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.: 2401-0153-10
MARIE FONROSE,	)	
Employee	)	
	)	Date of Issuance: May 4, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Monica Dohnji, Esq.
	)	Administrative Judge

Taylor Lewis, Employee's Representative
Sara White, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 20, 2009, Marie Fonrose ("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 her 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 her position was abolished was Counselor at Dunbar Pre-Engineering. Employee was serving in Educational Service status at the time her position was abolished.

I was assigned this matter on February 6, 2012. On February 10, 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. After further review of the documents on record, I scheduled a Status Conference for March 28, 2012, for the limited purpose of determining whether Dunbar Pre-Engineering was a valid School. Both parties attended the Status Conference. Thereafter, I issued an Order on March 30, 2012, requiring the parties to submit post Status Conference briefs codifying the arguments made during the Status Conference. Both parties complied. The record is now closed.

JURISDICTION

The 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]

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02,[2] 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:

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[1] See *Agency's Answer*, Tab 1 (December 23, 2009); *Agency's Brief* dated February 24, 2012.

[2] 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.

> (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.
>
> (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 government can only use it during times of fiscal emergency."[3] 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."[4]

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."[5] 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."[6] The Court stated that the "ordinary and plain

[3] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[4] *Id.* at p. 5.
[5] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[6] *Id.*

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."[7]

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.[8] 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."[9] 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."[10]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[11] 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. 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 due to a RIF 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.

Employee's Position

Employee submits that DCPS failed to follow proper procedures for conducting a reduction in force because DCPS did not give Ms. Fonrose one round of lateral competition.[12] Specifically, Employee notes that DCPS did not complete a competitive level ranking score card for her and the other Counselors at Dunbar Senior High School. Employee also highlights that by failing to complete her score card, Agency "failed to consider her 13 years of service; her accomplishment as the only National Board Certified counselor in the DCPS system; her June 2009 exceeds expectations evaluations; and her Masters and Ph.D., in relation to the credentials of the other counselors at Dunbar."[13]

Employee further maintains that she should have been ranked in the Dunbar Senior High School competitive area and not Dunbar Pre-Engineering competitive area because Dunbar Pre-Engineering High School is not a valid competitive area since it's "not a clearly identifiable segment of DCPS or even Dunbar High School."[14] And accordingly, the competitive area should be the school

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[7] *Id.*
[8] *Id*. at 1125.
[9] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[10] *Id.*
[11] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[12] *Employee's Brief* at p. 5 (March 12, 2012).
[13] *Id*. at p. 6.
[14] *Id.*

– Dunbar Senior High School and not Dunbar Pre-Engineering as stated on her October 2, 2009, RIF notice. Employee also notes that by creating a separate competitive area just for her, DCPS not only violated statutory requirements, it tailored the RIF process to ensure that Employee was terminated. Employee explains that this practice is "in sharp contrast to the purely budgetary motives and objective procedure that must be adhered to in a reduction in force."[15] Employee further notes that she was "set up by being placed in the pre-engineering Charter School w/in Dunbar so my work could not be compared to any other Counselor."[16] She further explains that she was placed at Dunbar Pre-Engineering without her consent or knowledge. Employee submitted a placement email[17] she received from a Mr. Pankaj Rayamajhi (Human Resource) stating that she had been placed at Dunbar.

During the Status Conference and in her post Status Conference brief, Employee submitted several web search results, in support of her position that Dunbar Pre-Engineering is not a separate school from Dunbar Senior High School.[18] One of such documents listed Dunbar Pre-Engineering as a career pathway at Dunbar Senior High School. While citing to 5 DCMR Chapter 15, Employee argues that, the Superintendent's designation of Dunbar Pre-Engineering as a competitive area for purposes of the RIF does not make it a valid competitive area. Employee also contends that Dunbar Pre-Engineering is not distinguishable from Dunbar High School in terms of mission, operation, function and staff. Employee also maintains that she was considered 'outstanding' and as such, she was invited to help interview potential teachers for fall and review and help craft new evaluation tools (IMPACT).[19] Additionally, Employee alleges that she was harassed by members of management and received disparate treatment.

Agency's Position

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Agency explains that each school was identified as a separate competitive area, and each position title a separate competitive level. Dunbar Pre-Engineering was determined to be a competitive area, and the counselor position a competitive level. Agency further maintains that Employee was in a single person competitive level since she was the only Counselor at Dunbar Pre-Engineering. 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 further explains that because one round of lateral competition was not warranted since the entire competitive area was eliminated, a Competitive Level Documentation Form ("CLDF") was not needed to determine what positions to be abolished.[20] Agency also asserts that it provided Employee with thirty (30) days written notice prior to the RIF effective date.

During the Status Conference and in its post Status Conference brief, Agency explained that Schools are classified based on their budgets and Dunbar Pre-Engineering had a separate budget from Dunbar Senior High School.[21] And for that reason, Dunbar Pre-Engineering qualified as a competitive area for the 2009 RIF. Agency explained that Dunbar Pre-Engineering was chartered in

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[15] *Id*. at p. 8.
[16] *Petition for Appeal* at p. 5 (November 20, 2009).
[17] *See* Employee's submission dated March 30, 2012.
[18] *See Employee's brief in support to Order for supplemental brief* (April 13, 2012).
[19] *Petition for appeal, Supra* at R7 Continued.
[20] *Agency's Brief* (February 24, 2012).
[21] *See Agency's Competitive Area and Competitive Level brief* (April 20, 2012).

1982 to prepare for careers in engineering and technology and had its own curriculum, and students needed to apply to get into Dunbar Pre-Engineering.[22] Agency also pointed to paragraph eighteen (18) of the Affidavit of Peter Weber[23] which provides that, Dunbar Pre-Engineering was classified as a competitive area for purposes of the RIF. Agency notes that the Chancellor had the authority to define Dunbar Pre-Engineering as a competitive area. In addition, Agency submitted a printout of Employee's PeopleSoft[24] (Work Location Tab) account which notes "Pre-Engineering @ Dunbar" as Employee's department on file, along with other documents in support of its position that Dunbar Pre-Engineering was a valid competitive area when the RIF was conducted.

In the instant matter, Employee argues that by placing her in Dunbar Pre-Engineering as a competitive area, Agency violated 5 DCMR § 1501, and Former Chancellor Michelle Rhee's September 10, 2009 memo to Current Chancellor Kaya Henderson stating that "each school will be a separate competitive area for this RIF."[25] Employee maintains that Dunbar Senior High School and not Dunbar Pre-Engineering should be her competitive area. I disagree. While the memo from Michelle Rhee to Kaya Henderson highlights what constitutes a competitive area, 5 D.C. Municipal Regulations ("DCMR") § 1501.1 authorizes the Superintendent to "establish competitive areas based upon all or a *clearly identifiable segment of the mission, division, or a major subdivision of the Board of Education, including discrete organizational levels such as an individual school or office*." (emphasis added). Although Dunbar Pre-Engineering is not classified as a separate school on the DCPS website, but rather as a career pathway within Dunbar Senior High School, from the documents on file, it is obviously a clearly identifiable segment of Dunbar Senior High School. It has its own budget allocation, active student enrollment and staff.[26] Additionally, Employee's PeopleSoft lists Dunbar Pre-Engineering as a department.

Moreover, according to the affidavit from Mr. Weber, Chancellor Rhee herself, designated the competitive areas for the instant RIF, and she classified Dunbar Pre-Engineering as a competitive area. Agency also identifies Dunbar Pre-Engineering as a competitive area in the retention register and the RIF notice. Furthermore, the placement email submitted by Employee only states that she was placed at Dunbar. The email doesn't specify whether it was Dunbar Senior High School or Dunbar Pre-Engineering. Assuming *arguendo* that Dunbar Pre-Engineering was not a valid and clearly identifiable school in 2009 when the RIF was conducted, it is still a valid competitive area since it is a clearly identifiable *segment* (it has its own budget, curriculum, and application process) of DCPS which is an individual school, and as such, falls within the definition of a valid competitive area (emphasis added). Giving the totality of the circumstance, I find that, while Dunmore Pre-Engineering may not be a "stand-alone" school, it is a clearly defined and identifiable segment of Dunbar Senior High School, and therefore, qualifies as a competitive area as defined by 5 DCMR § 1501. Further, pursuant to D.C. Code § 1-624.08(f), neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished shall be subject to review.

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[22] *Id.* at Exhibits A and B.

[23] *Agency's brief, Supra* at Exhibit B. According to this Affidavit, Mr. Weber was the Chief Advisor to Chancellor Rhee from January 2008 – March 2012. Mr. Weber stated in his affidavit that the Chancellor established the competitive area and level for the 2009 RIF, and she defined each school as a separate area, including Dunbar Pre-Engineering High School.

[24] PeopleSoft is the District of Columbia government's online Human Resources tool.

[25] *See Employee's Brief*, *supra*.

[26] Http://dc.gov/DCPS/Files/downloads/ABOUT%20DCPS/Budget%20-%20Finance/Preliminary-FY11-SchoolBudget/DCPS-Pre-Engineering-SWS-Dunbar-SHS-Preliminary-Budget.pdf; See also http://washington-dc.schooltree.org/public/Pre-Engineering-Swsc-Dunbar-017724.html. (Both retrieved on March 28, 2012).

Single Person Competitive Level

This Office has consistently held that, when an employee holds the only position in her competitive level, D.C. Official Code § 1-624.08(e), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR 1503.3, are both inapplicable. An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[27] According to the retention register produced by Agency, Employee was the sole Counselor at Dunbar Pre-Engineering. Accordingly, I conclude that Employee was properly placed into a single-person competitive level and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(e) pertaining to multiple-person competitive levels when it implemented the instant RIF. And for this reason, Agency did not have to complete a competitive level score card for Employee.

Thirty (30) days written Notice

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 her RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice stated that Employee's position was being abolished as a result of a RIF. The Notice also provides Employee with information about her 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.

Employee also alleges in her petition for appeal that she was harassed by members of management and received disparate treatment. However, I find that OEA does not have the authority to adjudicate Employee's arguments pertaining to claims of harassment and disparate treatment. Also, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. And I find that Employee's arguments are all grievances outside of OEA's purview.

<u>CONCLUSION</u>

Based on the foregoing, I find that Employee's position was abolished after she was properly placed in a single-person competition level and given thirty (30) days written notice prior to the RIF effective date. I therefore conclude that, Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08.

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[27] See *Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Bryant v. D.C. Department of Corrections,* OEA Matter No. 2401-0086-01 (July 14, 2003); and *Fagelson v. Department of Consumer and Regulatory Affairs,* OEA Matter No. 2401-0137-99 (December 3, 2001).

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