

Notice: This decision is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Office Manager of any formal errors in order that corrections be made prior to publication. This is not intended to provide an opportunity of a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
JOE BERDIN,)	
Employee)	OEA Matter No.: 2401-0039-11
)	
v.)	Date of Issuance: July 26, 2013
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	STEPHANIE N. HARRIS, Esq.
Agency)	Administrative Judge
)	
Joe Berdin, Employee <i>Pro-Se</i>		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 10, 2010, Joe Berdin (“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 abolishing his position through a Reduction-in-Force (“RIF”). Employee’s RIF notice was dated October 22, 2010, with an effective date of November 21, 2010. Employee’s position of record at the time his position was abolished was a Placement Specialist at the DCPS Office of Special Education’s Non-Public Unit (“NPU”). Employee was serving in Educational Service status at the time his position was abolished. On January 11, 2011, Agency filed an Answer to Employee’s appeal.

I was assigned this matter on July 30, 2012. On September 28, 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 (“September 28th Order”). Agency timely submitted its brief on October 12, 2012. The undersigned granted Employee’s request for an extension of time, and his brief was timely submitted on October 31, 2012.

Upon further review of this matter, the undersigned issued an Order dated March 11, 2013 (“March 11th Order”), requiring Agency to submit a brief and additional documentation on or before March 26, 2013. Employee was given an optional deadline to submit a response to

Agency's submission on or by April 9, 2013. The undersigned is in receipt of Agency's brief; Employee did not submit an optional brief in response to the March 11th Order. All required submissions have been received in this matter. After reviewing the record, I have determined that there are no material facts in dispute requiring further proceedings 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 FACT, ANALYSIS, AND CONCLUSIONS OF LAW

On October 8, 2010, former D.C. School Chancellor Michelle Rhee ("Chancellor Rhee") authorized a RIF pursuant to D.C. Code § 1-624.02, Title 5 of the District of Columbia Municipal Regulations ("DCMR") Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was conducted to eliminate specific positions in NPU and was necessitated by budgetary reasons, curtailment of work and reorganization of functions.¹

Although the instant RIF was authorized in part pursuant to D.C. Code § 1-624.02,² which encompasses more extensive procedures, for the reasons explained below, I find that D.C.

¹ See Agency's Answer, RIF Authorization, Tab 2 (January 12, 2011).

² 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;

Official Code § 1-624.08 (“Abolishment Act” or “the Act”) is the more applicable statute to govern this RIF.

Section § 1-624.08 states in pertinent part that:

(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*, 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.”³ 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.”⁴

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, DCPS conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”⁵ The Court of Appeals found that the 2004 RIF conducted for budgetary

-
- (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.

³*Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

⁴*Id.* at p. 5.

⁵*Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

reasons, triggered the Abolishment Act instead of “the regular RIF procedures found in D.C. Code § 1-624.02.”⁶ 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.”⁷

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.⁸ 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.”⁹ 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.”¹⁰

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹¹ 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. Therefore, I am primarily guided by § 1-624.08 for RIFs. Under this section, an employee whose position was terminated may only contest before this Office:

1. That he did not receive written notice thirty (30) days prior to the effective date of his separation from service; and/or
2. That he was not afforded one round of lateral competition within his competitive level.

Accordingly, the instant RIF will be analyzed under D.C. Code § 1-624.08, as well as Title 5 DCMR, Chapter 15, which contains the specific regulations that govern RIFs for Educational Service employees.

Employee’s Position

In his Petition for Appeal, Employee requests that he be reinstated to his former position. Employee challenges the procedure, process, and substance of the RIF. He claims that the RIF was procedurally and substantively flawed and it was conducted in a discriminatory and arbitrary manner. Employee further claims that the RIF was pre-textual, conducted for inappropriate statutory reasons, and was actually a disguised termination. He alleges that the work in his position was still being performed by other individuals in violation of the applicable Collective Bargaining Agreement (“CBA”).¹²

In his brief, Employee also makes the following contentions:

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

¹⁰ *Id.*

¹¹ *See Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

¹² *See* Petition for Appeal (December 10, 2010).

