THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRENDAN CASSIDY,	)	
Employee	)	OEA Matter No. 2401-0253-10R13R16
	)	
v.	)	Date of Issuance: January 24, 2017
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER ON
MOTION FOR INTERLOCUTORY APPEAL

Brendan Cassidy ("Employee") worked as an English 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]

In July of 2013, the Office of Employee Appeals' ("OEA") Board found that the Administrative Judge ("AJ") failed to consider material issues of law or fact raised by Employee on appeal. Therefore, it remanded the matter to the AJ to consider Employee's arguments. Additionally, the Board requested that the AJ determine if the Competitive Level Documentation Forms ("CLDF") were based on substantial evidence as it related to Employee's one round of

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

lateral competition.[2]

The parties engaged in an extensive discovery process and an evidentiary hearing was held by the AJ. Prior to the AJ issuing his Initial Decision on Remand, both parties filed Closing Briefs to summarize their arguments. Employee contended that Agency did not afford him one round of lateral competition in accordance with the applicable laws, rules, and regulations; the RIF was a pre-text to terminate him without cause; and Agency applied the wrong RIF regulations and criteria. In addition to arguments pertaining to witness credibility and specifics related to his CLDF, Employee asserted that Agency failed to use D.C. Official Code § 1-624.08 and District Personnel Manual ("DPM") Chapter 24 when conducting the RIF action against him.[3]

In its Closing Brief, Agency explained that all English teachers were evaluated based on the same criteria. Moreover, it posited that Employee's arguments pertaining to the CLDF and the RIF pre-text were meritless. Thus, it requested that the RIF action be upheld.[4]

The AJ issued his Initial Decision on Remand on May 28, 2015. He held that Agency should have used D.C. Official Code § 1-624.08, instead of D.C. Official Code § 1-624.02, because the RIF was taken as the result of budgetary constraints. Consequently, he provided that, in accordance with D.C. Official Code § 1-624.08, Employee was entitled to one round of lateral competition and thirty days' notice. The AJ ruled that Employee was provided thirty days' notice. As for the one round of lateral competition, he reasoned that McKinley Technology High School was properly designated as Employee's competitive area, and ET-15 English Teacher was the competitive level. The AJ used Title 5, DCMR § 1503.2 *et al.* and

[2] *Brendan Cassidy v. D.C. Public Schools*, OEA Matter No. 2401-0253-10R13, p. 4-5, *Opinion and Order on Petition for Review* (July 31, 2013).
[3] *Employee's Closing Argument, Proposed Findings of Fact, and Proposed Conclusions of Law,* p. 40 and 62-70 (May 5, 2015).
[4] *District of Columbia Public Schools' Closing Argument,* p. 16-24 (May 5, 2015).

1503.1 when analyzing Employee's one round of lateral competition. Additionally, he offered a detailed and thorough analysis of the CLDF and pre-text arguments raised by Employee. Ultimately, he held that Agency met its burden of proof and upheld its RIF action.[5]

Employee disagreed with the AJ's decision and filed a Petition for Review on Remand on July 2, 2015. He raised the same arguments on Petition for Review that were raised in his Closing Brief. Employee contended that the AJ's decision failed to consider that Agency did not properly administer the RIF because of its use of Title 5, DCMR § 1503.2 *et al.*, instead of DPM Chapter 24. He explained that Chapter 24 of the DPM does not grant an agency head the discretion to assign different weights to factors provided in the one round of lateral competition. Employee also asserts that Agency did not place him on the priority reemployment list. As for the AJ's rulings on the CLDF and pre-text issues, Employee opined that they are not based on substantial evidence.[6]

On August 5, 2015, Agency filed its Response to Employee's Petition for Review on Remand. It provided that because Employee's argument regarding Chapter 24 of the DPM was not raised before the close of the evidentiary hearing, the OEA Board could not consider this issue on appeal. Moreover, it contended that the Board did not specify that Chapter 24 of the DPM be addressed by the AJ on remand. Agency went on to argue that if Chapter 24 should have been considered, it still complied with those requirements. It explained that the relevant section of DPM Chapter 24 requires that tenure of appointment, length of credible service, Veteran's preference, residency preference, and relative work performance be considered to determine if an employee is retained or released. It asserted that it considered all of these factors

[5] *Initial Decision on Remand*, p. 23-29 (May 28, 2015).
[6] The majority of Employee's arguments on these issues amount to his assessment of the AJ's credibility determinations and his contention that he offered documentary evidence to refute statements provided on his CLDF. *Petition for Review of Initial Decision on Remand*, p. 2-30 (July 2, 2015).

together. Therefore, its decision to RIF employee was proper. Accordingly, Agency requested that the OEA Board uphold the AJ's Initial Decision on Remand.[7]

On September 13, 2016, the OEA Board held that in accordance with *Webster Rogers, Jr. v. D.C. Public Schools*, 2012 CA 006364 P(MPA)(D.C. Super. Ct. December 9, 2013), Chapter 24 of the DPM should be used when determining if the RIF actions conducted under D.C. Official Code § 1-624.08 were proper. Because the AJ improperly analyzed this case using Chapter 15 of the DCMR, the Board reasoned that the AJ's Initial Decision on Remand was not based on substantial evidence.[8] Accordingly, the matter was remanded to the AJ for the limited purpose of determining if Agency complied with DPM Chapter 24 when conducting the RIF action, as provided in D.C. Official Code § 1-624.08.[9]

