Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0055-10
ONUCHE SHAIBU,	)	
Employee	)	
	)	Date of Issuance: March 27, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Monica Dohnji, Esq.
	)	Administrative Judge

Yuval Rubinstein, Esq., Employee's Representative
Sara White, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 21, 2012, Onuche Shaibu ("Employee") filed a petition for appeal with the Office of Employee Appeals ("the OEA" or "the Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") action of abolishing his position through a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009. Employee's position of record at the time his position was abolished was a Special Education Teacher at Hamilton Education Center. Employee was serving in Education Service status at the time his position was abolished.

I was assigned this matter on December 12, 2011. Thereafter, I issued an Order on January 4, 2012, directing the parties to submit Prehearing Statements by January 26, 2012, and to attend a Prehearing Conference for February 15, 2012, in order to assess the parties' arguments, and to determine whether an Evidentiary Hearing was necessary. Both parties were present at the February 15, 2012, Prehearing Conference. On February 16, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. Both parties submitted timely responses to the order. The record is 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

On September 10, 2009, former D.C. School Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, 5 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[1].

In his petition for appeal, Employee submits that Agency failed to follow the appropriate RIF procedures as required by D.C. Code § 1-624.08, and therefore, he should be reinstated.[2] Employee further maintains that the competitive level used in the RIF was too narrow and that Agency did not follow appropriate procedure.[3] Employee also contends that the score on his Competitive Level Documentation Form ("CLDF") is inconsistent with his objective performance and as such an evidentiary hearing is needed to determine whether he was actually given one meaningful round of lateral competition. Employee explains that, because Agency's compliance with § 1-624.08(d) cannot be decided solely on the documentary evidence in the administrative record, an evidentiary hearing is necessary.[4]

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of his separation. Accordingly, Agency requests that, this matter be dismissed for Employee's failure to state a claim

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[1] *See Agency's Answer*, Tab 1 (December 17, 2009).
[2] Employee's *Petition for Appeal,* p. 3 (October 21, 2009).
[3] *Id*.
[4] Employee's *Response to Agency's Prehearing Statement,* p. 3(February 29, 2012).

upon which relief may be granted. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that the lowest ranked Special Education Teacher, Employee,[5] was terminated as a result of the round of lateral competition.

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02[6], which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

Specifically, 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.

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[5] Two (2) out of the sixteen (16) Special Education Teacher positions were identified for separation. Base on the Retention Register, Employee was the second lowest ranked employee with a total score of 1.5, and the lowest ranked employee had a total score of 0.5.

[6] 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.

> (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 of 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."[7] 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."[8]

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[9] The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act ("the Act") instead of "the regular RIF procedures found in D.C. Code § 1-624.02."[10] 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."[11]

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.[12] 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."[13] 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."[14]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[15] Moreover, the persuasive language of § 1-624.08, including the term 'notwithstanding', suggests that this is the more applicable statutory provision in order to conduct RIFs resulting from budgetary constraints. Accordingly, I am primarily guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. 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 their separation from service; and/or

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[7] *Mezile v. District of Columbia Department of Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[8] *Id.* at p. 5.
[9] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[10] *Id.*
[11] *Id.*
[12] *Id*. at 1125.
[13] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[14] *Id.*
[15] *Mezile v. D.C. Department of Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS Schools is authorized to establish competitive areas when conducting a RIF so long as those areas are 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." For the 2009/2010 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area. In accordance with Title 5, DCMR § 1502.1, competitive levels in which employees subject to the RIF competed were based on the following criterion:

> 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.[16]

Here, Hamilton Education Center was identified as a competitive area, and ET-15 Special Education Teacher was determined to be the competitive level in which Employee competed. There were sixteen (16) Special Education Teachers subject to the RIF. Of the sixteen (16) Special Education Teacher positions, two (2) positions were identified to be abolished.

Employee was not the only (Special Education Teacher) within his competitive level and was, therefore, required to compete with other employees in one round of lateral competition. According to Title 5, DCMR § 1503.2 *et al.*:

> If a decision must be made between employees in the same competitive area and competitive level, the following factors, in support of the purposes, programs, and needs of the organizational unit comprising the competitive area, with respect to each employee, shall be considered in determining which position shall be abolished:
>
> (a) Significant relevant contributions, accomplishments, or performance;
>
> (b) Relevant supplemental professional experiences as demonstrated on the job;
>
> (c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise; and
>
> (d) Length of service.

[16] *See Agency's Brief* at p. 3 (March 14, 2012). School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

(a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)

(b) Significant relevant contributions, accomplishments, or performance – (10%)

(c) Relevant supplemental professional experiences as demonstrated on the job – (10%)

(d) Length of service – (5%)[17]

Agency argues that nothing within the DCMR, applicable case law, or D.C. Official Code prevents it from exercising its discretion to weigh the aforementioned factors as it sees fit.[18] Agency cites *to American Federation of Government Employees, AFL-CIO v. OPM*, 821 F.2d 761 (D.C. Cir. 1987), wherein the Office of Personnel Management was given "broad authority to issue regulations governing the release of employees under a RIF…including the authority to reconsider and alter its prior balance of factors to diminish the relative importance of seniority." I agree with this position and find that Agency had the discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

Competitive Level Documentation Form

Agency employs the use of a CLDF in cases where employees subject to a RIF must compete against each other in lateral competition. In conducting the instant RIF, the principal of Hamilton Education Center was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the "length of service" category was completed by the Department of Human Resources ("DHR").

