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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
CAROLYN WILLIAMS,)	
Employee)	OEA Matter No.: 2401-0124-10-R13
)	
v.)	Date of Issuance: April 22, 2014
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	STEPHANIE N. HARRIS, Esq.
Agency)	Administrative Judge
)	
Derick Sohn, Esq., Employee Representative		
Sara White, Esq., Agency Representative		

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On November 2, 2009, Carolyn Williams (“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. On December 9, 2009, Agency filed an Answer to Employee’s appeal.

I was assigned this matter on February 8, 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. Agency timely submitted its brief on February 29, 2012. On March 8, 2012, Employee requested an extension in order to consult counsel. In a March 12, 2012 Order, the undersigned granted the extension of time request and ordered Employee to submit her brief on or before March 28, 2012. On March 23, 2012, Counsel for Employee submitted a second request for an extension of time after representation commenced on March 22, 2012. On March 27, 2012, I issued an Order granting the second request for an extension of time with a revised deadline of April 11, 2012. Employee submitted her brief as ordered on April 11, 2012. Both parties timely submitted their briefs.

On May 7, 2012, the undersigned issued an Initial Decision in this matter, finding that OEA lacked jurisdiction because Employee voluntarily retired in lieu of being separated via the instant RIF. On June 25, 2012, Employee filed a Petition for Review with the OEA Board

(“Board”). Employee submitted that she did not voluntarily retire in lieu of separation and argued that she was placed in the incorrect competitive level. On July 30, 2012, Agency responded to Employee’s Petition for Review, noting that Employee voluntarily chose to retire instead of being terminated and was placed in the correct competitive level used for the instant RIF.

On September 18, 2013, the OEA Board issued its decision and remanded this matter back to the undersigned, finding that there was not substantial evidence to show that Employee’s retirement was voluntary. The Board also remanded the case for the undersigned to address the merits of the appeal, including addressing what Employee’s position of record was at the time of the instant RIF and how that impacted the lateral competition requirement.

On October 30, 2013, the undersigned issued an Order convening a Status Conference (“October 30th SC”) in this matter. Both parties were in attendance at the Status Conference. A Post Status Conference Order was issued on November 26, 2013 (“November 26th Post SC Order”), requiring the parties to submit briefs in this matter. Agency’s Brief was due on or before December 20, 2013; however, it was not received by the prescribed deadline. On December 27, 2013, the undersigned issued an Order for Statement of Good Cause requiring Agency to explain its failure to respond to the November 26th Post SC Order, along with submitting its brief.

On January 17, 2014, Agency submitted its Statement of Good Cause and requested an extension of time in order to submit its brief. On January 22, 2014, the undersigned accepted Agency’s statement of good cause and granted the request for an extension of time, resulting in Agency’s brief being due on or before February 12, 2014. On January 27, 2014, Employee filed a Motion for Reconsideration regarding the undersigned’s Order granting Agency’s request for an extension of time. On January 28, 2014, the undersigned denied Employee’s Motion for Reconsideration. On March 10, 2014, Employee requested an extension of time to submit its brief, which was granted by the undersigned. Both parties have submitted their required briefs in this matter. After reviewing the documents of record, the undersigned has determined that 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

Jurisdiction Issues

The issue of an Employee's voluntary or involuntary retirement has been adjudicated on numerous occasions by this Office. The law is well settled with this Office that there is a legal presumption that retirements are voluntary.¹ Furthermore, OEA has consistently held that it lacks jurisdiction to adjudicate a voluntary retirement.² However, a retirement where the decision to retire was involuntary, is treated as a constructive removal and may be appealed to this Office.³

In its Petition for Review, Employee argued that OEA retained jurisdiction over this case because her retirement was involuntary. Employee provided documentation supporting her contention that Agency acknowledged that her retirement was involuntary. Specifically, Employee submitted a Notification of Personnel Action ("SF-50"), listing her retirement as involuntary.⁴ In its response to Employee's Petition for Review, Agency argues that Employee chose to retire instead of being separated via the instant RIF. In regards to the involuntary retirement notation on Employee's SF-50, Agency argues that its definition of involuntary retirement, which is defined in its Summary Plan Description for Teachers, is entirely different from OEA's definition.⁵

