THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRENDAN CASSIDY,	)	OEA Matter No. 2401-0253-10
Employee	)	
	)	Date of Issuance: July 31, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

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]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 2, 2009. He argued that the RIF was a pre-text for his removal.[2] Employee also contended that Agency failed to follow the proper RIF procedures, and it relied on false, inadequate, and unreliable performance data when rendering its decision. Therefore, he requested an evidentiary hearing in this matter.[3]

[1] *Petition for Appeal,* p. 6 (December 2, 2009).
[2] Employee provided that his removal was really an adverse action, for which Agency lacked the requisite cause.
[3] *Petition for Appeal,* p. 3-5 (December 2, 2009).

On January 7, 2010, Agency filed its response to Employee's Petition for Appeal. It explained that it conducted the RIF pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). Agency argued that the RIF was conducted in accordance with the regulations, and Employee was provided with one round of lateral competition. Moreover, Agency claimed that it provided Employee a written, thirty-day notice that his position was being eliminated. As a result, it believed the RIF action was proper.[4]

The Administrative Judge ("AJ") issued his Initial Decision on April 10, 2012. He held that it was within Agency's discretion to assign weight to particular categories within the Competitive Level Documentation Forms ("CLDF"). He ruled that Agency's action was proper and consistent in processing the RIF because the principal is allowed wide latitude with his discretion to assess its teachers. Moreover, the AJ ruled that Employee was provided with the requisite thirty-day notice for a RIF action. Accordingly, he upheld Agency's RIF action against Employee.[5]

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on May 15, 2012. He made a great deal of arguments on review. Among other things, Employee contends that the Initial Decision did not address all issues of law and fact that were properly raised on appeal.[6] Employee specifically addresses every assertion made on his CLDF.[7] He, again, asserts that Agency's action was a pre-text to a RIF action. Employee claims that despite a decrease in student enrollment, the principal hired an additional English teacher in

[4] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal,* p. 2-4 (January 7, 2010).
[5] *Initial Decision* (April 10, 2012). It is of importance to note that although the AJ mentioned Employee's pre-text to RIF argument, he failed to address this issue in the Initial Decision.
[6] Employee argues that he was not given the proper credit for rising test scores, coaching, tutoring, and working with parents. However, these accolades were present on other teachers' CLDFs. *Petition for Review of Initial Decision of Employee Brendan Cassidy*, p. 30-39 (May 15, 2012).
[7] *Id.*, 28-50.

August and began processing the RIF action in September.[8] Thus, he argues that Agency abused its discretion by engaging in this action.

Agency responded to Employee's Petition for Review by arguing that he failed to provide any evidence that the AJ engaged in an erroneous interpretation of statute, regulation, or policy. Moreover, it explains that Employee lacks sufficient grounds for the Board to grant his Petition for Review on the basis that he should have been awarded more points on his CLDF. Agency reasons that because the Initial Decision addressed all issues of law and fact, Employee's petition should be denied.[9]

Material Issue

In accordance with OEA Rule 633.3(d) ". . . the Board may grant a petition for review when the petition establishes that the initial decision did not address all material issues of law and fact properly raised in the appeal." Furthermore, the D.C. Court of Appeals held in *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 831-832 (D.C. 2011), that when the AJ is made aware of material issues in an employee's notice of appeal and there is the absence of any discussion of the employee's arguments in the OEA's Initial Decision, the determination cannot be made that all the issues were fully considered. Additionally, the court 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,

[8] Employee provides that the principal knew that when he hired the new teacher in August of 2009, he would remove another teacher within a matter of weeks. Employee believes this to be an abuse of his discretion. *Id.*, 8-9 and 52.
[9] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 2-4 (June 19, 2012).

205 (D.C. 2002)) further reasoned that "to pass muster, an administrative agency decision must 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."[10]

Employee's argument regarding a pre-text to the RIF action was raised on appeal before the AJ. The pre-text issue was clearly presented in his Petition for Appeal.[11] The AJ even acknowledged the argument in his Initial Decision.[12] However, for reasons unbeknownst to this Board, the AJ failed to address this material issue. In accordance with the aforementioned cases, this matter must be remanded for the AJ to consider Employee's pre-text argument.[13]

Substantial Evidence to Support CLDF

This Board also finds that this case must also be remanded for the AJ to determine if there is substantial evidence to support the CLDF. The D.C. Court of Appeals held in *Anjuwan* that OEA's authority regarding RIF matters is narrowly prescribed. According to D.C. Official

[10] *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 830 (D.C. 2011)
[11] *Petition for Appeal*, p. 3 (December 2, 2009).
[12] *Initial Decision*, p. 4 (April 10, 2012).
[13] As it relates to Employee's pre-text argument, the record reflects that there were two English teachers who were hired at the beginning of fiscal year 2009, which began in August. *District of Columbia Public Schools' Brief,* Exhibit A (March 8, 2012). The CLDFs were completed on September 29, 2009. *Id.* at Exhibit B. Per the RIF notice, Employee was removed from his position on October 2, 2009. This is less than two months after the new hires' employ in August. Employee contends that Agency's action rose to the level of a pre-text for the RIF action. If Employee's claims are true, it would appear that Agency filled two positions in August – bringing the total number of positions to eight, only to abolish one of the eight positions in September.

This case appears to present similarities that were outlined in *Levitt v. District of Columbia Office of Employee Appeals*, 869 A.2d 364 (D.C. 2005) because of Employee's assertions that Agency made personnel changes *before* the RIF action (emphasis added). The *Levitt* court found that OEA abused its discretion by failing to allow discovery and to conduct a hearing when an employee provides detailed allegations involving improper personnel actions related to pre-text RIF claims. In *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883, 885-86 (D.C. 1998), the D.C. Court of Appeals held that an employee challenging the abolition of the position he occupied needed to demonstrate that his contention was non-frivolous in order to be entitled to a hearing. Similarly, the *Dupree* court provided that a hearing is necessary when issues are raised that require clarification and cannot be decided solely on the documentary evidence in the administrative record. We conclude that the contentions in Employee's Petition for Appeal were not frivolous and, therefore, met the threshold established in *Anjuwan*. There were a series of events that occurred before Employee's RIF that raise material questions of fact regarding his pre-text claims. Thus, this matter must be remanded for the AJ to consider Employee's pre-text argument.

Code § 1-624.08(d) and (e), OEA is tasked with determining if Agency afforded Employee one round of lateral competition within her competitive level and if they provided a thirty-day notice. More recently, in *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA)(D.C. Super. Ct. March 14, 2013), the Superior Court of the District of Columbia held that a hearing on the facts and circumstances of computing the CLDF may be necessary for OEA to determine if one round of lateral competition was actually satisfied in these RIF cases. It went on to reason 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."[14]

Moreover, the Superior Court for the District of Columbia held in *Onuche David Shaibu v. D.C. Public Schools*, 2012 CA 003606 P(MPA), p. 6 (D.C. Super. Ct. January 29, 2013) that if an employee offers evidence that directly contradicts any of the factual basis for the CLDF, then OEA must conduct a hearing to address the material facts in question. Employee provided an exhaustive list of arguments and exhibits that contradict items within his CLDF.[15] As it stands, the record does not reflect that there was substantial evidence to support Agency's CLDF. Thus, this Board believes that discovery and/or an evidentiary hearing should have been conducted to determine if one round of lateral competition was actually afforded to Employee given the material facts raised by Employee. Accordingly, this matter is remanded to the AJ to consider Employee's pre-text claims and to determine if the CLDF is based on substantial evidence.

[14] *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA), p. 4 (D.C. Super. Ct. March 14, 2013).
[15] *Employee Brendan Cassidy's Response to District of Columbia Public Schools' Brief,* p. 5-6 (March 29, 2012) and *Petition for Review*, p. 28-50 (May 15, 2012).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**; the matter is **REMANDED** to the Administrative Judge to address the merits of Employee's pre-text to RIF arguments and to determine if the CLDF was based on substantial evidence.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

_____
Vera M. Abbott

_____
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.