court upheld OEA's assessment that in accordance with *Washington Teachers' Union v. District of Columbia Public Schools*, 960 A.2d 1123, 1132 (D.C. 2008), a RIF authorized for budgetary reasons triggers D.C. Official Code §1-624.08. Specifically, it found that Agency's budget for fiscal year 2010 was not sufficient to support the number of positions that existed in 2009. Accordingly, principals were given the authority to eliminate positions within competitive levels based on budget reductions. Thus, the Court held that D.C. Official Code §1-624.08 was triggered because the RIF was authorized for budgetary reasons.[29] In accordance with the previous Superior Court

[29] The Court noted that a September 10, 2009 Memorandum from Chancellor Michelle Rhee cited that the reason for the 2009 RIFs were due to budget constraints, requiring the elimination of positions at schools that the 2010 budget could not support. It went on to note that D.C. Official Code §1-624.08 placed restrictions on what employees could appeal. However, D.C. Official Code §1-624.02 did not present restrictions. Thus, in accordance with D.C. Official Code §1-624.08, OEA was authorized to consider if there was one round of lateral competition and if employee was provided a thirty-day notice. *Sheila Gill and Rhonda Robinson v. District of Columbia Office of Employee Appeals and District of Columbia Public Schools*, 2012 CA5844 and 5883 (MPA), p. 2 and 5-6 (D.C. Super. Ct. October 23, 2013).

rulings in the *Rogers* case, as well as the ruling in *Gill* and *Robinson*, Agency's contention that the AJ incorrectly relied on D.C. Official Code §1-624.08 lacks merit.

One Round of Lateral Competition

The D.C. Court of Appeals in *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883 (D.C. 1998), held that OEA's authority regarding RIF matters is narrowly prescribed, and it may not determine whether the RIF was bona fide or violated any law, other than the RIF regulations. According to D.C. Official Code § 1-624.08(d) and (e), OEA is tasked with determining if Agency afforded Employee one round of lateral competition within her competitive level and if it provided a thirty-day notice. Employee's notice is not at issue in this matter on remand. This Board is tasked with reviewing the AJ's decision regarding one round of lateral competition.

Agency argues that the AJ failed to address all issues of law and fact when determining if Employee was afforded one round of lateral competition. It conceded that there were several sections of the Abolishment Act that it did not follow when conducting this RIF action, however, it claims that OEA's jurisdiction is limited to whether Employee received one round of lateral competition. Agency explained that competitive level documentation forms alone constitute substantial evidence that an employee received one round of lateral competition. It is Agency's position that the criteria for which it did not comply falls outside of OEA's jurisdiction.[30]

Agency asserts that the Superior Court for the District of Columbia held in *Sheila Gill and Rhonda Robinson v. D.C. Office of Employee Appeals and D.C. Public Schools*, 2012 CA 5488 (MPA) and 2012 CA 5883 (MPA)(October 23, 2013) that the competitive level form alone is enough to determine that it provided Employee with one round of lateral competition. This is a blatant misrepresentation of the ruling in that case. The language quoted by Agency's counsel

[30] *District of Columbia Public Schools' Petition for Review,* p. 4-8 (April 3, 2015).

does not exist in the *Gill* decision.

This Board will rely on the actual holding by the Court in *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA), p. 4 (D.C. Super. Ct. March 14, 2013). The *Sligh* decision provided that implicit in the authority to determine whether an employee has been given one round of lateral competition is the jurisdiction to decide whether an employee's evaluation is supported by substantial evidence.[31] Thus, more is required from Agency than simply the production of a competitive level form.

More importantly, Agency concedes that it did not comply with Chapter 24 of the DPM when it took RIF action against Employee. On Petition for Review, Agency explained that while it is true that there are several enumerated parts to the Abolishment Act and Chapter 24 of the DPM that the Agency did not follow in enacting the 2009 RIF, OEA's jurisdiction is limited to whether Employee received one round of lateral competition and thirty (30) days of notice.[32] Based on the AJ's findings and Agency's admission that it failed to comply with the regulation, we must uphold the AJ's decision that Employee was not afforded one round of lateral competition.

Inadequate Performer

Agency contends that the AJ failed to address its argument that because Employee was rated as an Inadequate Performer, then his position would have been abolished before any other employees within his competitive level. This Board notes that the AJ did consider Agency's Inadequate Performer argument and found that it failed to provide evidence proving that rating

[31] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *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). The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.