In its analysis, the OEA Board stated that in order for a retirement to be involuntary, employees must establish that the retirement was due to Agency's coercion or that they relied on misinformation.⁶ The Board found Employee's documentation, the SF-50 notating "Involuntary Retirement- Retire w/Pay" persuasive to show that her retirement was involuntary. The Board also agreed with Employee's position that by processing the SF-50, Agency also acknowledged

¹ See *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Charles M. Bagenstose v. D.C. Public Schools*, OEA Matter No. 2401-1224-96 (October 23, 2001).

² See *Deborah Gray-Avent v. D.C. Department of Human Resources*, OEA Matter No. 2401-0145-08, *Opinion and Order on Petition for Review* (July 30, 2008); *Adele LaFranque v. D.C. Public Schools*, OEA Matter No. 2401-0032-10 (February 8, 2011); *Curtis Woodward v. D.C. Public Schools*, OEA Matter No. 2401-0029-10 (February 8, 2011).

³ *Christie*, 518 F.2d at 587.

⁴ See Employee's Petition for Review (June 25, 2014); Employee Brief, Exhibit A10 (February 29, 2012).

⁵ Agency Response to Employee's Petition for Review (July 30, 2012).

⁶ See *Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995) (holding that an employee's decision to retire is deemed voluntary unless the employee presents sufficient evidence to establish otherwise.).

that she retired involuntarily. Agency's RIF Notice informed Employee that she had "a limited right to appeal this reduction in force. If you voluntarily retire, however, then you may not be able to appeal this determination before [OEA]." The Board explained that Agency's use of the term "involuntary retirement" on the SF-50 and the language in the RIF Notice led to misinformation and misrepresentation by Agency, and that Employee reasonably believed that she was not retiring by her own volition. Further, the Board found that in light of the evidence presented, "Employee adequately proved that she involuntarily retired," and therefore, OEA maintained jurisdiction over her case to consider the merits of the RIF action.⁷

During the October 30th SC, Agency raised issues regarding the Board's decision finding that Employee's retirement was involuntary and that OEA retained jurisdiction in this matter. The undersigned ordered both parties to address the jurisdiction issue raised by Agency in this matter. Employee argued that the Board's decision regarding jurisdiction "cannot now be overturned" because Agency waived any additional arguments and evidence it now raises by failing to do so during the initial adjudication and Petition for Review phase. Employee further argues that Agency could have also appealed to the District of Columbia Superior Court, but failed to do so.⁸

OEA Rule 628.2 provides that employees have the burden of proving issues of jurisdiction. Issues regarding jurisdiction may be raised at any time during the course of the proceeding.⁹ Since this case was remanded for the undersigned to address the merits of the case, jurisdiction arguments may still be made.

Regarding the jurisdiction issue in this case, Agency argues that the only reason Employee's resulting SF-50 from the instant RIF states that she was eligible for involuntary retirement is "solely because she met the requirements for involuntary retirement as defined by Agency's Summary Plan Description for Teachers ("Summary Plan")."¹⁰ Agency's Summary Plan definitions, in relevant part, are as follows:

1. Voluntary Retirement Benefit: Employees are eligible for the voluntary retirement benefit if they have at least five (5) years of work as a DCPS teacher at age sixty-two (62); at age sixty (60) with twenty (20) years of service; at age fifty-five (55) with thirty (30) years of service, if hired before November 16, 1996; or for all teachers hired on or after November 16, 1996, at any age with thirty (30) years of service;
2. Involuntary Retirement Benefit: Employees may qualify for an involuntary retirement benefit if they are involuntarily

⁷ *Carolyn Williams v. D.C. Public Schools*, p. 7, OEA Matter No. 2401-0124-10, *Opinion and Order on Petition for Review* (September 18, 2013).

⁸ Employee Remand Brief, p. 4 (March 21, 2014).

