THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
R. JAMAL JOHNSON, Employee	OEA Matter No. 1601-0011-07
	Date of Issuance: June 20, 2007
DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

R. Jamal Johnson ("Employee") worked as an attendance clerk at Benning Elementary School within the D.C. Public Schools ("Agency") system. On August 22, 2006, Employee received a letter from Agency stating that as a result of equalization, his position was abolished. Agency claimed that it needed to equalize the staff assignment with student enrollment and/or budgetary constraints. According to the notice, Employee's position was to be terminated on September 29, 2006. The notice also informed him of his appeal rights to the Office of Employee Appeals ("OEA").

On October 25, 2006, Employee filed a Petition for Appeal with OEA. In his petition, he argued that he was not provided with documentation of budget cuts to

warrant abolishing his position. He also provided that his last performance rating was classified as outstanding.[1]

Agency responded to the Petition for Appeal on December 1, 2006. It outlined the same information that was included in Employee's termination letter. Its reasoning was that due to budgetary constraints and alignment with student enrollment, Employee's position could not be funded. Therefore, he was terminated.[2] Agency did not provide any other information regarding Employee's termination.

The Administrative Judge ("AJ") in this case then requested Pre- and Post-hearing Statements from both parties. Employee's pre-hearing statement provided that after his termination there were subsequent hirings by Agency. Both of his statements posed a number of questions to Agency that requested information like the number of employees on staff, the salaries for employees, and the number of students enrolled prior and subsequent to his termination.[3]

Agency's Pre-hearing Statement provided the same arguments that were previously made in its response to Employee's Petition for Appeal. However, it also asserted that it was authorized to separate any employee if budgetary constraints precluded it from continuing to employ them, and Employee had no legal basis for challenging its administrative decision to terminate him. Agency also reasoned that it gave Employee more than 30 days notice that he would be separated. It argued that in addition or alternatively, Employee was an at will employee and could be separated for

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[1] *Petition for Appeal,* p. 6-7 (October 25, 2006).
[2] *District of Columbia Public Schools' Answer to Employee's Appeal,* p. 1-2 (December 1, 2006).
[3] *Employee's Pre-hearing Statement* (n.d.) and *Employee's Post-Conference Brief,* p. 2-3 (January 29, 2007).

any reason at all. [4]

Agency's Post-conference Brief was more detailed than the Pre-conference Brief. It provided that Employee's termination was a separation and not an abolishment nor a RIF. Agency argued that as a result OEA lacked jurisdiction over this matter, and the case should be dismissed accordingly. However, if the AJ found that OEA did have jurisdiction, Agency argued that Employee could not make any legal arguments against the school system realigning staff to conform with its budget.[5]

On February 8, 2007, the AJ issued his Initial Decision. He found that Agency did not prove that the action taken against Employee was proper and in accordance with its regulations. The AJ reasoned that because Employee's position was abolished due to budgetary reasons, then that constituted a reduction-in-force ("RIF") action. Furthermore, Agency gave Employee 30 days notice that his position would be terminated, also consistent with a RIF action. However, the AJ held that if this was a RIF action, Agency failed to show that it performed one round of lateral competition when it decided to terminate Employee. Additionally, the AJ stated that if Agency's argument was that Employee's termination was based on an adverse action against him, it also failed to offer a cause for such action. Therefore, the AJ ruled that Agency's action be reversed because Employee's termination was improper. [6]

Agency filed a Petition for Review on March 13, 2007. It provided that there is new and material evidence available that, despite due diligence, was not available when

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[4] *District of Columbia Public Schools' Pre-hearing Statement* (January 5, 2007).
[5] *District of Columbia Public Schools' Brief in Accordance with Post Conference Order,* p. 2-3 (January 29, 2007).
[6] *Initial Decision,* p. 3 (February 8, 2007).

the record closed. Agency stated that the new evidence would show that Employee was separated from Agency as a part of a school-closing process in accordance with Title 5 DCMR Chapter 36. Agency also claimed that it could prove that Employee was separated because of his low seniority status.[7]

D.C. Official Code § 1-624.08(d), (e), and (f) clearly establishes the circumstances under which the OEA may hear RIFs on appeal.

> "(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 position in the employee's competitive level.
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> (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.
>
> (f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:
>
> > (1) An employee may file a complaint contesting a determination or separation pursuant to subchapter XV of this chapter or § 2-1403.03; and
> >
> > (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied."

Furthermore, OEA Rules 629.1 and 629.3 establishes that Agency has the burden of

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[7] *Petition for Review of Initial Decision*, p. 1 (March 13, 2007). Agency specifically cites §§ 3601.5 and 3603.1 as the regulations used to separate Employee.

proving all issues other than jurisdiction by preponderance of the evidence.[8]

The facts of this case have left this Board with several uncertainties that prevent us from upholding Agency's action. The Board is uncertain that Agency followed the proper procedures in terminating Employee. Agency never identifies the procedure used to terminate Employee. Some language offered in its response and motions suggest that a RIF action was taken against him, but there is no clear indication of that in any notice to Employee or motions filed with the AJ. Furthermore, Agency argued in its Post-Conference Brief that Employee's termination was not the result of a RIF action.[9]

We are also uncertain that there is any new and material evidence available as Agency suggests. On its face, the regulations that Agency cites in its Petition for Review provide no logical connection to why Employee was terminated. The regulations discuss the Board of Education relocating students and programs of overcrowded buildings and closing facilities that are not being used effectively. Neither of these regulations address reasons for abolishing an employee's position. Furthermore, if Agency properly removed Employee from his position, it should have evidence to readily prove that it conducted a proper termination at any time after such termination. The Board cannot comprehend why there will be new and material evidence that was just recently made available to Agency regarding its termination of an employee. The information had to exist on the

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[8] Preponderance of the evidence is defined as "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."

[9] *District of Columbia Public Schools' Brief in Accordance with Post Conference Order,* p. 2-3 (January 29, 2007).

date of termination to justify terminating Employee, therefore, the evidence would not be new or material.

It is without question that Agency failed to provide evidence which a reasonable mind would accept as sufficient to prove that it followed proper procedures to terminate Employee. Moreover, Agency hints in its Post-Conference Brief that it conducted some type of lateral competition, a requirement for RIF actions. It provided that Employee was placed in a pool of 27 similarly situated clerks and was determined to be one of the least senior clerks.[10] However, it clearly stated that a RIF was not the basis for terminating Employee. Agency also failed to attach any documentation highlighting the recently discovered new and material evidence to its Petition for Review. Therefore, it did not prove that it conducted one round of lateral competition to properly terminate Employee, nor did it show cause to justify an adverse action. Accordingly, we uphold the AJ's decision and deny Agency's Petition for Review.

[10] *Id.* at 2.

ORDER

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

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Keith E. Washington

Barbara D. Morgan

Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.