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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 2401-0218-10
DEBORAH MOORE,	)	
Employee	)	
	)	Date of Issuance: July 27, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	STEPHANIE N. HARRIS, Esq.
_____	)	Administrative Judge
Kristin E. Dobbs, Esq., Employee Representative		
W. Iris Barber, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On October 27, 2009, Deborah Moore (“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 Early Education Teacher at Shepherd Elementary School (“Shepherd”). Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter on February 6, 2012. On February 15, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations. Both parties timely submitted their briefs. A Status Conference was held in this matter on May 15, 2012. On May 22, 2012, I issued an Order directing the parties to submit briefs and supporting documentation regarding the arguments made during the Status Conference. Both parties have complied. After reviewing the record, I have determined that there are no material facts in dispute and therefore, an evidentiary hearing is not warranted. The record is now closed.

**JURISDICTION**

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

### ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

### BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

### FINDINGS OF 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:

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<sup>1</sup> See Agency's Answer, Tab 1 (January 7, 2010).

<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>

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<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 asserts that Agency erroneously applied the RIF provisions of D.C. Code § 1-624.08, including the competitive level designation and RIF notification process. She also submits that there was an error in her service computation date (“SCD”), competitive level documentation, and RIF notice. Employee also claims that she was assigned to a school “without the necessary training for the in-school special academic program.”<sup>12</sup>

In her brief, Employee states that in August 2009, she was placed at Shepherd as an Early Education Teacher. However, she alleges that she was not given a “classroom placement” and was instead assigned to work with other teachers as an aide. She also contends that she was never observed by the principal and that her CLDF failed to consider factors such as “significant relevant contributions, accomplishments or performance; relevant supplemental professional experiences as demonstrated on the job; office or school needs, such as curriculum, specialized education, degrees, licenses or areas of expertise; and length of service.” Employee also details the following errors in her RIF documentation:

- 1) The Competitive Level Ranking Score Card (“score card”) drafted for her incorrectly listed her name as ‘Dedra D. Moore.’
- 2) The SCD was incorrectly listed as 1997; Employee contends that she began teaching with DCPS in 1991.

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<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> Petition for Appeal (December 2, 2009).

- 3) Employee asserts that she received a RIF notice, addressed to ‘Dedra D. Moore,’ on October 5, 2009.
- 4) The RIF notice lists the incorrect Employee ID number.

Additionally, Employee contends that she was not properly given one round of lateral competition because Agency failed to properly complete the competitive level score card, noting that because of numerous errors including the issuance of documents with another teacher’s name on it, “it cannot be stated with any degree of certainty that the score card even belongs to Deborah Moore.” Employee further contends that Agency failed to give Employee proper notice of the RIF within thirty (30) days of the effective date. Specifically, she contends that she received the RIF notice on October 5, 2009 and the notice was addressed to another teacher. She also argues that Agency failed to provide her with priority re-employment consideration. Employee asserts that Agency has not shown that it properly implemented the priority re-employment prong of the RIF procedures.<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 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 the lowest ranked Early Education Teacher, was terminated as a result of the round of lateral competition.<sup>15</sup>

### *Status Conference*

On May 22, 2012, I issued an Order directing the parties to submit briefs and supporting documentation regarding the arguments made during the May 15, 2012 Status Conference. In its Post Status Conference brief, Employee argues that she was not given one round of lateral competition because Agency did not properly consider relevant factors, including Employee’s relevant contributions and years of service. Employee further asserts that Agency has provided no evidence that it intended to remove her and not the teacher listed on some of the RIF documents, Ms. Dedra Moore. Further, Employee contends that Agency “has not proffered any evidence that Employee ever received notice of her separation, as they have not been able to produce a formal letter of separation” issued with employee’s name. She submits that the only letter produced has the hand-written address of Employee on it. Employee also submits that because this is an “issue beyond a mere typographical error, it is quite possible that DCPS intended not to remove Ms. Deborah Moore, but intended to RIF Ms. Dedra Moore.”<sup>16</sup>

During the May 15, 2012 Status Conference, Agency acknowledged that the wrong SCD was used in the calculation of Employee’s length of service. Agency also submitted the correct personnel file for Employee at this time. Additionally, in its Post Status Conference brief, Agency does not dispute that Employee received her RIF notification on October 5, 2009, but contends that the three day delay in serving Employee was not harmful error that would require reinstatement. Agency

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<sup>13</sup> Employee Brief (March 28, 2012).