⁹ See *Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

¹⁰ Agency Remand Brief, Exhibit 3 (February 12, 2014).

separated from service (unless the separation is for cause on charges of misconduct or delinquency). Employees are eligible for an involuntary retirement if they have twenty-five (25) years of service, including at least five (5) years as a DCPS teacher; or twenty (20) years of service if they are at least age fifty (50), with a minimum of five (5) years as a DCPS teacher.

While Agency's definition of involuntary retirement does in fact differ from the plain meaning, general legal meaning, as well as OEA's definition of involuntary retirement, the undersigned finds that Agency cannot benefit from confusing and misleading language that differs from the general understanding and plain language of a term. In this case, Employee's retirement documentation clearly denotes "involuntary retirement."¹¹ Further, Agency's RIF Notice states that she may not appeal if she "voluntarily retires."¹² Both of these documents were drafted by Agency, and therefore Agency is responsible for its conflicting content.

In support of its argument that its definition of involuntary retirement differs, Agency presents a case, *Tilahun Dejene v. D.C. Public Schools*,¹³ where an OEA Administrative Judge found that Agency's "use of the word involuntary doesn't mean that an employee's retirement was, in fact, involuntary."¹⁴ However, this case is distinguishable from the instant matter because the employee in *Dejene* did not present *credible* written documentation showing that his retirement was involuntary, and instead relied on allegations that the retirement office told him that his retirement was involuntary. Further, because the Administrative Judge in this matter decided that an evidentiary hearing was necessary, she based her decision in part on employee's lack of credibility due to conflicting statements. In this case, the Board found, and the undersigned agrees, that Employee showed that the conflicting statements on her SF-50 and RIF Notice, caused misinformation and misrepresentation.

The undersigned does not find Agency's argument regarding Employee's retirement persuasive and upholds the Board's decision and finding that Employee involuntarily retired. Accordingly, the undersigned finds that Employee's retirement was involuntary and OEA retains jurisdiction over his matter.

RIF Analysis

On September 10, 2009, former D.C. School Chancellor Michelle 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 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.¹⁵

¹¹ See Employee Notification of Personnel Action ("SF-50"); Employee Brief, Exhibit A10 (April 11, 2012).

¹² Agency Answer, Tab 3 (December 9, 2009).

¹³ OEA Matter No. 1601-0144-10 (February 7, 2014).

¹⁴ Agency Remand Brief, p. 2 (February 12, 2014).

¹⁵ See Agency's Answer, Tab 1 (December 9, 2009).

Although the instant RIF was authorized in part pursuant to D.C. Code § 1-624.02,¹⁶ which encompasses more extensive procedures, for the reasons explained below, I find that D.C. 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 (emphasis added).

(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

¹⁶ 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.

government can only use it during times of fiscal emergency.”¹⁷ 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.”¹⁸

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.”¹⁹ The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act instead of “the regular RIF procedures found in D.C. Code § 1-624.02.”²⁰ 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.”²¹

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.²² 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.”²³ 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.”²⁴

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.²⁵ 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 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.

In *Webster Rogers v. District of Columbia Public Schools*,²⁶ the District of Columbia Superior Court stated that D.C. Code §1-624.08 is the correct statute for RIFs conducted due to budgetary constraints and found that Chapter 24 of the District of Columbia Personnel Manual (“DPM”), which is cited in the preceding statute, is the applicable criteria to be used, as opposed

¹⁷ *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

¹⁸ *Id.* at p. 5.

¹⁹ *Washington Teachers’ Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

²⁴ *Id.*

²⁵ See *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

²⁶ No. 2012 CA 006364 (D.C. Super. Ct. December 9, 2013).

to Title 5-E DCMR, Chapter 15. However, Agency argues that Employee was a member of the educational service during the instant RIF and the DPM does not apply to educational service employees.²⁷