Employee received a total of one and a half (1.5) points on his CLDF, and was, therefore, ranked the second lowest in his competitive level. Employee's CLDF stated, in pertinent part, the following:

> "Mr. David Shaibu does not effectively contribute to the school program and instructional plan for his students…. Every day since the beginning of the school year, an administrator has had to intervene in Mr. Shaibu's classroom, assisting with several students acting out…. Mr. Shaibu frequently is unable to produce daily lesson plans when asked, and consistently produces one lesson plan for the entire week… Mr. Shaibu has failed to reach his students on an instructional, behavioral, or

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[17] It should be noted that OEA has consistently held that DCPS is allowed discretion to accord different weights to the factors enumerated in 1503.2. Thus, Agency is not required to assign equal values to each of the factors. *See White v. DCPS*, OEA Matter No. 2401-0014-10 (December 30, 2001); *Britton v. DCPS*, OEA Matter No. 2401-0179-09 (May 24, 2010).

[18] Agency's Brief at p. 5 (March 14, 2012).

> personal level. He has not utilized small group instruction, and has not reached or attempted to reach the various learning styles within his classroom… On several occasion Mr. Shaibu has left his classroom, either unsupervised, or supervised by the inappropriate individuals… Mr. Shaibu does not effectively participate in professional development. Every professional development session, Mr. Shaibu is witnessed falling asleep. He has not used or attempted to use any ideas or practices from those trainings."[19]

Office or school needs

This category is weighted at 75% on the CLDF and includes: curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of zero (0) points out of a possible ten (10) points in this category; a score much lower than other employees within his competitive level. In 2006, Employee received a certificate from Agency's Office of Academic Credentials and Standard, stating that Employee is qualified to teach "Non-Categorical Spec. ED./K-12 Grade Level."[20] Employee was also pursuing a Doctorate degree in Education Studies and Leadership at Bowie State University, Maryland in 2009. However, Employee has failed to provide any evidence to highlight how the degree translates into his classroom expertise. Employee argues that the documentary evidence, specifically his performance evaluation from 2006 – 2009, does not support the score afforded to him. However, an employee's performance evaluation does not fall within this category when allocating scores in the CLDF. Moreover, it is within the Principal of Hamilton Education Center's managerial expertise to assign numeric values to this factor.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area and contends that his yearly performance evaluations are inconsistent with the statements contained within the CLDF. This category includes factors such as student outcomes, rating, awards, attendance etc. Employee has not provided any evidence to indicate his contribution to the student body. Moreover, the principal has discretion to award points in this area giving his independent knowledge of the employees and student body.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee did not provide any documentation to supplement additional points being awarded in this area.

Length of service

This category accounts for 5%. It was completed by DHR and was calculated by adding the following: 1) years of experience; 2) military bonuses; 3) D.C. residency points; and 4) rating add—four years of service was given for employees with an "outstanding" or "exceeds expectations" evaluation within the past year. The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

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[19] Agency's Brief, Exhibit B (January 26, 2012).
[20] Employee's petition for appeal (October 21, 2009).

Here, Employee was employed with Agency for a total of four (4) years. He received a total of three (3) points for years of services. He did not receive any points for Veterans preference, D.C. residency or rating. An outstanding performance rating in the previous year will get an employee an extra four (4) years of service. In the school year 2008/2009, Employee did not receive an "outstanding" or "exceeds expectations" performance rating, he received a "meets expectations" and as such, is not entitled to the extra four (4) points. Employee received a total weighted score of one and a half (1.5) points in this category. He does not contest the calculation of the points awarded. Therefore, I find that Agency properly calculated this number.

Also, Employee asserts that, an Evidentiary Hearing is needed to validate the truthfulness of the principal's statements contained within his CLDF. Employee also contends that the CLDF scores are in direct conflict with his previous work performance throughout his tenure with DCPS. In reviewing the documents of record, Employee does not offer any statutes, case law, or other regulations to refute Agency's position regarding the principal's authority to utilize discretion in completing an employee's CLDF during the course of the instant RIF. In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*, 109 F.3d 774 (D.C. Cir. 1997), the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that "school principals have total discretion to rank their teachers" and noted that performance evaluations are "subjective and individualized in nature."[21] Moreover, according to the CLDF, Employee received a total score of one and a half (1.5) after all of the factors outlined above were tallied and scored. The next lowest colleague who was retained received a total score of thirty-nine (39) points. Employee has not proffered any evidence to suggest that a re-evaluation of his CLDF scores would result in a different outcome in this case.[22]