<sup>14</sup> Agency Brief at pp. 3-7 (March 7, 2012).

<sup>15</sup> *Id.* at pp. 2, 4-5. 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> Employee Post Status Conference Brief (June 1, 2012).

submits that two employees with similar names had their statuses confused, but both errors were corrected as soon as possible. Agency reiterates that the error with the names in Employee's RIF documentation was a procedural error and should not be treated as an error of significant magnitude, referencing DPM § 2405.7. Agency also submits an affidavit from the principal of Shepherd, Jamie Miles, stating that he completed the CLDF documents for Employee, as well as the Notification of Personnel Action ("SF-50") during the instant RIF for Dedra Moore.

### ***RIF Procedures***

Employee contends that Agency failed to use the same criteria required by the central administration. However, there is no evidence that Agency was required to use a specific criteria used by central administration for the instant RIF. 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 separate competitive area.<sup>17</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>18</sup>

Here, Shepherd was identified as a competitive area, and Early Education Teacher was determined to be the competitive level in which Employee competed. However, Employee contends that she did not work as an Early Education Teacher, but was assigned to work with other teachers as an aide. However, Employee has not provided any credible evidence showing that she did not work as an Early Education Teacher. Further, Employee has not provided any official documentation, such as an SF-50 showing that she had a different job title, pay plan, or pay grade different from what was documented for her by Agency in the instant RIF. According to the Retention Register provided by Agency, there were five (5) Early Education Teacher positions subject to the RIF.<sup>19</sup> Of the five (5) positions, one (1) position was identified to be abolished. Because Employee was not the only Early Education 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,

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<sup>17</sup> Agency Answer, Tab 1, RIF Authorization (January 7, 2010).

<sup>18</sup> *Id.*

<sup>19</sup> Agency Brief, Exhibit A, Retention Register (March 7, 2012).

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 (“Needs of the School”) - (75%)
- (b) Significant relevant contributions, accomplishments, or performance (“Significant relevant contributions”) – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job (“Relevant supplemental professional experiences”) – (10%)
- (d) Length of service – (5%)<sup>20</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>21</sup> Agency cites to *American Federation of Government Employees, AFL-CIO v. OPM*,<sup>22</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>23</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.

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<sup>20</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>21</sup> Agency Brief at pp. 4-5 (March 7, 2012).

<sup>22</sup> 821 F.2d 761 (D.C. Cir. 1987).

<sup>23</sup> *Id.*

### ***RIF Documentation***

Agency employs the use of a Competitive Level Ranking Score Card (“score card”) and 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 Shepherd 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”). The principal of Shepherd completed the CLDF, which included a narrative analysis for the needs of the school, significant relevant contributions, and relevant supplemental professional experiences categories. Principals were instructed to report to the DHR to complete the narrative documentation, where they were provided with a list of all the personnel identified to be RIF’d.<sup>24</sup> DHR was responsible for completing the score card and the Retention Register, which incorporated the category scores calculated by the principal and provided a breakdown of the length of service calculation. 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>25</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 appears in the Retention Register and Employee’s score card.