Employee argues that Agency should not be able to raise the issue of whether the DPM is applicable in this matter because it should have been raised previously. However, the undersigned disagrees with Employee's arguments and notes that the Board remanded this case so that the merits could be fully addressed, which includes arguments surrounding how the competitive level was established and therefore, relates to whether the DPM, Chapter 24 or Title 5-E, DCMR Chapter 15 applies. Although there is conflicting language in the relevant case law, regulations, and statutes, the undersigned finds that D.C. Code §1-624.08 is the controlling provision in this matter because of its statutory nature. D.C. Code §1-624.08 requires that the RIF be analyzed under DPM, Chapter 24. Therefore, although DPM, Chapter 24 denotes that it is only applicable to educational service employees in the Office of the State Superintendent of Education, the statutory language of D.C. Code §1-624.08 must be followed, even where there is a discrepancy in the regulatory language. Therefore the RIF will be analyzed under D.C. Code § 1-624.08, as well as the District Personnel Manual ("DPM") Chapter 24, and where applicable 5-E DCMR, Chapter 15.

Employee's Position

In her Petition for Review and Remand Brief, Employee submits that her official position of record was an ET-15 Social Studies Teacher and that this position should have been used to place her in a competitive level for the instant RIF. Employee alleges that Agency improperly placed her into a single person competitive level for the Hospitality Teacher position.²⁸

Employee claims that she served as an ET-15 Social Studies Teacher at Roosevelt High School ("Roosevelt") for close to twenty years. She states that she was first appointed to the position in October 1993 and helped develop Roosevelt's Academy of Hospital Tourism. Employee acknowledges that she was assigned to teach hospitality at various points during her teaching tenure; however, she argues that DCPS never changed her position of record from Social Studies Teacher. Employee submits that in 1998, DCPS offered her a promotion to Coordinator of Travel & Tourism and approved a Request for Personnel Action, but she declined the promotion and the Personnel Action was never processed.²⁹ She states that Agency continued to require her to maintain formal certification as a Social Studies teacher and her performance evaluations often identified her as a Social Studies Teacher.³⁰ Further, Employee submits that when DCPS conducted RIFs in 2003 and 2004, it included her in the Social Studies Teacher competitive level.³¹ Thus, Employee contends that because there was no official change in her position of record, she was improperly placed in the single person competitive level for a Hospitality Teacher. Further, Employee argues that she should have been given one round of lateral competition in the Social Studies Teacher competitive level.

²⁷ See DPM§2400 which denotes applicability to specific employees.

²⁸ See Employee Remand Brief (March 21, 2014); Employee's Petition for Review (June 25, 2012).

²⁹ Employee Remand Brief, Exhibit A-3 (March 21, 2014).

³⁰ *Id.*, Exhibits A-4; A5, A6, A7, A8.

³¹ *Id.*, Exhibits A2, A9.

Employee contends that pursuant to 5-E DCMR §1503, her right to lateral competition depends on whether or not the entire competitive level was eliminated. Additionally, she notes that DPM §2410.2 provides that an assignment to a competitive level shall be based upon the employee's position of record. Employee submits that Agency's own regulations, 5-E DCMR §1315.4, provides that "personnel actions and other documents, filed as permanent records in the [official personnel] folder shall ...establish an employee's rights and benefits under the pertinent laws and regulations governing employment." She also notes that 5-E DCMR §1502 requires that all positions that are sufficiently alike be placed in the same competitive level.³²

Agency's Position

Agency submits that it conducted the RIF in accordance with D.C. Code §1-624.02 and 5-E DCMR, Chapter 15. Agency explains that each school was identified as a separate competitive area and each position title constituted a separate competitive level. Roosevelt was determined to be a competitive area and the ET-15 Hospitality Teacher position constituted a competitive level. Agency maintains that Employee was in a single person competitive level since she was the only Hospitality Teacher at Roosevelt. Agency explains that Employee was not entitled to one round of lateral competition since the entire single person competitive level within the competitive area was eliminated. Agency notes that because one round of lateral competition was not warranted due to the elimination of the entire competitive area, a Competitive Level Documentation Form ("CLDF") was not required. Additionally, Agency contends that Employee received specific written notice on October 2, 2009, that she would be separated from service with DCPS effective November 2, 2009.³³

Addressing Employee's claims that she was placed in the wrong competitive level, Agency contends that several forms in Employee's personnel file from 1997-2006 indicate that Employee was in fact teaching hospitality at the time of the instant RIF. Agency argues that the Chancellor has the authority to identify particular position titles as separate competitive levels pursuant to 5-E DCMR §1502, which reads as follows:

For purposes of this section, "competitive levels" are groups, within a competitive area consisting of all positions in the same grade or occupational level that are sufficiently alike in the following characteristics that a person could be assigned to any position without changing the terms of appointment or unduly interruption of the work program: (a) Qualifications; (b) Requirements; (c) Duties; (d) Responsibilities; (e) Pay Schedules; and (f) Working conditions.

