THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CHARLES ALEXANDER,	)	OEA Matter No. 2401-0219-10
Employee	)	
	)	Date of Issuance: December 17, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Charles Alexander ("Employee") worked as a Social Studies 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 challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 2, 2009. In it, he argued that his rights were violated because the evaluation process was not in accordance with the union contract. Employee also argued that he was removed due to his age. Therefore, he requested reinstatement to his position.[2]

In its answer to Employee's Petition for Appeal, Agency explained that it conducted the RIF pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of

[1] *Petition for Appeal*, p. 6-7 (December 2, 2009).
[2] *Id.* at 3.

Columbia Municipal Regulations ("DCMR"). It argued that in accordance with 5 DCMR §§ 1503 and 1506, Employee was provided one round of lateral competition through the use of Competitive Level Documentation Forms ("CLDF"), and he received a written, thirty-day notice that his position was being eliminated. Thus, Agency believed the RIF action was proper.[3]

Prior to issuing the Initial Decision, the OEA Administrative Judge ("AJ") ordered the parties to submit briefs addressing whether Agency followed the District's laws when it conducted the RIF action.[4] In its brief, Agency argued that Woodson Senior High was determined to be the competitive area, and the Social Studies position was the competitive level for purposes of this RIF action. It explained that one Social Studies position was slated to be eliminated, and Employee ranked the lowest of the four teachers within his competitive level. Additionally, Agency reiterated its position that OEA is limited to determining whether it followed D.C. Official Code § 1-624.02 and 5 DCMR §§ 1503 and 1506.[5]

Employee raised several issues in his brief. He provided that Agency's claims on his CLDF were factually inaccurate. Specifically, Employee argued that Agency's allegation that he was serving a 90-day probationary plan was false. As for Agency's CLDF claims that his room was disorganized and his students were noisy, Employee contended that the principal never observed his class during the school year. As it relates to the claim that Employee lacked a strong bond with fellow teachers, Employee countered by arguing that he was elected by his faculty peers to serve as Chairman of the Local School Restructuring Team, which advised the school principal on personnel and budgetary issues. As for Agency's assertions that Employee did not form a bond with his students, Employee provided that he had one of the highest

[3] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, p. 1-4 (January 7, 2010).
[4] *Amended Order Requesting Briefs* (February 21, 2012).
[5] *District of Columbia Public Schools' Brief* (March 13, 2012).

students' parent participation rates in the school. He also claimed that he volunteered and participated in weekend activities for his students. Employee asserted that he chaperoned events and field trips; served as a member of the prom committee; attended and financially contributed to athletic events; mentored former students who attended the University of Maryland Eastern Shore; and cooked for the student picnics.

In addition to addressing the allegations made in his CLDF, Employee also provided that prior to the RIF, the principal instructed him to identify fifteen employees who should be RIFed. According to Employee, the principal explained that when compiling the list, he could not include teachers falling into the following categories for RIFs – those on the principal's administrative team; teachers hired in the summer of 2009; and teachers associated with Teach for America. Therefore, Employee reasoned that the principal violated RIF statutes and regulations by seeking to protect and exclude certain teachers from the RIF action.[6]

The Initial Decision was issued on June 18, 2012. The AJ found that although the RIF was authorized pursuant to D.C. Official Code § 1-624.02**,** D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF.[7] As a result, she ruled that § 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 if Agency provided one round of lateral competition within his competitive level. The AJ found that Employee was properly afforded one round of lateral competition and explained that Agency properly considered all of the factors enumerated

[6] *Brief of Employee, Charles Alexander*, p. 6-9 (April 20, 2012).
[7] The AJ cited the District of Columbia Court of Appeals' position in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools,* 960 A.2d 1123 (D.C. 2009) and reasoned that D.C. Official Code § 1-624.08 or the "Abolishment Act" was the applicable statute because the RIF was conducted for budgetary reasons, and the statute's 'notwithstanding' language is used to override conflicting provisions of any other section. *Initial Decision,* p. 2-4 (June 13, 2012).

in DCMR § 1503.2 when it conducted the RIF.[8] She also found that Agency provided Employee the required thirty-day notice. In response to Employee's claim that the principal was protecting certain teachers from the RIF, the AJ reasoned that although there may have been probationary employees who were not RIFed, they were also subjected to the RIF procedures.[9]

Employee disagreed with the AJ's decision and filed a Petition for Review with the OEA Board. He asserts that the AJ failed to consider his claim that the principal instructed him to identify fifteen employees to be RIFed, not to include those on the principal's administrative team; teachers hired in the summer of 2009; and teachers associated with Teach for America. Accordingly, Employee contends that Agency did not comply with D.C. Official Code § 1-624.02 or 5 DCMR §15 when conducting the RIF. Consequently, Employee requests that the Board review the AJ's decision and that an evidentiary hearing be conducted to address the factual dispute in question.[10]

Material Issue

In accordance with OEA Rule 633.3(d) ". . . the Board may grant a petition for review when the petition establishes that the initial decision did not address all material issues of law and fact properly raised in the appeal." The D.C. Court of Appeals held in *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 832 (D.C. 2011), that when the AJ is made aware of material issues in an employee's notice of appeal and there is the absence of any discussion of the employee's arguments in the OEA's initial decision, the determination cannot be made that all