[32] *District of Columbia Public Schools' Petition for Review,* p. 5 (April 3, 2015).

for Employee. Moreover, the AJ ruled that this argument exceeded the scope of the Superior Court remand order because it was not raised until after the matter was remanded.

The AJ is correct in her assessment. Agency did not raise the Inadequate Performer argument before her on Petition for Appeal or before Judge Mott on petition in Superior Court. Judge Mott specifically remanded the matter to the AJ to ". . . review the 2009 RIF procedure under the proper criteria outlined in chapter 24 of the DCPM as required by the Abolishment Act."[33] Therefore, Agency's Inadequate Performer argument exceeds the scope of the remand.

Furthermore, as Employee accurately contends, there is no evidence in the record of an Inadequate Performer rating for Employee. Agency suggests that its 2008-2009 unsatisfactory rating of Employee "equates to Inadequate Performer."[34] However, DPM § 2414.2 provides that "an employee with a current performance rating of 'Inadequate Performer' or a current performance rating at the level equivalent to "Inadequate Performer" under the Legal Service performance appraisal system . . . shall be terminated ahead of any competing employee in his or her competitive level without regard to length of creditable service or preference eligibility . . . ." Therefore, DPM § 2414.2 only applies to employees with an actual rating of Inadequate Performer. The only exception which allows for an equivalent rating to Inadequate Performer is for those employees on the Legal Service scale.

It is clear from the record that Employee is not on the Legal Service scale. In accordance with DPM § 3600.1, Legal Service "applies to all attorneys appointed to the Legal Service who are employed by the Office of the Attorney General for the District of Columbia, the Mayor's Office of Legal Counsel, or a subordinate agency." Employee's personnel records indicate that

[33] *Webster Rogers, Jr. v. District of Columbia Public Schools,* Civil Case No. 2012 CA 006364 P(MPA), p. 9 (D.C. Super. Ct. Dec. 9, 2013).
[34] *District of Columbia Public Schools' Petition for Review,* p. 6 (April 3, 2015).

he was classified as an "ET-15."[35] ET is a designation on the Education pay scale and not the Legal Service scale which uses the designation "LS." Thus, Agency's argument regarding the "equivalent" of an Inadequate Performer designation lacks merit. Therefore, this Board must uphold the AJ's decision.

Priority Re-employment

Agency argues that its RIF notice satisfied the Priority Re-employment requirements. D.C. Official Code § 1-624.08(h) provides that separation pursuant to a RIF action, "shall not affect an employee's rights under either the Agency Reemployment Priority Program or the Displaced Employee Program established pursuant to Chapter 24 of the District Personnel Manual." DPM § 2427 discusses the District's priority reemployment program, and it provides the following:

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

[35] *Employee's Personnel File,* p. 2-3, 28, 32, 61, and 107 (March 13, 2012).

2427.6 Except as provided in subsection 2426.1 of this chapter, the employee's name shall be entered on the appropriate agency reemployment priority list for all positions for which qualified as follows:
(a) At his or her grade level at the time of separation; and
(b) At any lower grade acceptable to the employee.

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

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

Agency's RIF notice provides that Employee ". . . may apply for any job vacancies at DCPS within the District government that arise in the future. Employees separated pursuant to a reduction in force receive priority re-employment consideration, but are not guaranteed re-employment." The AJ held that Agency offered no proof that it actually placed Employee on a re-employment list. DPM § 2427.1 requires Agency to establish and maintain priority re-employment lists. Agency offered nothing more than its RIF notice to prove its compliance. This Board agrees with the AJ's determination that this does not rise to the level of adequate proof of Agency's compliance with the statutory or regulatory requirements.

Conclusion

Agency failed to show that it complied with Chapter 24 of the DPM regulations when processing Employee's RIF action. As a result, we must uphold the AJ's decision to reverse Agency's action. Accordingly, Agency's Petition for Review is denied.

ORDER

It is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. As provided in the Initial Decision, Agency's termination action is **REVERSED.** Accordingly, Agency shall reinstate Employee to his last position of record or a comparable position. Additionally, it must reimburse Employee all back pay and benefits lost as a result of the termination action. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

_____
William Persina, Chair

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Sheree L. Price, Vice Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.