- 1) Employee alleges that although his RIF Notice stated that he would be separated on November 21, 2010, he “contends [that] the separation, for all intents and purposes, was actually effectuated on October 22, 2010,” the date of the RIF Notice.¹³ He states that he was required to return all of Agency’s equipment, his identification badge, was told not to report to any assigned worksite or central administration offices, and was escorted out of the building. Employee believes that due to these actions, Agency did not satisfy the thirty (30) day notice requirement. He also indicates that the RIF Notice did not give any reasons or cause for the RIF.
- 2) He states that Chancellor Rhee abused D.C. Code §1-624.08 and authorized the instant RIF to dismiss specific employees and avoid using adverse action procedures.
- 3) Employee claims Chancellor Rhee was not the head of Agency on the effective date of the RIF, November 21, 2010. He claims that Chancellor Rhee was not authorized to identify his position to be abolished because she announced her resignation on October 13, 2010, and there was no other indication of a different resignation date.¹⁴ He alleges that because Chancellor Rhee was no longer employed by Agency, she improperly issued the RIF Notice dated October 22, 2010.
- 4) Employee questions the statement in the RIF Notice that there is a limited right to appeal a RIF to this Office, citing a portion of the *Washington Teacher’s Union*¹⁵ case, noting the following: “At the time of its creation, the Council described the OEA as an independent, personnel appeals authority which will hear all personnel related employee appeals,” with Employee adding emphasis on the word ‘all.’¹⁶
- 5) He also questions the use of, and reasons for contracting out the positions eliminated in the instant RIF, as described in the October 8, 2010, RIF Authorization submitted by Agency. Employee takes particular issue with Agency’s assertion that it would now “be able to establish incentive structures that encourage contactors to address the needs of DCPS students without encouraging the contractors to act in such a manner as to preserve their jobs.” Employee states that based on this intention, the RIF was not the appropriate action to be taken. He also suggests that if he was addressing the needs of students to preserve his job, “then the Chancellor was obligated to follow Title 5, Adverse Action Procedures of the CBA between the Council of School Officers and DCPS.”¹⁷
- 6) Employee alleges that there was no true budgetary reduction because the NPU received a 7% increase according to the District of Columbia Annual Operating Budget/Capitol Plan for FY 2010.¹⁸ Employee also claims that the costs associated with replacing Placement Specialists in NPU by hiring contractors exceeded the amount of money proposed to be saved by conducting the instant RIF.
- 7) Referencing an August 15, 2012 press release, Employee claims that Agency has not operated under a fiscal emergency in over ten years.¹⁹ He claims that Agency has not

¹³ Employee Brief, p. 1 (October 31, 2012).

¹⁴ *Id.*, Tab 2.

¹⁵ 960 A.2d 1123.

¹⁶ Employee Brief, p. 2; Tab 3 (October 31, 2012).

¹⁷ *Id.*, p. 3.

¹⁸ *Id.*, Tab 7.

¹⁹ *Id.*, Tab 11.