In the instant case, the score card, which is the first page of the competitive level documentation, lists the name of another teacher, Dedra Moore. The score card also includes the service computation date for Dedra Moore.<sup>26</sup> The second and third pages, which consists of the CLDF completed by the principal, has Employee’s name on it. These pages also contain the signature of the principal. In light of the errors in her RIF documentation, Employee contends that “it cannot be stated, with any degree of certainty that the score card” was issued for her and that she was the employee intended to be RIF’d. However, the undersigned disagrees. While the score card completed by DHR contains the incorrect teacher’s name, the CLDF completed by the principal has Employee’s name correctly listed. Agency has submitted an affidavit from Jamie Miles, who was the principal at Shepherd during the instant RIF.<sup>27</sup> The affidavit corroborates Agency’s assertion that the CLDF was properly completed for Employee, based on observations of Employee’s interactions with students, parents, and colleagues.<sup>28</sup> While Employee argues that she may not have been the intended teacher to be RIF’d, the record shows that the other teacher listed in the RIF documentation, Dedra Moore, did not work at Shepherd and was not employed as an Early Education teacher. Further, Agency has provided the SF-50’s used for Dedra Moore, which shows that she was reinstated one day after being erroneously separated via the instant RIF.<sup>29</sup> Thus, while the record shows an error on the part of DHR in completing Employee’s score card and length of service calculation, the narrative documentation was properly completed for Employee by the principal of Shepherd.

Thus in light of the aforementioned arguments, the undersigned finds that Employee was the proper teacher placed into the Early Education teacher competitive level. The undersigned finds that while Agency made several errors in Employee’s RIF documentation, a RIF documentation error will

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<sup>24</sup> Agency Answer, Tab 2 (January 7, 2010).

<sup>25</sup> Agency Brief, Exhibit B (March 7, 2012).

<sup>26</sup> Agency Post Status Conference Brief, Exhibit A (June 11, 2012).

<sup>27</sup> *Id.*, Exhibit B.

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

<sup>29</sup> *Id.*, Exhibit A.



not be reversed if said error does not adversely affect an employee's substantive entitlements.<sup>30</sup> In this case, Agency has proven by a preponderance of the evidence that Employee was properly placed in the correct competitive level and the errors in the RIF documentation did not adversely affect Employee.

Employee also contends that Agency failed to provide her with a copy of the CLDF at the time she received her RIF Notice. The RIF regulations do not require Agency to provide a copy of the CLDF at the time the RIF notice is given to employees. However, the undersigned notes that upon Employee's request, Agency provided a copy and also included a copy in its Answer.<sup>31</sup>

Employee received a total score of thirty-three and a half (33.5) points on her CLDF and was therefore, ranked the lowest employee in her respective competitive level. Employee's CLDF stated in pertinent part, the following:

“Ms. Moore is flexible. She is [sic] arrives to work on time and has attended all meetings and professional development sessions. Ms. Moore has not set up a webpage and has not asked me what needs to be done. She was assigned to team teach with a PK teacher and during my observations I have not observed her planning with the teacher and/or taking on a leadership role. Our school is currently pursuing IB authorization. A requirement to become an authorized school is that all teachers have received Level 1 training. Ms. Moore currently has not received any training in the International Baccalaureate (IB) program and does not have any experience teaching in an IB school.”<sup>32</sup>

### **Needs of the School**

Employee received four (4) points out of a possible ten (10) points in this category; a score much lower than the other employees within her competitive level who were retained in service.<sup>33</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.

Employee alleges that her CLDF was not properly completed because it failed to consider her degrees, certifications, and participation in school related activities. However, Employee has failed to provide any credible evidence or supporting documentation to highlight how her degrees, school participation and certifications translate specifically into how she met the needs of the school. While Employee has provided a detailed rebuttal to the comments in her CLDF regarding the Needs

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<sup>30</sup> See *Hill v. Dep't of Commerce*, 25 M.S.P.R. 205, 208 (M.S.P.B. Dec. 11, 1984); see also Fed. R. Civ. P. 61 (which provides, in pertinent part, that “[T]he court at every stage of the proceeding must disregard an error or defect in the proceedings which does not affect the substantial rights of the parties.”).

<sup>31</sup> Agency Answer, Tab 3 (January 7, 2010).

<sup>32</sup> *Id.*, Tab 3.

<sup>33</sup> Agency Brief, Exhibit A, Retention Register (March 7, 2012).

of the School category, she has not proffered 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.<sup>34</sup> The principal of Shepherd was given the discretion to complete Employee's CLDF and had wide latitude to invoke his managerial discretion.

Additionally, Employee claims that she was never observed by the principal. The undersigned notes that the criteria Agency instructed the principals to use in ranking employees did not require a formal observation of employees.<sup>35</sup> Specifically, in the Needs of the School 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>36</sup> Further, while advanced degrees and certifications 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. Agency did not develop an exhaustive list of factors to be considered, but rather listed examples that could be considered by principals.<sup>37</sup> Moreover, because Employee received four (4) points in this category, it can be reasonably assumed that her degrees and certifications were taken into consideration.

#### **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.

#### **Length of service**

This 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. Employees were granted an additional five (5) years of service for D.C. residency, four (4) years of service for veterans' preference, and four (4) years of service for performance evaluations of 'outstanding' or 'exceeds expectations' for the last school year.<sup>38</sup> The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

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<sup>34</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>35</sup> Agency Answer, Tab 2, Attachment B (January 7, 2010).

<sup>36</sup> *Id.* at p. 1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at p. 4.

Employee contends that Agency used the wrong SCD in her calculation of length of service. Agency acknowledges this error, and in the personnel file submitted during the Status Conference, it shows that Employee's SCD is May 25, 1983.<sup>39</sup> Using the correct SCD, shows that Employee should have received credit for twenty-six (26) years of service. Employee received zero (0) points for D.C. residency, veterans preference, and outstanding performance evaluation and she has not contested that there are any errors with this particular data.

In an affidavit, Peter Weber explains that ten (10) points was to be awarded for employees with twenty-one (21) or more years of service.<sup>40</sup> Because the length of service calculation was worth five percent (5%) of the total score, Employee's recalculation yields her a weighted score of five (5) points. Thus, with this recalculation, I find that Employee should have been awarded the maximum five (5) points allowed in this category, resulting in a total weighted score of thirty-six and a half (36.5) points. However, even with the recalculation of Employee's length of service computation, Employee's score is still far below the next lowest scoring Early Education Teacher in Employee's competitive level retained in service, who received a total score of sixty-three (63) points.<sup>41</sup> 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.<sup>42</sup>

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>43</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>44</sup> Based on *Washington Teachers' Union*, this Office cannot substitute its judgment for that of the principal at Shepherd, who was given discretion to complete Employee's CLDF and had wide latitude to invoke his managerial discretion.<sup>45</sup> Thus, with respect to the aforementioned CLDF categories, I find that I will not substitute my judgment for that of the principal of Shepherd as it relates to the scores he accorded Employee and her colleagues in the instant matter.

Further, the undersigned finds that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.<sup>46</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>47</sup> Accordingly, I find

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<sup>39</sup> See Employee Personnel File (May 15, 2012).

<sup>40</sup> Agency Brief, Exhibit B (March 7, 2012).

<sup>41</sup> *Id.*, Exhibit A, Retention Register.

<sup>42</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>43</sup> 109 F.3d 774 (D.C. Cir. 1997).

<sup>44</sup> See *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>45</sup> *Id.*

<sup>46</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>47</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

that the principal of Shepherd had discretion in completing Employee's CLDF, as he 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.

### ***Notice Requirements***

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 “[a]n employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The specific notice shall state specifically what action is to be taken, the effective date of the action, and other 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).

Employee alleges that she did not receive thirty (30) days notice of the instant RIF. Specifically, Employee alleges that she received her RIF notice on October 5, 2009. Agency also acknowledges that Employee received her RIF notice on October 5, 2009, but argues that the three (3) day delay in serving Employee was not harmful error. However, the record shows that Agency failed to issue a RIF notice with Employee's name and address. The RIF notice contained in the record is issued to another teacher, Dedra Moore, with one copy showing a handwritten correction with Employee's name and address. Although Agency submits that it corrected the errors in the RIF notice as soon as possible, Agency has not provided documentation showing that it issued an official RIF notice to Employee. The requirements of DCMR § 1506 specifically require that an Employee be given specific notice. Further, while Employee signed an acknowledgement of receipt of separation letter, she was given a letter issued to another teacher. The undersigned finds that in the instant matter, notice cannot be specific if it is addressed to another employee. Upon notice of the error, instead of issuing Employee a new RIF notice with the correct name, address, and employee ID number, the record only shows a handwritten correction on the RIF notice given to Employee.<sup>48</sup>

While, Agency maintains that Employee was provided with the required thirty (30) days notice, they have failed to submit any documentary evidence showing a RIF notice was properly issued to Employee. Agency has the burden of proof to show that it gave Employee thirty (30) days written notice prior to the effective date of the RIF. Further, the issuance of the RIF notice was solely within Agency's control. Therefore, based on the above reasoning and analysis, I find that Agency has failed to meet its burden and did not give Employee thirty (30) days written notice prior to the effective date of the instant RIF.

Agency's failure to provide Employee with thirty (30) days written notice is considered procedural error, and thus calls for a reconstruction of this process as opposed to a retroactive

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<sup>48</sup> It is unclear whether Agency or Employee made the handwritten additions to the RIF notice.

reinstatement of Employee.<sup>49</sup> A retroactive reinstatement of employee is only allowed where there is a finding of harmful error in the separation of employee.<sup>50</sup> The DCMR defines harmful error as an error with “such a magnitude that in its absence, the employee would not have been released from his or her competitive level.”<sup>51</sup> I find that Agency’s failure to provide Employee with thirty (30) days written notice prior to the RIF effective date was a procedural error, as Employee would have still been released from her competitive level based on the one round of lateral competition procedures. The undersigned finds that Agency’s error will not serve to negate or overturn Employee’s termination and does not constitute harmful error.

### ***Priority Re-employment***

Employee also argues that Agency failed to provide her with priority re-employment consideration. As discussed above, § 1-624.08, the Abolishment Act, and not § 1-624.02 applies to the instant RIF. The Abolishment Act does not require Agency to engage in priority re-employment procedures. However, in conducting the instant RIF, Agency maintains that it complied with 5 DCMR Chapter 15, which addresses the issue of priority re-employment.<sup>52</sup> Agency’s RIF Notice stated that “[e]mployees separated pursuant to a reduction in force receive priority re-employment consideration, but are not guaranteed re-employment.”<sup>53</sup> The notice also explained that employees may apply for future job vacancies at DCPS or within the District government that arise in the future.<sup>54</sup> Further, 5 DCMR § 1505.3<sup>55</sup> states that while an Agency is authorized to establish and implement priority reemployment procedures, separated employees are not granted a right to be reemployed. Also, Employee has not provided any credible evidence to show that she applied for available positions and was not given priority consideration. The undersigned notes that merely applying and not being hired is not by itself evidence that priority re-employment was not given.

### ***Grievances***

Additionally, Employee claims that she was assigned to a school where she did not have the necessary training to teach the special academic program. Employee also contends that she was not placed in a classroom and was instead assigned to work with other teachers as an aide. The undersigned finds that a complaints of this nature are grievances and 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

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<sup>49</sup> See District of Columbia Municipal Regulations (“DCMR”) § 2405.6, 55 DCR 12899, 12902 (2008), which states in relevant part:

An action which was found by...the Office of Employee Appeals to be erroneous as a result of procedural error shall be reconstructed and a re-determination made of the appropriate action under the provisions of this chapter.

<sup>50</sup> See DCMR § 2405.7, 55 DCR 12899, 12902 (2008).

<sup>51</sup> *Id.*

<sup>52</sup> Agency’s Brief at p. 3 (March 7, 2012).

<sup>53</sup> See Agency’s Answer, Tab 4 (January 7, 2010).

<sup>54</sup> *Id.*

<sup>55</sup> 49 DCR 5975 (2002).

jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

### CONCLUSION

Based on the foregoing, I find that Employee's position was correctly abolished after she properly received one round of lateral competition. However, I find that Agency did not provide Employee with thirty (30) days written notice prior to the effective date of the instant RIF, resulting in a procedural error which can be corrected through a reconstruction of the notice period. Therefore, in light of the correctable procedural error, I find 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:

1. Agency reimburse Employee thirty (30) days pay and benefits commensurate with her last position of record; and
2. Agency's action of abolishing Employee's position through a Reduction-In Force is **UPHELD**; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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STEPHANIE N. HARRIS, Esq.  
Administrative Judge