Agency argues that the Chancellor further defined the competitive levels for the RIF in the following ways: (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 specialty subjects, the subject taught by the employee.

³² Employee Remand Brief (March 21, 2014).

³³ Agency Brief (February 29, 2012); Agency Remand Brief (February 12, 2014).

Agency claims that based on Employee's SF-50 from her retirement prior to the instant RIF, Employee's official position title was Teacher, but she taught a specialty subject, Hospitality. Agency also claims, without supporting documentation, that her qualifications, requirements, duties, responsibilities, pay schedule, and working conditions were that of a Hospitality Teacher because that is the job she was performing at the time of the RIF.³⁴

Agency contends that DCPS is not required to follow the DPM for RIFs, because the Chancellor, as the head of DCPS has the authority to determine if a RIF is necessary and ensure that the provisions of the RIF subchapter, specifically 5-E DCMR, Chapter 15, are applied when effecting a RIF within DCPS. Agency notes that the Chancellor specifically authorized this RIF pursuant to D.C. Code §1-624.02 and 5-E DCMR, Chapter 15. Agency argues that DPM, Chapter 24 only applies when a RIF is conducted under D.C. Code §1-624.08, and further notes that these provisions do not apply to educational service employees.³⁵

Competitive Area and Level

In order to determine if Agency conducted the instant RIF properly, the undersigned must determine whether an employee was placed in the proper competitive level in order to determine if the lateral competition requirement has been met. Generally, an employee's position of record is shown through the issuance of an SF-50 Notification of Personnel Action.³⁶ A retroactive reinstatement of Employee is only allowed where there is a finding of harmful error in the separation of an employee.³⁷ Harmful error is defined as an action of such a magnitude that in its absence the employee would not have been released from his or her competitive level.³⁸

In reviewing the competitive area and level claims, the DPM § 2409 states that each agency shall constitute a single competitive area and lesser competitive areas within an agency may be established by the personnel authority. According to DPM §2409.4, the lesser competitive area should be no smaller than a major subdivision of an agency or an organizational segment that is clearly identifiable and distinguished from others in the agency in terms of mission, operation, function, and staff. DCPS, acting as its own personnel authority pursuant to 5-E DCMR § 1501.1, established competitive areas 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. Here, Agency states that the competitive area for the instant RIF was defined as Roosevelt High School, which I find is a major subdivision of DCPS and meets the requirements of DPM §2409.

Regarding the establishment of a competitive level, DPM §2410.1 states that each personnel authority shall determine the positions comprising the competitive levels that employees compete for retention. Additionally, DPM §§2410.2, 2410.3 states that assignment to a competitive level "shall be based upon the employee's position of record," which is the

³⁴ See Agency Remand Brief (February 12, 2014).

³⁵ *Id.*

³⁶ See *Armata Ross v. D.C. Office of Contracting & Procurement*, OEA Matter No. 2401-0133-09-R11 (April 8, 2013).

³⁷ DPM §2405.7.

³⁸ *Id.*

position that the employee receives pay. Further, DPM §2410.4, states that a competitive level shall consist of all positions which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one (1) position could successfully perform the duties and responsibilities of any of the other positions.

Employee has submitted personnel documents in support of her contention that her last position of record was Social Studies Teacher.³⁹ Specifically, Employee submits that prior to the instant RIF, the most recent *enacted* personnel action showing her position as a Social Studies Teacher has an effective date of October 1, 1993 (emphasis added).⁴⁰ Additionally, the most recent *enacted* personnel action in the record from Agency's submission of Employee's personnel file has an effective date of January 1, 1996, and reflects Employee's position as a Social Studies Teacher (emphasis added).⁴¹ The subsequent personnel actions from the instant RIF lists Employee's position as a "Teacher, Senior High".⁴² While there are performance evaluations showing that Employee was rated as both a Hospitality and Social Studies Teacher, I do not find that these are official documents that can be used to determine Employee's position of record.⁴³ Additionally, the last performance evaluation provided in the record from June 2004, shows that Employee's position was listed as Social Studies Teacher.⁴⁴

Under DPM §2411.2, lesser competitive levels may be established in some cases, where employees who have the same title, series, and grade, but have specialties which are identified on their position descriptions by parenthetical titles. However, a lesser competitive level cannot be different or narrower than Employee's position of record. While, the Chancellor has some discretion to determine the positions which comprise competitive levels, this discretion cannot be so broad and wide ranging that an employee would be unable to determine their definite standing in a RIF and identify what employees they should be able to compete with during lateral competition. Agency also has discretion to assign duties to its employees, but if it were allowed to base an employee's competitive level on *some* of their duties, instead of the official position of record, there would be no uniformity and employees could essentially be placed in any competitive level (emphasis added).

Agency contends that several forms in Employee's personnel file from 1997-2006 indicate that Employee was in fact teaching Hospitality at the time of the instant RIF.⁴⁵ The undersigned disagrees and submits that while these documents show that Employee may have taught Hospitality in some capacity, it does not show that this was her position of record at the time of the instant RIF. None of these documents are from the year of or the year prior to the instant RIF. Further, Agency's own documentation including submission of Employee's personnel file, do not disclose any *processed and enacted* Personnel Actions showing that

³⁹ Employee Brief, Exhibits A1-A3, A7-A9, A14 (April 11, 2012).

⁴⁰ Employee Brief, Exhibit A1(April 11, 2012).

⁴¹ Agency Brief, Employee Personnel File, p. 113 (February 29, 2012). There is also a letter of retirement from Employee dated August 11, 2001, but there are no official retirement documents to corroborate if the retirement was effective., Employee Personnel File, p. 369.

⁴² Employee Brief, Exhibit A10 (April 11, 2012); Agency Remand Brief, Exhibit 4 (February 12, 2014).

⁴³ Agency Brief, Employee Personnel File, pp. 368, 402-404, 411-413, 440. *See also* Employee brief, Exhibits A7-A8 (April 11, 2012); Agency Remand Brief, Exhibit 1 (February 12, 2014).

⁴⁴ Agency Brief, Employee Personnel File, p. 413 (February 29, 2012).

⁴⁵ Agency Remand Brief, Exhibit 1 (February 12, 2014).

Employee's position was officially changed to or that she occupied the position of Hospitality Teacher (emphasis added). Additionally, even if the undersigned accepted Agency's argument that the most recent SF-50 from the instant RIF showing retirement, which designates employee as "Teacher, Senior High" should apply, Employee would have still been placed in the wrong competitive level.⁴⁶ The undersigned notes that Agency is fully responsible for the accuracy of the records it issues, including personnel actions.

Therefore, for purposes of the instant RIF, I find that Employee should have been placed in the competitive level based on her position of record. Agency cannot benefit from arguing that Employee taught Hospitality when her official position of record shows that she was assigned to a Social Studies Teacher position. The official position of record reflected in an employee's SF-50 has been held by this Office as a determination of whether an employee was placed in the proper competitive level.⁴⁷

In this case, although Employee's official position of record was Social Studies Teacher and there were other Social Studies Teachers, Employee was the only one placed in a separate competitive level for Hospitality. Agency has not provided any definitive documentation that Employee's sole job was to teach Hospitality or an official personnel action making this her official position of record. Because Employee's official position of record was Social Studies Teacher, I find that she should have been allowed to compete for one round of lateral competition with the other Social Studies Teachers. Moreover, I find that Agency's failure to properly place employee in the Social Studies Teacher competitive level for the RIF is harmful error because in its absence, Employee may not have been released from the appropriate competitive level.

Agency also argues that 5-E DCMR, Chapter 15 is the applicable regulation that should govern this RIF. Agency maintains that the Chancellor had the authority to identify particular position titles as separate competitive levels, pursuant to 5-E DCMR §1502.1, which states in relevant part, that competitive levels consist of all positions in the same grade or occupational level that are sufficiently alike in the following characteristics that a person could be assigned to any position without changing the terms of the appointment or unduly interruption of the work program: (a) Qualifications; (b) Requirements; (c) Duties; (d) Responsibilities; (e) Pay Schedules; and (f) Working Conditions. Agency also argues that the Chancellor further defined competitive level for the RIF in the following ways: 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.

The requirements of 5-E DCMR §1502.1 require competitive levels to consist of all positions that are sufficiently alike in qualifications, requirements, duties, responsibilities, pay schedules, and working conditions. Even though Agency submits that this is the correct regulation that should be used to analyze the instant RIF, Agency has not provided any evidence showing that Employee's position at the time of the instant RIF was sufficiently *different in*

⁴⁶ Agency Remand Brief, p. 6, Exhibit 4 (February 12, 2014).

⁴⁷ See *Armeta Ross v. D.C. Office of Contracting & Procurement*, OEA Matter No. 2401-0133-09-R11 (April 8, 2013).

qualifications, requirements, duties, responsibilities, pay schedules, and working conditions from the other teachers who were placed in the Social Studies competitive level, other than *stating* that Employee worked as a Hospitality Teacher (emphasis added). Further, Agency's own RIF Authorization requires that employees be placed into competitive levels by the job title for each teacher.⁴⁸ The RIF Authorization also states that an employee's competitive levels could also be based on a specialty subject that was taught, but I find that this could only be established by their position title. As noted above, there are conflicting documents concerning Employee's position title, but the undersigned finds Employee's last *enacted* SF-50 to be the controlling document showing that her position was Social Studies Teacher (emphasis added).

I find that Agency has failed to meet its burden of proof to show that Employee was a Hospitality Teacher for purposes of the instant RIF. I further find that Employee was erroneously placed in the Hospitality Teacher competitive level, which prevented her from being ranked and rated with the other Social Studies Teachers, which is the competitive level she should have been placed in based on her official position of record. Moreover, I find that Employee was improperly separated via the instant RIF from a position that she did not officially occupy. Accordingly, I conclude that Agency failed to provide Employee with one round of lateral competition in accordance with D.C. Code §1-624.08.⁴⁹ Therefore, I find that Employee should be reinstated to her last position of record prior to the instant RIF.⁵⁰

Thirty (30) Days Written Notice

Under both DPM §2422 and 5-E DCMR §1506, Agency is required to provide written notice at least thirty (30) days prior to the effective date of the RIF. In this case, Employee acknowledged that she received her RIF Notice on October 2, 2009, as claimed by Agency.⁵¹ Further, Employee has not alleged that she did not receive thirty (30) days notice prior to the effective date of the RIF. Accordingly, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

CONCLUSION

Based on the foregoing, I find that Employee was not placed in the proper competitive level and therefore, Agency has not met its burden of proof which requires that Employee be provided with one round of lateral competition, as required by D.C. Code §1-624.08. Accordingly, Agency's action of separating Employee via the instant RIF must be reversed.

⁴⁸ Agency Answer, RIF Authorization, Tab 1 (December 9, 2009).

⁴⁹ The one round of lateral competition requirement is also required by D.C. Code §1-624.02.

⁵⁰ At this juncture, it does not appear that a reconstruction of the instant RIF is possible due to the length of time that has passed and it would be unfair to ask the Social Studies Teachers who were not separated to undergo a lateral competition round due to agency's error.

⁵¹ Petition for Appeal, p. 3 (November 2, 2009).

ORDER

It is hereby **ORDERED** that:

1. Agency's action of separating Employee via the instant RIF is **REVERSED**;
2. Agency shall reinstate Employee to the position of record that she occupied at time of the instant RIF;
3. Agency shall reimburse Employee all back-pay and benefits lost from the effective date of the separation; and
4. Agency shall file with this Office, within thirty (30) calendar days from the date on which his decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge