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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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| In the Matter of: |) | |
| |) | |
| BRENDAN CASSIDY, |) | OEA Matter No. 2401-0253-10R13 |
| Employee |) | |
| |) | |
| v. |) | Date of Issuance: September 13, 2016 |
| |) | |
| D.C. PUBLIC SCHOOLS, |) | |
| Agency |) | |
| |) | |

OPINION AND ORDER
ON REMAND

This matter has previously been before the Office of Employee Appeals (“OEA”) Board. By way of background, Brendan Cassidy (“Employee”) worked as an English teacher with the D.C. Public Schools (“Agency”). On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force (“RIF”). The effective date of the RIF was November 2, 2009.¹

The Board found that the OEA Administrative Judge (“AJ”) failed to consider material issues of law or fact raised by Employee on appeal. Therefore, it remanded the matter to the AJ to consider Employee’s pre-text arguments. Additionally, the Board requested that the AJ determine if the Competitive Level Documentation Forms (“CLDF”) were based on substantial

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

evidence as it related to Employee's one round of lateral competition.²

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

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

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

² *Brendan Cassidy v. D.C. Public Schools*, OEA Matter No. 2401-0253-10R13, p. 4-5, *Opinion and Order on Petition for Review* (July 31, 2013).

³ *Employee's Closing Argument, Proposed Findings of Fact, and Proposed Conclusions of Law*, p. 40 and 62-70 (May 5, 2015).

⁴ *District of Columbia Public Schools' Closing Argument*, p. 16-24 (May 5, 2015).

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

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

On August 5, 2015, Agency filed its Response to Employee's Petition for Review on Remand. It provides that because Employee's argument regarding Chapter 24 of the DPM was not raised before the close of the evidentiary hearing, the OEA Board cannot consider this issue on appeal. Moreover, it contends that the issue cannot be considered because the Board did not outline Chapter 24 of the DPM as one of the issues for the AJ to address on remand. Agency goes on to argue that if Chapter 24 should have been considered, it still complied with those requirements. It explains that the relevant section of DPM Chapter 24 requires that tenure of appointment, length of credible service, Veteran's preference, residency preference, and relative work performance be considered to determine if an employee is retained or released. It asserts

⁵ *Initial Decision on Remand*, p. 23-29 (May 28, 2015).

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

that it considered all of these factors together. Therefore, its decision to RIF employee was proper. Accordingly, Agency requests that this Board uphold the AJ's Initial Decision on Remand.⁷

One Round of Lateral Competition

The crux of Employee's argument on Petition for Review on Remand pertains to the AJ's improper analysis of the RIF regulation. As Employee contends, in *Webster Rogers, Jr. v. D.C. Public Schools*, 2012 CA 006364 P(MPA)(D.C. Super. Ct. December 9, 2013), the Superior Court for the District of Columbia held that D.C. Official Code § 1-624.08 was the proper statute to use when analyzing these RIF cases. However, it found that the OEA Administrative Judges were incorrectly using Chapter 15 of the DCMR when issuing their rulings on these cases. The court held that Chapter 24 of the DPM should be used when determining if the RIF actions conducted under D.C. Official Code § 1-624.08 were proper.

Unfortunately, the AJ improperly analyzed this case using Chapter 15 of the DCMR. In his Closing Brief, Employee argued that Chapter 24 of the DPM should have been used. However, it appears that the AJ neglected to address it. This Board held in the first remand to the AJ that "implicit in the authority to determine whether an employee has been given one round of lateral competition is the jurisdiction to decide whether an employee's CLDF is supported by substantial evidence."⁸ The AJ thoroughly addressed the statements raised in

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

⁸ Citing *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA), p. 4 (D.C. Super. Ct. March 14, 2013). Agency improperly asserts that the AJ, and by extension – this Board, cannot consider Employee's DPM Chapter 24 arguments because they were made after the evidentiary hearing. However, OEA Rule 629.1 provides that "when an evidentiary hearing has been provided, the record shall be closed at the conclusion of the hearing, unless the Administrative Judge directs otherwise." On January 29, 2015, the AJ clearly ordered both parties to submit closing briefs after he made transcripts from the evidentiary hearing available for pick up. Thus, the submission of closing briefs closed the record in this matter. Moreover, during the last day of the

Employee's CLDF and offered a compelling analysis.⁹ However, he used the wrong regulation when assessing the specifics of the one round of lateral competition. Additionally, Employee's argument related to priority reemployment, as discussed in DPM Chapter 24, was not addressed.¹⁰ Thus, the AJ's Initial Decision on Remand is not based on substantial evidence.¹¹

As was provided in the first remand to the AJ, the D.C. Court of Appeals held in *District of Columbia Department of Mental Health v. District of Columbia Department of Employment Services*, 15 A.3d 692, 697 (D.C. 2011) (quoting *Branson v. District of Columbia Department of Employment Services*, 801 A.2d 975, 979 (D.C. 2002)), that it could not assume that "[an] issue has been considered *sub silentio* when there is no discernible evidence that it has." The *Dupree* court (quoting *Murchison v. District of Columbia Department of Public Works*, 813 A.2d 203, 205 (D.C. 2002)) further reasoned that "to pass muster, an administrative agency decision must

evidentiary hearing, the AJ stated that the "... written closing argument is your final word in this matter . . ." *OEA Hearing Transcript*, p. 132-137 (January 15, 2015).

⁹ This Board rejects Employee's arguments that the AJ's assessment pertaining to his CLDF were not based on substantial evidence. The AJ offered a detailed analysis regarding this issue. As previously stated, Employee's arguments boil down to witness credibility and his belief that he offered documentary evidence to refute Agency's claims in his CLDF. As this Board has held in previous matters, when it comes to determinations of witness credibility, we will defer to the AJ's assessment. See *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015). Moreover, Agency witnesses, along with its documentary evidence, adequately prove that the statements made on Employee's CLDFs were based on substantial evidence.

¹⁰ This Board notes that the Superior Court for the District of Columbia held in *Webster v. District of Columbia Public Schools*, 2012 CA 006364 P(MPA), p. 8 (D.C. Super. Ct. December 9, 2013) that in accordance with D.C. Official Code § 1-624.08(h) and DPM § 2427.5, employees "... have a right to be added to the priority reemployment list . . . in light of the criteria under the procedures set forth in chapter 24 of the DPM."

¹¹ The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions of law must follow rationally from its findings.”¹²

In accordance with OEA Rule 633.3(b) and (d) “. . . the Board may grant a petition for review when the petition establishes that the decision . . . is based on an erroneous interpretation of . . . regulation , or the initial decision did not address all material issues of law and fact properly raised in the appeal.” The AJ utilized the wrong regulation when rendering his ruling. The correct regulation was raised by Employee in his Closing Brief. Thus, this matter is remanded to the AJ for the limited purpose of determining if Agency complied with DPM Chapter 24, as provided in D.C. Official Code § 1-624.08, when conducting the RIF action.

¹² *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 830 (D.C. 2011).

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further determinations.

FOR THE BOARD:

Sheree L. Price, Interim Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.