- offered any evidence 1) of budgetary constraints at the time of the RIF; 2) to support the reorganization of NPU; 3) to show that a curtailment of work was necessary; or 4) that the competitive level was eliminated.
- 8) By using contractors in substitution of Placement Specialists, Employee submits that work existed and there was no true curtailment of work. Referring to Chancellor Rhee's statement that NPU would function more properly by use of contractors, Employee argues that "if the unit is functioning, then the competitive area has not been eliminated."²⁰
 - 9) Employee argues that Agency still employs managers that are assigned to manage Placement Specialists contractors. Employee states that he did not get a chance to compete for the management positions retained in the NPU competitive area. He also alleges that prior to the RIF, the management employees retained "were Placement Specialists or other positions identified to be abolished." Employee further argues that because competitive levels are based on the permanent position of the employee, all Placement Specialists should have been "given one round of competitive level consideration."²¹
 - 10) He claims that Agency retained one employee within the Placement Specialist competitive level, and therefore, he should have been allowed to compete for the one remaining position of Placement Specialist.
 - 11) Employee argues that Agency's RIF was improper because the Placement Specialist position is not defined by DCPS, but instead is defined by the Individual with Disabilities Education Improvement Act of 2004.
 - 12) Employee further asserts that DCPS violated the provisions of the District of Columbia Privatization Act by using contractors from First Home Care to replace Placement Specialists. He explains that this law is applicable because it was prior to the Abolishment Act and was evaluated for compliance in the same year as the Abolishment Act.
 - 13) He claims that Agency failed to 1) retain a Retention Roster for employees impacted by the instant RIF and 2) establish a mechanism to inform a Recruiting Officer that a RIF'd employee applied for a position. Employee further claims that Agency "is now acting on the inappropriate RIFs in 2012. Our unit continues to be excluded."²²
 - 14) Employee argues that Agency failed to communicate with Union Representatives as it related to positions within the Central Office, noting that positions have been advertised on websites other than the DCPS official website in an effort to hide positions.
 - 15) Employee alleges that Agency has engaged in unfair hiring practices, age discrimination, unfair labor practices, and race discrimination. He alleges that Agency "has taken to fraternization to select and promote employees" and that many positions are filled without ever being advertised.²³

²⁰ *Id.*, p. 4.

²¹ *Id.*, pp. 5-7, Tab 13.

²² *Id.*, p. 6.

²³ *Id.*, p. 6.

- 16) He claims that Agency's efforts to undermine the Council of School Officers ("CSO") have been well documented and constitutes an unfair labor practice in violation of section 7116 of an uncited Federal Labor Relations Authority statute. Employee also claims that Agency favors the Washington Teachers Union ("WTU") over the CSO and has changed positions within the NPU so that they will fall under the WTU.
- 17) In regards to race discrimination, Employee contends that Agency "targeted the Non Public Unit for elimination because all (100%) of the people in the identified positions were black, and a majority was over the age of 40."²⁴
- 18) In conclusion, Employee *stipulates* that Chancellor Rhee "followed the procedures outlined in D.C. Code § 1-624.2," but asserts that the applicable provision is "D.C. Code §1-624.8." She states that if the "RIF was the intention, Agency should be held to the Abolishment Act." Employee claims that Agency's use of "D.C. Code §1-624.2" constitutes an unfair labor practice (emphasis added).²⁵

Agency's Position

Agency submits that it followed RIF procedures in accordance with 5 DCMR § 1500.2,²⁶ and that former Chancellor Rhee authorized the RIF to eliminate specific positions from the NPU in order to address reorganization and elimination of functions, curtailment of work, and budgetary issues. In order to better meet its obligations to students, to reduce administrative complaints, and to promote compliance with the *Blackman/Jones v. District of Columbia*²⁷ consent decree, Agency reorganized NPU by outsourcing functions that could be performed more efficiently and effectively by a contractor under the oversight of DCPS employees. Agency contends that prior to the RIF, NPU consisted of twenty-five (25) DCPS staff positions, and after the reorganization, NPU eliminated all non-management staff positions to reduce costs associated with NPU while improving performance. Agency asserts that NPU was determined to be a competitive area and the Placement Specialist position constituted a competitive level. Agency further states that there were nine (9) other Placement Specialists whose positions were eliminated during the instant RIF. Therefore, according to Agency, a Competitive Level Documentation Form ("CLDF") was not warranted and one round of lateral competition was not required because the entire competitive level was eliminated.²⁸ Agency also asserts that it provided Employee with the required specific written notice, thirty (30) days prior to the effective date of the instant RIF. Moreover, Agency denies that the RIF was pretextual and disguised as a termination and notes that OEA lacks jurisdiction to address the alleged collective bargaining issues raised by Employee.²⁹

²⁴ *Id.*, p. 7.

²⁵ *Id.*, pp. 2, 7. Additionally, it appears that Employee is referencing D.C. Code §§1-624.02, 10624.08, as there are no provisions for §§1-624.2 and 1-624.8.

²⁶ 5 DCMR § 1500.2 states in relevant part that a RIF is a process whereby the total number of positions is reduced for one of the following reasons:

- (a) budgetary reasons;
- (b) curtailment of work;
- (c) reorganization of functions; or
- (d) other compelling reasons.

²⁷ Civil Action Nos. 97-1629 (PLF) and 97-2402 (PLF) (D.D.C.).

²⁸ Agency Answer, p. 4 (January 12, 2011); Agency Brief, pp. 3-4 (October 12, 2012).

²⁹ See Agency Answer (January 12, 2011); Agency Brief (October 12, 2012).

Additionally, in response to Employee's allegations that Chancellor Rhee resigned from her position prior to the date of the instant RIF, October 22, 2010, Agency submits Chancellor Rhee's SF-50, which shows the effective date of her resignation as November 2, 2010.³⁰

OEA's Jurisdiction over RIF Appeal

Employee questions whether OEA in fact has a limited right over RIF appeals and refers to a portion of the *Washington Teacher's Union*³¹ case which references that at the time of OEA's creation, the D.C. Council described this Office as an "independent, personnel appeals authority which will hear all personnel related employee appeals." Employee's reliance on this statement is misguided. The Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA") amendments provide that employees separated via a RIF are entitled to one round of lateral competition within their competitive level and thirty (30) days advanced written notice of the effective date of the RIF.³² Further, OEA's jurisdiction regarding RIFs is well established and this Office has consistently held that RIF appeals are generally limited to whether Agency 1) properly provided Employee with one round of lateral competition within his competitive level and 2) gave Employee thirty (30) days specific written notice prior to the effective date of the RIF.³³

Entire Competitive Level Abolished

This Office has consistently held that when an employee holds the only position in his competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added), D.C. Official Code § 1-624.08(d), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR § 1503.3 and 6 DCMR § 2420.3, are inapplicable.³⁴ An agency is therefore not required to go through the rating and ranking process described in that chapter when the entire competitive level is abolished.

Here, Employee's Notification of Personnel Action, Standard Form 50 ("SF-50") reflects that Employee's position of record at the time he was separated from service was Placement Specialist.³⁵ Agency asserts that NPU was determined to be a competitive area and the Placement Specialist position constituted a competitive level. Based on the documents of record, I find that Employee's official position of record was properly used as his competitive level for the instant RIF.

According to the RIF Authorization Notice, the Placement Specialist position, along with several others, were eliminated subject to the instant RIF.³⁶ Employee claims that the competitive area was not eliminated as a result of the instant RIF. Agency has not claimed that

³⁰ Agency Brief, Tab 1 (March 28, 2013).

³¹ 960 A.2d 1123.

³² *Scott-Gilchrist v. D.C. Department of Human Service*, OEA Matter No. 2401-0177-09 (May 28, 2010).

³³ *Id.* See also *Gaddy v. District of Columbia Public Schools*, OEA Matter No. 2401-0036-10 (February 7, 2012); *Cooper v. District of Columbia Public Schools*, OEA Matter No. 2401-0238-09 (February 24, 2011); *Nelson v. Department of Employment Services*, OEA Matter No. 2401-0041-05 (March 14, 2006); *Gill v. District of Columbia Public Schools*, OEA Matter No. 2401-0074-04 (February 23, 2005).

³⁴ *Perkins v. District Department of Transportation*, OEA Matter No. 2401-0288-09 (October 24, 2011); *Allen v. Department of Health*, OEA Matter No. 2401-0233-09 (March 25, 2011); *Wigglesworth v. D.C. Department of Employment Services*, OEA Matter No. 2401-0007-05 (June 11, 2008); *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005).

³⁵ Agency Brief, Tab 1 (October 12, 2012).

³⁶ Agency Answer, RIF Authorization, Tab 2 (January 12, 2011).

the entire competitive area was eliminated; only that certain competitive levels, including Placement Specialist, were eliminated. The elimination of the entire competitive area is not necessary for Agency to eliminate Employee's entire competitive level under the RIF regulations of D.C. Code §1-624.08. Further, in support of its assertion that the instant RIF eliminated the entire competitive level, Agency provided an affidavit from Neela Rathinasmay, who served as the Senior Director of Administration in the Office of Special Education during the time of the instant RIF. Ms. Rathinasmay states that she was responsible for notifying employees of terminations resulting from the RIF. Ms. Rathinasmay further asserts that the entire competitive level for the Placement Specialist position was eliminated and therefore, Employee was not provided with one round of lateral competition.³⁷

Additionally, Employee claims that there was no true curtailment of work because contractors were hired for Placement Specialist positions. He also claims that he should have been given a right of first refusal for the contractor Placement Specialist position. The undersigned finds these arguments wholly unpersuasive. Employee was only entitled to compete for a position within his competitive level of Placement Specialist. Agency's use of contractors does not in and of itself prove that there was no curtailment of work and Employee has failed to provide any statute or case law showing that he should have been entitled to compete for a contractor position which is outside of District government employment. Accordingly, I find that Employee would have only been entitled to one round of lateral competition within his specific competitive level of Placement Specialist.

Employee also alleges that there was one employee retained in the Placement Specialist position who was retained from the instant RIF and he argues that he should have been allowed to compete for this position using a CLDF. However, Employee has not provided any evidence to corroborate this allegation. The documents submitted to support this allegation, including a solicitation for Placement Specialist contractors, an Individualized Education Program form that mentions a DCPS 'LEA' employee, and LinkedIn profiles for current NPU employees, do not confirm or prove that NPU retained a Placement Specialist during the instant RIF.³⁸ Further, Agency has provided documentation showing that the entire competitive level for Placement Specialist was eliminated.³⁹

Accordingly, based on the documents of record, specifically the RIF Authorization letter eliminating specific positions at NPU and the affidavit of Ms. Rathinasmay, I find that Employee's entire competitive level was properly abolished and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(d) pertaining to multiple-person competitive levels when it implemented the instant RIF. For this reason, Agency was not required to provide Employee with one round of lateral competition.

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

³⁷ Agency Brief, Tab 2, (October 12, 2012).

³⁸ See Employee Brief, Tab 13 (October 31, 2012).

³⁹ Agency Answer, Tab 2, (January 12, 2011); Agency Brief, Tab 2, (October 12, 2012).

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).

Here, the record shows that Employee's RIF notice was dated October 22, 2010 and the effective date for the RIF was November 21, 2010.⁴⁰ The notice states that Employee's position was eliminated as part of a RIF and also provided Employee with information about his appeal rights. Moreover, Employee acknowledged that he received his RIF notice on October 22, 2010, which equates to thirty (30) days written notice.⁴¹ Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the instant RIF.

Employee also contends that he was not properly given thirty (30) days notice because he was 1) required to turn in all his work-related items; 2) was told not to report to any assigned worksites or the central administration offices; and 3) was escorted from the building. For these reasons, Employee contends that the RIF was actually effectuated on the date of the RIF Notice, October 22, 2010, which he also claims failed to disclose the reasons for the RIF.

I disagree with Employee's contention. Agency's RIF Notice contained all of the requirements listed in 5 DCMR §1506.1, which includes a statement of "specifically what action [was taken], the effective date of the action, and other necessary information regarding the employee's status and appeal right." In this case, the RIF Notice stated that Employee's position was eliminated as part of a RIF effective November 21, 2010, along with information about his appeal rights to this Office. Additionally, in its Answer, Agency provided a copy of the RIF Authorization, dated October 8, 2010, which detailed the specific reasons and legal basis for the instant RIF. Further, it is within Agency's discretion to request the return of work related items, escort an Employee out of the workplace, and to place an employee on administrative leave during the thirty (30) day notice period for a RIF.⁴² Based on the record, I find that Employee was properly placed on paid administrative leave from October 22, 2010 until November 21, 2010.

Agency Compliance with D.C. Code §1-624.08

Employee argues that D.C. Code §1-624.08 should have been used instead of D.C. Code §1-624.02 and that the use of the latter constitutes an unfair labor practice violation. Employee has also *stipulated* that Agency followed the procedures of D.C. Code § 1-624.02 (emphasis added).⁴³ As noted in the analysis above, the undersigned finds that D.C. Code §1-624.08 is the more applicable provision for the instant RIF. Further, Agency's initial use of D.C. Code §1-624.02 does not constitute an error since the relevant provisions of D.C. Code §1-624.08 granting employee one round of lateral competition and thirty (30) days written notice prior to the effective date of the RIF are wholly encompassed within D.C. Code §1-624.02.⁴⁴ Therefore,

⁴⁰ Agency Answer, Tab 1, (January 12, 2011).

⁴¹ Petition for Appeal, p. 4 (December 10, 2010).

⁴² See District Personnel Manual ("DPM") § 2422.11, which states in part that an employee who receives written notice of release from his or her competitive level due to reduction in force may be placed on administrative leave at the discretion of the agency head.

⁴³ Employee Brief, p. 2 (October 31, 2012).

⁴⁴ See D.C. Code §§1-624.02(a(2)); (d) (2001).

Employee's stipulation that Agency followed the procedures of D.C. Code §1-624.02 essentially means that Agency also followed the provisions of D.C. Code §1-624.08.

Employee also alleges that Chancellor Rhee abused D.C. Code §1-624.08 and authorized the RIF as a disguised termination to dismiss specific employees without having to follow adverse action procedures. Based on a review of the record, the undersigned finds that there is no evidence suggesting that the instant RIF was in fact an adverse action, which resulted in Employee's termination. Employee has failed to provide any direct evidence to corroborate this allegation, especially in light of the fact that all of the positions in Employee's competitive level were eliminated via the instant RIF. Further, Agency met its burden of proof by providing official documentation showing that Employee's entire competitive level was eliminated and Employee acknowledged that he received thirty days written notice prior to the effective date of his separation, which are the two provisions that this Office is charged with addressing.⁴⁵

As noted in the above headings, I find that Employee was properly separated via the instant RIF after his entire competitive level was abolished and he was given thirty (30) days written notice prior to the effective date of the RIF. Although Employee's ancillary arguments do not appear to be directly related to whether Agency properly followed D.C. Code §1-624.08, and could be characterized as pre-RIF, post-RIF, or collateral issues, they will be addressed in the following sections.⁴⁶

RIF and Budget Rationale

Employee alleges that the RIF was procedurally and substantively flawed. He questions the reasons for, and Agency's use of contractors to handle the workload of the positions eliminated by the instant RIF. He argues that there was no true budgetary reduction or curtailment of work and that the costs associated with using contractors as Placement Specialists exceeded the amount of money saved by conducting the instant RIF. Employee also claims that Agency has not offered any evidence 1) of budgetary constraints at the time of the RIF; 2) to support the reorganization of NPU; or 3) to show that a curtailment of work was necessary.

In *Anjuwan v. D.C. Department of Public Works*,⁴⁷ the D.C. Court of Appeals ruled that OEA's authority over RIF matters is narrowly prescribed. The Court ruled that OEA lacked authority to determine whether an Agency's RIF was *bona fide* and explained that OEA's authority is to determine whether the RIF complied with applicable District personnel statutes and regulations dealing with RIFs (emphasis added).⁴⁸ The Court further noted that OEA does not have the "authority to second guess ... management decisions about which position should be abolished in implementing the RIF."⁴⁹ OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issues of whether an Agency's budgetary shortfall, curtailment of work, or RIF was *bona fide*, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services or chooses which position are subject to a RIF. In this case, how Agency elected to reorganize internally

⁴⁵ See Petition for Appeal, p. 4 (December 10, 2010); Agency Answer, Tab 2 (January 12, 2011).

⁴⁶ See *Mezile*, No. 2010 CA 004111.

⁴⁷ 729 A.2d 883 (December 11, 1998).

⁴⁸ The applicable RIF regulations are contained in D.C. Code §§1-624.08(d)-(f).

⁴⁹ *Anjuwan*, 729 A.2d at 885.

was a management decision, over which neither OEA nor this Administrative Judge (“AJ”) has any control.⁵⁰

Further, while issues of Agency’s bona fide budgetary constraints are outside of OEA’s jurisdiction, Employee has provided various editorial documents purportedly showing that there was no true budgetary shortage. However, none of these documents fully corroborate that there were no budgetary constraints at Agency *during the time of the instant RIF* (emphasis added).⁵¹ The editorial documents presented by Employee merely express an opinion on various issues surrounding Agency, and as stand-alone documents do not serve to substantiate Employee’s allegations. Additionally, while Agency’s use of contractors as Placement Specialists does show that there was work to perform as suggested by Employee, it also corroborates Agency’s rationale for curtailment of work and reorganization of NPU. Further, Agency has provided sufficient supporting documentation in the form of the October 8, 2010, RIF Authorization, which describes the reasons for the RIF under the guidelines 5 DCMR §1500.2.⁵²

Post-RIF Activity

Employee alleges that the work in his former position is still being performed by other individuals in violation of the CBA. He also contends that the management employees retained after the instant RIF actually worked as Placement Specialists or other positions that were identified during the instant RIF. Employee has provided several documents in support of this contention including ‘LinkedIn’ profiles⁵³ for current employee in management positions at NPU and a March 2011 job announcement for an Assistant Program Director.⁵⁴

As noted above, OEA’s authority over RIF matters is narrowly prescribed and this Office has consistently held that it lacks jurisdiction to entertain any post-RIF activity, which may have occurred at an agency.⁵⁵ Further, Employee has failed to set forth adequate material evidentiary facts or provide direct evidence to corroborate this contention. The fact that there are current employees in management positions at NPU, who may have been employed during the instant RIF, alone, does not equate to reasoning that these employees should have been subject to the instant RIF or could not have been employed by Agency at a later date.

Violation of CBA

Regarding Employee’s contention that Agency’s RIF violated the CBA with CSO and other various allegations regarding unfair labor practices, the undersigned notes that D.C. Code §1-605.02, specifically reserves resolution of unfair labor practice allegations to the Public Employee Relations Board (“PERB”). According to the preceding statute, PERB is tasked with deciding whether unfair labor practices have been committed and with issuing appropriate remedial orders. Moreover, this Office has held that complaints relating to Employee’s union

⁵⁰ *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

⁵¹ See Employee Brief (October 31, 2012): e.g. Tab 9 (undated Washington Post Editorial describing layoff of twenty-four special education staffers, but also noting DCPS projected overspending of \$30 million); Tab 10 (undated DC Watch article); Tab 11 (August 15, 2012 Press Release by District of Columbia Mayor’s Office describing an *unanticipated* surplus used to repay employees for furloughs).

⁵² Agency Answer, p. 5; Tab 2 (January 12, 2011).

⁵³ Employee Brief, Tab 13: Undated; purportedly retrieved on October 19, 2012 (October 31, 2012).

⁵⁴ Employee Brief, Tabs 13,14 (October 31, 2012).

⁵⁵ *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); see also *Anjuwan v. D.C. Department of Public Works*, 729 A.2d 883.

activities are considered grievances and do not fall within the purview of OEA's scope of review.⁵⁶ Therefore, I find that Employee's allegations regarding Agency's alleged unfair labor practices are outside of OEA's jurisdiction.

Discrimination Claims

Employee alleges that the instant RIF was pre-textual and conducted in a discriminatory and arbitrary manner. He further alleges that Agency engaged in age and race discrimination via the instant RIF by "targeted the Non Public Unit for elimination because all (100%) of the people in the identified positions were black, and a majority was over the age of 40."⁵⁷

Claims of race and age discrimination are generally outside of the this Office's purview of jurisdiction. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR").⁵⁸ Per this statute, the purpose of OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Moreover, the Court in *Anjuwan*⁵⁹ held that OEA's authority over RIF matters is narrowly prescribed and explained that OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied...the rules and regulations issued pursuant thereto." This court further explained that OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs."⁶⁰ The undersigned notes that Employee has failed to submit or set forth any adequate material or evidentiary facts to support his allegations of age and race discrimination.

The undersigned also notes that the Court in *El-Amin v. District of Columbia Dept. of Public Works*⁶¹ stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that [he] was targeted for whistleblowing activities outside the scope of the equal opportunity laws, or that [his] complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation..."⁶² Here, Employee's claims, as described in his submissions to this Office do not allege any whistleblowing activities as defined under the Whistleblower Protection Act. Thus, I find that Employee's claims of discrimination fall outside the scope of OEA's jurisdiction.

Collateral Issues

Employee asserts that Agency violated the provisions of the District of Columbia Privatization Act, explaining that this law is applicable because it was evaluated for compliance and enacted prior to the Abolishment Act. He also asserts that the instant RIF was improper because the Placement Specialist position is not defined by Agency, but instead is defined by the Individuals with Disabilities Education Improvement Act of 2004.

OEA has no jurisdiction to hear claims regarding the enforcement of the Privatization Act or Individuals with Disabilities Education Improvement Act of 2004, which are collateral issues

⁵⁶ See also *Anjuwan v. D.C. Department of Public Works* 729 A.2d 883 (December 11, 1998).

⁵⁷ Employee Brief, p. 6 (October 31, 2012).

⁵⁸ See also *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111, p.6 (D.C. Super. Ct. February 2, 2012)(Superior Court stated that OEA was the wrong venue for discrimination claims).

⁵⁹ 729 A.2d 883.

⁶⁰ See *Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

⁶¹ 730 A.2d 164 (May 27, 1999).

⁶² *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

in terms of this RIF appeal. The undersigned reiterates the District of Columbia Court of Appeals' finding in *Anjuwan*,⁶³ which states that OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied...the rules and regulations issued pursuant thereto."⁶⁴

Further, Employee has failed to provide any statutory or case law requirement, nor any credible analysis showing how enforcement of the Privatization Act or the Individuals with Disabilities Education Improvement Act of 2004 falls within the purview of this Office's jurisdiction. This Office has held that an "employee raising collateral issues when challenging a RIF does not confer additional authority upon [this] Office to enforce all laws and regulations, as such would clearly exceed both the limited statutory authority and jurisdiction of this Office."⁶⁵ Furthermore, OEA has long held that the jurisdiction for RIF appeals is limited to the authority granted by the plain language of the OPRAA statute, and particularly the specific provisions of D.C. Code §§1-624.08(d)-(e).⁶⁶

Priority Reemployment

Employee argues that Agency failed to maintain proper communication for priority reemployment consideration. In the instant case, complaints addressing priority reemployment are generally considered post-RIF actions, which are outside of the jurisdiction of this Office. Agency's RIF Notice states that "[e]mployees separated pursuant to a reduction in force receive priority reemployment consideration, but are not guaranteed reemployment."⁶⁷ The notice also explained that employees may apply for future job vacancies at DCPS or within the District government that arise in the future.⁶⁸ Further, 5 DCMR § 1505.3⁶⁹ states that while Agency is authorized to establish and implement priority reemployment procedures, separated employees are not granted a right to be reemployed. As such, the undersigned finds that Agency is not required to guarantee Employee any position under the priority reemployment provisions.

Grievances

Additionally, it is an established matter of public law that as of October 21, 1998, pursuant to OPRAA, D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Complaints regarding priority reemployment, maintenance of a Retention Roster for RIF employees, advertisement of positions, and Agency hiring practices are generally considered grievances and do not fall within the purview of OEA's scope of review. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

⁶³ 729 A.2d 883.

⁶⁴ See also *Gilmore*, 695 A.2d 1164.

⁶⁵ *Scott-Gilchrist v. D.C. Department of Human Services*, OEA Matter No. 2401-0177-09 (May 28, 2010).

⁶⁶ *Id.*

⁶⁷ See Agency's Answer, Tab 1 (January 12, 2011).

⁶⁸ *Id.*

⁶⁹ 49 DCR 5975 (2002).

CONCLUSION

Based on the foregoing, I find that Employee was properly separated via the instant RIF after his entire competitive level was abolished and he was given thirty (30) days written notice prior to the effective date of the RIF. I therefore conclude 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 Agency's action of abolishing Employee's position through a Reduction-In-Force is **UPHELD**.

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge