THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BELINDA BRYANT,	)	OEA Matter No. 2401-0256-10
Employee	)	
	)	Date of Issuance: October 29, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Belinda Bryant ("Employee") worked as a Teacher with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that she was being separated from her position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was November 2, 2009.[1]

Employee contested the RIF action. She filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 2, 2009. She requested that OEA provide her an evidentiary hearing.[2]

Agency filed its response to the Petition for Appeal on January 7, 2010. It explained that the RIF was conducted pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It submitted that pursuant to 5 DCMR

[1] *Petition for Appeal,* p. 5 (December 2, 2009).
[2] *Id.* at 4.

§ 1501, Luke C. Moore High School was determined to be the competitive area, and under 5 DCMR § 1502, the EG 9 Teacher position was the competitive level subject to the RIF. However, because Employee was the only EG 9 Teacher within her competitive level, she was not provided one round of lateral competition.[3] Agency asserted that it provided Employee a written, thirty-day notice that her position was being eliminated. As a result, it believed the RIF action was proper.[4]

After the matter was assigned to the OEA Administrative Judge ("AJ"), she ordered the parties to submit legal briefs addressing whether Agency followed the District's laws when it conducted the RIF.[5] In its responsive brief, Agency reiterated its position and submitted that OEA is limited to determining whether it followed D.C. Official Code § 1-624.02, 5 DCMR §§ 1503 and 1506.[6] Employee's brief provided that Agency did not give her a thirty-day notice prior to her separation.[7]

Thereafter, the parties were ordered to address Agency's delivery of the RIF notice and whether it constituted a thirty-day notice prior to separation.[8] In Agency's brief, it explained that on October 2, 2009, the principal met with Employee and presented her with the RIF notice. Agency also submitted that Employee was provided an additional copy of the notice via mail. Therefore, it argued that it provided Employee the required notification in accordance with 5 DCMR § 1506.[9] Employee did not respond to the AJ's May 14, 2012 Order.

Because Agency's brief did not address whether it procured signed documentation from

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[3] Employee was in a single-person competitive level. Therefore, pursuant to 5 DCMR § 1503.3, Agency claimed that it did not have to consider the competitive factors defined in 5 DCMR § 1503.2 which provide an employee with one round of lateral competition.
[4] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal* (January 7, 2010).
[5] *Amended Order Requesting Briefs* (February 15, 2012).
[6] *District of Columbia Public Schools' Brief,* p. 5 (February 21, 2012).
[7] Employee explained that she was informed of the RIF action around October 20, 2009. *Employee's Brief* (March 16, 2012).
[8] *Order Requesting Briefs* (May 14, 2012).
[9] *District of Columbia Public Schools' Brief* (May 23, 2012).

Employee acknowledging that she timely received the RIF notice, the AJ ordered Agency to address this issue and file an additional brief with supporting documentation.[10] Agency subsequently submitted its brief and attached a FedEx® receipt showing that a FedEx® envelope was delivered to Employee's address on October 6, 2009, and signed for by "S. Bryant."[11]

The Initial Decision was issued on June 13, 2012. The AJ found that although the RIF was authorized pursuant to D.C. Official Code § 1-624.02**,** D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF.[12] As a result, she ruled that § 1-624.08 limited her review of the appeal to determining whether Employee received a written, thirty-day notice prior to the effective date of her separation and if Agency provided one round of lateral competition within her competitive level. The AJ concluded that one round of lateral competition was inapplicable because Employee occupied the only position within her competitive level.

With regard to the thirty-day notice, the AJ found that Agency failed to confirm that Employee timely received the RIF notice and thus, committed a procedural error.[13] She found that Employee received an eighteen-day written notice prior to the effective date of her separation. Accordingly, the AJ ruled that the RIF was conducted in accordance with § 1-624.08 and upheld Agency's action. However, she ordered Agency to reimburse Employee for twelve days of back pay and benefits and to file with OEA documents evidencing compliance with the

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[10] *Order to Agency Requesting Brief* (May 24, 2012).