Furthermore, Employee cites to *Dupree v. D.C. Office of Employee Appeals*,[23] and *Brown v. D.C. Public Schools*, OEA Matter No. 2401-0125-04[24] (June 5, 2006), in support of his position that he should be afforded an Evidentiary Hearing to "determine whether he was actually given one meaningful round of lateral competition."[25] Employee maintains that his unfair scores on his CLDF prevented him from having any fair chance of receiving a lateral position. And as such, this matter "cannot be decided solely on the documentary evidence in the administrative record."[26]

The Court in *Dupree* held that the "ALJ abused his discretion in failing to conduct an Evidentiary Hearing on whether [the] termination of a District of Columbia employee by [the] Department of Corrections (DOC), due to a mandated reduction in force (RIF), complied with [the] applicable regulations...and factual determinations were required for at least two of the four issues raised by employee." The Employee in *Dupree* appealed his termination to the OEA, alleging that he should have received an enhancement for an "outstanding" performance rating and that the Retention Register for the Criminal Investigator position failed to include two employees classified as "Criminal Investigators (Internal Affairs)." The employee claimed that the ALJ should have

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[21] *See also American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

[22] See *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986) (stating that a material fact is one which might affect the outcome of the case under governing law.)

[23] *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826 (D.C., Dec. 22, 2011).

[24] Employee cited to the wrong case number in his brief. The correct OEA Matter No. assigned to this case is OEA No. 2401-0126-04.

[25] Employee's Response to Agency's Prehearing Statement at pp. 1-2 (February 29, 2012).

[26] *Id*. at p. 3, *citing Dupree*.

conducted an Evidentiary Hearing "to adduce testimony to support the argument that the agency's termination action was flawed and contrary to law."

The facts in this case are distinguishable from those in *Dupree*. Unlike in *Dupree*, here, Employee is challenging the RIF on the grounds that the score on his CLDF was inconsistent with his performance rating from 2006 - 2009. Employee asserts that from 2006 – 2009, he received either a "meets expectations" or "exceeds expectations." Accordingly, he maintains that his CLDF score is inconsistent with his performance rating. Employee also provided declarations from three (3) of his former colleagues noting that he was an exceptional teacher.[27] In the instant RIF, an Employee's performance rating bears very little significance in the calculation of the total CLDF score, because performance evaluation only count toward the length of service classification of the CLDF. *See* Title 5, DCMR § 1503.2, *supra.* DHR, in its evaluation of an employee's record, will add four (4) years of service for employees with an "outstanding" or "exceeds expectations" evaluation within the past year. Here, the length of service calculation, in addition to the other factors, was weighted and added together, resulting in a ranking for each competing employee. Employee received a "meets expectations" evaluation within the past year and did not qualify for the four (4) additional years of service. And unlike in *Dupree*, Employee is not challenging this performance evaluation nor has he provided any argument that he should have received an enhancement for an "outstanding" performance rating…"[28] Although the circumstances surrounding Employee's termination in this case were unfortunate, however; Employee's mere assertions and those of a few colleagues that he was an exceptional teacher doesn't invalidate the principal's evaluation or DHR's scoring on the CLDF.

Also, this case is distinguishable from *Brown*, *supra*, in that, in *Brown*, the total score needed to retain Brown over the employee that was retained was only eleven (11) points, as opposed to the instant case where the total score needed to retain Employee is thirty-eight (38) points. A significantly higher amount compared to the employee in *Brown*. And Employee has failed to provide credible evidence that would bolster his score in any of the above-referenced categories. Additionally, an AJ has the discretion to decide a matter on the record or conduct an evidentiary hearing.[29]

Accordingly, I find that the Principal of Hamilton Education Center had discretion in completing Employee's CLDF as he was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. Moreover, it appears as though Employee's basis for requesting an Evidentiary Hearing is to be afforded an opportunity to explore and undoubtedly dispute "…interpretations of their worth against [the] principals' evaluations."[30] While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that would lead the Undersigned to believe that the RIF was conducted unfairly. Therefore, I further find that, Agency did not abuse its discretion in completing the CLDF, and Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08, and an Evidentiary Hearing is unwarranted in this matter.

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[27] *Employee's Response to Agency's Prehearing Statement* at p. 2, (February 29, 2012).
[28] *Dupree, Supra.*
[29] OEA rule §624.2.
[30] *Washington Teachers' Union* at 780.

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 "an employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The notice shall state specifically what action is taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights." Additionally, the D.C. Official Code § 1-624.08(e) which governs RIFs provides that an Agency *shall* (emphasis added) give an employee thirty (30) days notice *after* such employee has been *selected* (emphasis added) for separation pursuant to a RIF. Here, Employee received his RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice states that Employee's position is being abolished as a result of a RIF. The Notice also provides Employee with information about his appeal rights. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Based on the foregoing, I find that Employee's position was abolished after he properly received one round of lateral competition and a timely thirty (30) days legal notification was properly served. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in his removal is upheld.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD

FOR THE OFFICE:

____
MONICA DOHNJI, ESQ.
ADMINISTRATIVE JUDGE