The AJ held a Status Conference on October 17, 2016. Subsequently, he issued a Post-Status Conference Order requesting that both parties submit briefs on "whether Agency complied with DPM Chapter 24, as provided in D.C. Official Code § 1-624.08, when it conducted the instant RIF action."[10] On October 24, 2016, Employee filed a Motion Requesting Certification of an Interlocutory Appeal. In his motion, Employee argues that his case would be unfairly prejudiced if Agency was allowed to submit briefs on DPM Chapter 24, when it had ample opportunity to provide this information before the record was closed.[11]

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[7] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 5-11 (August 5, 2015). Employee filed a reply to Agency's Response to Petition for Review and made many of the same arguments presented in his Closing Brief and Petition for Review on Remand. *Employee's Reply to Agency's Response to Employee's Petition for Review of Initial Decision on Remand* (August 18, 2015).

[8] 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. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *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).

[9] *Brendan Cassidy v. D.C. Public Schools,* OEA Matter No. 2401-0253-10R13, *Opinion and Order on Remand* (September 13, 2016).

[10] *Post Status Conference Order* (October 20, 2016).

[11] *Motion Requesting Certification of an Interlocutory Appeal Regarding the Office's Plan to Accept Briefs or Any*

Subsequently, on October 27, 2016, the AJ issued an order granting Employee's certification of the Interlocutory Appeal to the Board.[12] After the order was granted, Agency filed its response to the Interlocutory Appeal. It asserts that in general, courts and administrative forums disfavor Interlocutory Appeals. Agency contends that the AJ has total discretion in rendering his findings. It offers several examples of matters that were remanded to Administrative Judges who allowed parties to submit briefs or conduct evidentiary hearings. Therefore, Agency requests that the motion for Interlocutory Appeal be denied.[13]

This matter was remanded to the AJ because he relied on an erroneous regulation when offering his analysis. The AJ neglected to consider DPM Chapter 24 despite Employee's argument that Agency failed to meet its requirements. In Employee's Closing Brief, he argued that D.C. Official Code § 1-624.08 and DPM Chapter 24 were not properly used when Agency conducted the RIF action against him.[14]

More importantly, the AJ knew or should have known that DPM Chapter 24 was the proper regulation to offer an analysis of Agency's RIF action. On December 9, 2013, the Superior Court for the District of Columbia held in *Webster Rogers, Jr. v. D.C. Public Schools*, 2012 CA 006364 P(MPA)(D.C. Super. Ct. December 9, 2013), that Chapter 24 of the DPM should be used when determining if the RIF actions conducted under D.C. Official Code § 1-624.08 were proper. Thus, the AJ was aware well before his Initial Decision on Remand that an analysis of Title 5, DCMR § 1503.2 *et al.* was not appropriate in this case.

Further Argument on Remand and Motion to Stay the Proceedings During the Time the Interlocutory Appeal is Pending, p. 2 (October 24, 2016).

[12] *Order Regarding Employee's Motion for an Interlocutory Appeal* (October 27, 2016).

[13] *District of Columbia Public Schools' Response to Employee's Motion Requesting Interlocutory Appeal and Motion to Stay* (November 1, 2016). Employee filed a reply to Agency's response on November 8, 2016. It reasons that the cases Agency used as examples are distinguishable from his case because none of the other cases involved a full evidentiary hearing with written closing arguments. *Employee's Reply to Agency's Response to Employee's Motion Requesting Interlocutory Appeal and Motion to Stay* (November 8, 2016).

[14] *Employee's Closing Argument, Proposed Findings of Fact, and Proposed Conclusions of Law,* p. 40 and 62-70 (May 5, 2015).

Furthermore, Agency had several days of an evidentiary hearing and its closing brief to offer its position on DPM Chapter 24. It instead provided its curt explanation that it complied with the regulation in its response to Employee's Petition for Review.[15] Agency offered no proof of compliance with DPM Chapter 24. It only offered that it complied with DPM Chapter 24 because it considered tenure of appointment, length of credible service, Veteran's preference, residency preference, and relative work performance to determine if an employee is retained or released.[16] Therefore, it should not be allowed another opportunity to provide additional arguments when so many chances existed prior to the record closing. At this juncture, it is improper for the AJ to request additional briefs on DPM Chapter 24.

Despite the parties conflicting positions related to the Interlocutory Appeal, none of this would have been an issue if the AJ offered an analysis based on DPM Chapter 24 instead of Title 5, DCMR § 1503.2 *et al.* But for the AJ's analysis of the wrong regulation, this matter would have been decided in his May 28, 2015 Initial Decision on Remand**.** Thus, as was consistent with this Board's September 16, 2016 remand, the Interlocutory Appeal is granted for the AJ to determine if Agency complied with DPM Chapter 24, as provided in D.C. Official Code § 1-624.08, when conducting the RIF action.

[15] *District of Columbia Public Schools' Response to Employee's Motion Requesting Interlocutory Appeal and Motion to Stay* (November 1, 2016).
[16] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 5-11 (August 5, 2015). It should be noted that Agency did not offer any evidence to support its claim that it complied with Chapter 24, as it should have done during the evidentiary hearing or in its closing statement after the hearing.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Interlocutory Appeal is **GRANTED**, and this matter is **REMANDED** to the Administrative Judge.

FOR THE BOARD:

_____
Sheree L. Price, Interim Chair

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Vera M. Abbott

_____
Patricia Hobson Wilson

_____
P. Victoria Williams

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.