[11] Initially, Agency's responsive brief filed on June 1, 2012, stated that documentation could not be located. Thereafter, Agency filed a supplemental brief and attached the FedEx® receipt. *District of Columbia Public Schools' Supplemental Brief* (June 12, 1012).

[12] The AJ cited the District of Columbia Court of Appeals' position in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123 (D.C. 2009) and reasoned that D.C. Official Code § 1-624.08 or the "Abolishment Act" was the applicable statute because the RIF was conducted for budgetary reasons, and the statute's 'notwithstanding' language is used to override conflicting provisions of any other section. *Initial Decision*, p. 3-5 (June 13, 2012).

[13] The AJ explained that pursuant to the court's finding in *Nursat Aygen v. District of Columbia Office of Employee Appeals*, No. 2009 CA 006528; No. 2009 CA 008063 (D.C. Superior Ct. April 5, 2012), Agency should have submitted documentary evidence such as Employee's signature acknowledging receipt, a signed statement by a witness stating that Employee refused acknowledgement, or a certified or registered mail return receipt acknowledgement. *Initial Decision*, p.7 (June 13, 2012).

order.[14]

Agency filed a Petition for Review with the OEA Board on July 17, 2012. It submits that new and material evidence is available that was not available prior to the record being closed. Agency explains that its supplemental brief filed on June 14, 2012, evidenced that it was able to locate supporting documentation which proved that proper notice was given to Employee, but the AJ's Initial Decision made no reference the supplemental filing.[15] It is Agency's position that proper notice was given because Employee received the notice via hand delivery on October 2, 2009 and a courtesy copy via FedEx® on October 6, 2009. Therefore, it believes that the AJ's finding regarding the notice has been refuted and requests that the OEA Board determine that Employee received written notice of the RIF action on October 6, 2009.[16]

OEA was given statutory authority to address RIF cases in D.C. Official Code §1-606.03(a). This statute provides that:

> An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

In an attempt to more clearly define OEA's authority, D.C. Official Code § 1-624.08(d), (e), and (f) establish the circumstances under which the OEA may hear RIFs on appeal.

> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be

[14] *Id.,* 7-9.
[15] Although Agency's Certificate of Service provides that the Supplemental Brief was filed June 14, 2012, OEA received the filing via fax on June 12, 2013 and by U.S. Mail on June 21, 2012.
[16] *District of Columbia Public Schools' Petition for Review* (July 17, 2012).

> 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.
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> (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.
>
> (f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:
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> > (1) An employee may file a complaint contesting a determination or separation pursuant to subchapter XV of this chapter or § 2-1403.03; and
> >
> > (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

As a result of the above-referenced statutes, this Office is authorized to review RIF cases where an employee claims the agency did not provide one round of lateral competition or where an employee was not given a thirty-day written notice prior to their separation.

The merits of the RIF action regarding one round of lateral competition are not in dispute in this matter. The AJ correctly found that Employee was not entitled to one round of lateral competition because she was in a single-person competitive level. Agency provided in its brief and Retention Register that Employee was the only person within her position title.[17] OEA has consistently held that one round of lateral competition does not apply to employees in single-person competitive levels.[18] Therefore, one round of lateral competition is not applicable to this

[17] *District of Columbia Public Schools' Brief* (February 21, 2012).
[18] *Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Robert T. Mills*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant*, OEA Matter No. 2401-0086-01 (July 14, 2003); *Robert James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (August 28, 2003); *Richard Dyson, Jr. v. Department of Mental Health*, OEA Matter No. 2401-0040-

case.

The issue that is contested by Agency is the AJ's determination that it did not provide the requisite 30 days' notice to Employee. The AJ held that Employee only received an eighteen-day written notice prior to the effective date of her separation. Therefore, she ordered Agency to reimburse Employee for twelve days of back pay. However, it is clear from a review of the record that Agency provided proof, the day before the AJ issued her Initial Decision, of a FedEx® receipt which showed that Employee received notice of the RIF action on October 6, 2009. This evidence was provided to the AJ before issuing her Initial Decision and should have been considered before issuance.