[8] The AJ agreed with Agency regarding its discretion and noted that under *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997) the principal was given wide latitude to rank his teachers. The AJ held that Employee did not proffer any credible statutes, case law, or other regulation to refute the Agency's position regarding the principal's authority to utilize discretion in completing the CLDF. With regard to Employee's allegations regarding his competitive ranking scores, the AJ held that he did not proffer any supplemental evidence that would bolster his score. *Initial Decision*, p. 7-10 (June 18, 2012).
[9] *Id.* at 9.
[10] *Petition for Review* (July 31, 2012).

the issues were fully considered. Moreover, the court held in *District of Columbia Department of Mental Health v. District of Columbia Department of Employment Services*, 15 A.3d 692, 697 (D.C. 2011) (quoting *Branson v. District of Columbia Department of Employment Services*, 801 A.2d 975, 979 (D.C. 2002)) that it could not assume that "[an] issue has been considered *sub silentio* when there is no discernible evidence that it has." The *Dupree* court (quoting *Murchison v. District of Columbia Department of Public Works*, 813 A.2d 203, 205 (D.C. 2002)) further reasoned that "to pass muster, an administrative agency decision must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions of law must follow rationally from its findings."

In response to Employee's claim that the principal was protecting certain teachers from the RIF, the AJ reasoned that although there may have been probationary employees who were not RIFed, they were subjected to the RIF procedures.[11] This response misses the mark of Employee's claims. Specifically, Employee claimed that the principal instructed him to identify fifteen employees who should be RIFed which could not include those on the principal's administrative team; teachers hired in the summer of 2009; and teachers associated with Teach for America.[12] The AJ failed to address this material issue in its entirety. Therefore, the Initial Decision did not consider all material issues of fact surrounding Employee's CLDF, despite him properly raising them on appeal. In accordance with *Dupree*, we must remand this case for the AJ to consider the merits of this material issue of fact.

Substantial Evidence to Support CLDF

This Board also finds that this case must be remanded for the AJ to determine if there is

[11] *Initial Decision*, p. 9 (June 18, 2012).
[12] *Brief of Employee, Charles Alexander*, p. 6-7 (April 20, 2012).

substantial evidence to support the CLDF. The D.C. Court of Appeals held in *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883, 885-886 (D.C. 1998) that OEA's authority regarding RIF matters is narrowly prescribed. 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 they provided a thirty-day notice. In *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA)(D.C. Super. Ct. March 14, 2013), the Superior Court of the District of Columbia held that a hearing on the facts and circumstances of computing the CLDF may be necessary for OEA to determine if one round of lateral competition was actually satisfied in these RIF cases. It went on to reason 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 CLDF is supported by substantial evidence."[13] Moreover, the Superior Court for the District of Columbia held in *Onuche David Shaibu v. D.C. Public Schools*, 2012 CA 003606 P(MPA), p. 6 (D.C. Super. Ct. January 29, 2013) that if an employee offers evidence that directly contradicts any of the factual basis for the CLDF, then OEA must conduct a hearing to address the material fact in question.

Agency made the following claims on Employee's CLDF:

> Mr. Alexander is still on a 90[-]day probationary plan from last year. Mr. Alexander was disorganized and failed to follow a logical, linear lesson plan.
>
> His room was disorganized and the students were noisy. He set low expectations for his students and does not plan strong lesson or unit plans. One student sat at his computer and told the Principal she was making up a crossword puzzle for the next day's class.
>
> When Mr. Alexander began to teach, he was yelling instead of speaking in a clear and concise voice. His yelling has been mentioned to him in

[13] *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 past in that it stirs students up while he tried to talk above them. He has not formed a strong bond with his students or his fellow teachers.[14]

As provided in his April 20, 2012 Brief, Employee specifically addressed the allegations made on his CLDF.[15] Thus, in accordance with *Shaibu*, Employee offered contradictory evidence to the statements made in the CLDF.

As a result, this matter is REMANDED to the AJ to consider the merits of Employee's claims regarding the principal's protection of certain teachers and to determine if the CLDF was based on substantial evidence.

[14] *District of Columbia Public Schools' Brief*, Exhibit B (March 13, 2012).

[15] Employee argued that Agency's claim that he was serving a 90-day probationary plan was incorrect. According to Employee, his probationary period ended in April of 2009. As for Agency's CLDF claims that his room was disorganized and his students were noisy, Employee contended that the principal never observed his class during the school year. As it relates to the claim that Employee lacked a strong bond with fellow teachers, Employee countered by arguing that he was elected by his faculty peers to serve as Chairman of the Local School Restructuring Team, which advised the school principal on personnel and budgetary issues. As for Agency's assertions that Employee did not form a bond with his students, Employee provided that he had one of the highest students' parent participation rates in the school. He claimed that he volunteered and participated in weekend activities for his students. He chaperoned events and field trips; served as a member of the prom committee; attended and financially contributed to athletic events; mentored former students who attended the University of Maryland Eastern Shore; and cooked for the student picnics. *Brief of Employee, Charles Alexander*, p. 7-9 and Exhibit # 1 (April 20, 2012).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**, and the matter is **REMANDED** to the Administrative Judge to consider Employee's claims regarding the principal's protection of certain teachers from the RIF action and to determine if the CLDF was based on substantial evidence.

FOR THE BOARD:

_____
William Persina, Chair

_____
Sheree L. Price, Vice Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

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.