In accordance with District Personnel Manual § 1614.4, "the notice of final decision shall be delivered to the employee, if in a duty status, i.e., at work, on or before the time the action is effective." Moreover, §1614.5 provides that "the employee to whom the notice of final decision is delivered shall be asked to acknowledge its receipt. If the employee refuses to acknowledge receipt, a brief descriptive written statement, signed by a witness, may be used as evidence of service." In this matter, Employee does not argue that she was absent from work on October 2, 2009. Although Agency provided a sworn and signed affidavit from the principal stating that he provided Employee with notice on October 2, 2009, there was no documentation signed by Employee showing that she received notice on that date, nor was there a signature from a witness providing that Employee refused to acknowledge receipt of service, as provided in DPM § 1614.5. Thus, Agency did not adequately prove that Employee received notice on October 2, 2009.

However, Agency did mail a copy of Employee's notice via FedEx® on October 2, 2009.

03, Opinion and Order on Petition for Review (April 14, 2008); and *Gordon Cloney v. Department of Insurance Securities and Banking*, OEA Matter No. 2401-0085-09, Opinion and Order on Petition for Review (August 22, 2011).

District Personnel Manual §§ 1608.7 and 1614.6 provide that "if the employee is not in a duty status, i.e., at work, the notice of proposed action and final decision shall be sent to the employee's last known address by courier, or by certified or registered mail, return receipt requested before the time the action becomes effective." The Superior Court for the District of Columbia in *Nursat Aygen v. D.C. Office of Employee Appeals*, 2009 CA 006528 P(MPA) and 2009 CA 008063 P(MPA) (D.C. Super. Ct. April 5, 2012) held that a document mailed by certified or registered mail, return receipt requested, is adequate evidence to prove that the document was indeed mailed. According to the FedEx® documentation submitted by Agency on June 12, 2012, FedEx® retrieved Employee's RIF notice from Agency on October 2, 2009. The first attempt to deliver the notice by FedEx® was on October 3, 2009 at 11:41 a.m. The notice was actually delivered on October 6, 2009 at 3:32 p.m. to Employee's last known address of record by Agency.[19] It was signed for by "S. Bryant." Thus, Agency complied with issuing the notice to Employee before the RIF was effective on November 2, 2009. However, it did not provide the requisite 30 days' notice.

Agency proved that notice was received on October 6, 2009. Thirty days from October 6, 2009, would have made the effective RIF date November 6, 2009. However, the effective date on the RIF notice was November 2, 2009. Because D.C. Official Code § 1-624.08(e) requires at least thirty days' notice before the effective date of separation, Agency is required to pay Employee for four days of back pay and benefits, not the twelve days ordered by the AJ.

[19] OEA has held that in accordance with USCS Fed Rules Civil Procedure Rule 5 and D.C. Superior Court Rules of Civil Procedure Rule 5(b)(2)(B), service by mail is complete upon mailing a copy of the document to a party's last known address. *Sharon Young-Wester v. D.C. Public Schools*, OEA Matter No. J-0033-03, Opinion and Order on Petition for Review (September 19, 2006); *Clara Bowers v. D.C. Public Schools*, OEA Matter No. 2401-0078-04, Opinion and Order on Petition for Review (September 19, 2006); *Bryant Prater v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0135-03, Opinion and Order on Petition for Review (November 28, 2006); and *Billy Mims v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0148-08, Opinion and Order on Petition for Review (July 30, 2010).

Therefore, this Board rules that Agency's decision to remove Employee through the RIF action is upheld, and the AJ's decision granting twelve days of back pay and benefits is REVERSED. Agency is ordered to provide Employee with four days of back pay and benefits.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. Agency is to reimburse Employee four days of back pay and benefits commensurate with her last position of record. Within 30 days of this Order, Agency shall file documentation evidencing compliance with the terms of this Order.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.