THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROBERT WILLIS,	)	OEA Matter No. 2401-0210-10
Employee	)	
	)	Date of Issuance: October 29, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Robert Willis ("Employee") worked as a Science 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 challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 1, 2009. He contested the RIF evaluation process and believed that his Competitive Level Documentation Form ("CLDF") contained information that was false.[2] Ultimately, Employee believed that he was selected to be separated because of his concerns with Agency's spending of local school funds. Accordingly, he requested that OEA

[1] *Petition for Appeal,* p. 11 (December 1, 2009).
[2] Employee believed that the computation of the scores he received on his CLDF was flawed. He further provided that the Principal did not follow RIF protocol because he did not involve the Local School Restructuring Team.

provide him an evidentiary hearing.[3]

In its response to the Petition for Appeal, Agency 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 § 1501, Ballou Senior High School was the competitive area, and under 5 DCMR § 1502, the Science Teacher position was determined to be the competitive level subject to the RIF. Accordingly, Employee was provided one round of lateral competition where the Principal utilized CLDFs to rate each employee, as defined in 5 DCMR § 1503.2.[4] After discovering that Employee was ranked the lowest in his competitive level, Agency provided him a written, thirty-day notice that his position was being eliminated. Therefore, it believed the RIF action was proper.[5]

On February 3, 2010, Employee filed an Amended Petition for Appeal and Motion for Summary Disposition.[6] In the Amended Petition, he contested his CLDF ratings and stated that Agency was not authorized to assign percentage values to the competitive ranking factors.[7] In response, Agency provided that the competitive ranking factors were left to its discretion. Furthermore, it explained that the relevant regulation did not require that each competitive factor be given equal weight.[8]

The OEA Administrative Judge ("AJ") ordered the parties to submit legal briefs

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[3] *Id.*, 6-11.
[4] Agency explained that when it conducted the RIF, its Office of Human Resources computed Employee's length of service, including credit for District residency, veteran's preference, and any prior outstanding performance rating.
[5] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal* (December 31, 2009).
[6] The Motion for Summary Disposition set forth the same arguments outlined in the Amended Petition for Appeal. Additionally, it provided that summary disposition was proper because Agency did not respond to the Amended Petition, and thus, conceded that it did not provide Employee one round of lateral competition.
[7] Employee explained that neither D.C. Official Code § 1-624.02 nor 5 DCMR § 1503.2 gave the Chancellor the discretion to assign percentage values to the competitive ranking factors. He argued that Agency's actions were unlawful and resulted in him receiving an incorrect and unfair evaluation; an incorrect and unfair competitive ranking; and caused him to be separated from his position without due process. Accordingly, he requested that OEA reverse Agency's action and requested reinstatement, back pay, retirement benefits, sick leave, and attorney's fees. *Amended Petition for Appeal*, p. 2-5 (February 3, 2010).
[8] *District of Columbia Public Schools' Response to Employee's Motion for Summary Disposition and Answer to Employee's Amended Appeal* (January 13, 2012).

addressing whether Agency followed the District's laws when it conducted the RIF.[9] Agency reiterated its previous arguments and submitted that OEA is limited to determining whether it followed D.C. Official Code § 1-624.02, 5 DCMR §§ 1503 and 1506.[10] Employee argued in his brief that Agency rated him based on its own subjective factors and not in accordance with 5 DCMR § 1503.2.[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, he ruled that § 1-624.08 limited his review of the appeal to determining whether Employee received a written, thirty-day notice prior to the effective date of his separation and if Agency provided one round of lateral competition within his competitive level. The AJ found that Employee was properly afforded one round of lateral competition and explained that Agency properly considered all of the factors enumerated in DCMR § 1503.2 when it conducted the RIF.[13] He also found that Agency provided Employee the required thirty-day notice. Accordingly, the AJ denied Employee's request for an evidentiary hearing, denied his Motion for Summary Disposition, and upheld Agency's RIF action.[14]

Employee filed a Petition for Review with the OEA Board on July 19, 2012. In it, he

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[9] *Order Requesting Briefs* (February 16, 2012).
[10] *District of Columbia Public Schools' Brief,* p. 8 (March 8, 2012).
[11] *Petitioner Robert Willis' Brief,* p. 6-16 (April 10, 2012).
[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. 2-4 (June 13, 2012).
[13] The AJ agreed with Agency regarding its discretion and noted that under *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997) the principal was given wide latitude to rank his teachers. The AJ held that Employee did not proffer any credible statutes, case law, or other regulation to refute the Agency's position regarding the principal's authority to utilize discretion in completing the CLDF. With regard to Employee's allegations regarding his competitive ranking scores, the AJ held that Employee did not proffer any supplemental evidence that would bolster his score. *Initial Decision,* p. 8-9 (June 13, 2012).
[14] *Id.* at 11.

argues that the Initial Decision was based on an erroneous interpretation of statute, regulation, and case law; it did not address his issues; and it denied his procedural due process rights. Employee explains, *inter alia*, that the AJ erroneously interpreted *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997) as the precedent ruling that principals have wide discretion to rank their teachers.[15] He believes that the Initial Decision did not address his claims of Agency's subjective factors to the RIF procedures which resulted in a subjective performance evaluation, not an evaluation pursuant to the RIF regulations. Therefore, Employee requests that the OEA Board set aside the AJ's order denying his motion and reinstate him with benefits, back pay, and attorney's fees.[16]

In response, Agency provides that the court's finding in *American Federation of Government Employees, AFL-CIO v. Office of Personnel Management*, 821 F.2d 761 (D.C. Cir. 1987) confirmed its interpretation of the RIF regulations.[17] It reiterates that it conducted the RIF in accordance with the relevant law and regulation. Accordingly, it requests that the OEA Board affirm the Initial Decision, deny the Petition for Review, and declare that its action was in accordance with law and regulation.[18]

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decision is not based on substantial evidence or when the Initial Decision did not address all material issues of law and fact. Substantial evidence is defined as evidence that a reasonable

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[15] Employee believes that the court's discussion of the principal's wide discretion should not have constituted a precedent because it was a "point of law merely assumed in an opinion . . . [and was] not authoritative." He opines that the issue this court had to consider was "the constitutionality of the emergency rules." *Petitioner Robert Willis' Petition for Review*, p. 6 (July 19, 2012).
[16] *Id.* at 11.
[17] Agency notes that this Court found that Congress gave the U.S. Office of Personnel Management broad authority to issue regulations for the release of employees pursuant to a RIF, including the authority to determine the relevant weight to be placed on each RIF factor. *District of Columbia Public Schools' Response to Employee's Petition for Review*, p. 4 (August 23, 2012).
[18] *Id.* at 7.

mind could accept as adequate to support a conclusion.[19] 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. After a thorough review of the record, this Board 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 v. District of Columbia Department of Public Works*, 729 A.2d 883, 885-86 (D.C. 1998) that OEA's authority regarding RIF matters is narrowly prescribed. According to D.C. Official Code § 1-624.08(d) and (e), OEA is tasked with determining if Agency afforded Employee one round of lateral competition within his 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."[20]

The court in *Sligh, et al.* identified several points that should be considered by OEA when evaluating the CLDFs provided by Agency. Specifically, the court held that if OEA did not adequately evaluate CLDFs, then employees could be arbitrarily removed from their positions.

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[19] *Black's Law Dictionary*, Eighth Edition; *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).

[20] *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA), p. 4 (D.C. Super. Ct. March 14, 2013).

By way of example, the court reasoned that ". . . a principal might submit a boilerplate CLDF in place of an individualized evaluation of the employee." It held that "such a construction of the OEA's authority would remove meaning from the 'one round of lateral competition' requirement, and would frustrate the purpose of the regulations concerning RIFs."[21]

The CLDFs in this case blatantly violate the holding in *Sligh et al*. Agency provides language verbatim in the CLDFs for the three employees removed from their positions.[22] Likewise, Agency uses the exact language for those employees who retained their positions.[23] Agency did not even attempt to camouflage the boilerplate language used throughout the CLDFs for those terminated and those retained. It appears that this was done in an effort to replace

[21] *Id.* The court cited *Dupree v. District of Columbia Office of Employee Appeals*, 36 A.3d 826, 829 (D.C. 2011), which provided that regulations have been promulgated to ensure that RIFs are conducted in a fair manner and are, therefore, less vulnerable to administrative challenge.

[22] This Board would estimate that ninety-eight percent of the language used in all three CLDFs is exactly the same. In all three CLDFs, Agency describes that the employee "does not have high expectations for Ballou students, which is apparent in [their] failure to employ rigorous instruction." The forms also provide that each teacher "failed to establish a set of norms, routines, or procedures." Moreover, all three CLDFs provide that the teacher "is not tailoring instruction to address the specific needs of the students." Each document further provides that the teachers "fail to use a variety of teaching methods and instructional activities to accommodate various student-learning styles." The CLDFs provide that the three terminated teachers "lack the skills that match the instructional model of the school and [they do] not participate in school-wide activities." Similarly, all three forms describe that each teacher "displayed a negative attitude by aligning [themselves] with teachers [who] foster conflict and resistance to implementing the school improvement plan." Finally, all three CLDFs report that the RIFed employees "teach without lesson plans, [they] fail to state an objective, and [their] workspace is disorganized." *District of Columbia Public Schools' Brief,* Exhibit B (March 8, 2012).

[23] The CLDF language of six teachers who were retained was also strikingly similar. There were only two of the retained teachers who had language that differed on their CLDFs from the other six teachers who were retained. The six teachers' CLDFs each began with "starting with the first day of school [they] came prepared and committed to provide high[-]quality teaching." The forms went on to provide that "before students reported to school, [they] organized [their] classroom, posted rules, procedures, consequences, as well as encouraging messages to students." Additionally, they described that the teachers "laid the foundation for establishing a good rapport with students by establishing a routine and reviewing the posted rules and procedures." Each of the CLDFs explained that the teacher "demonstrates high expectations for [their] students and makes every moment a learning opportunity." Moreover, the documents provide that the teachers "actively applies principles of learning [,] such as active participation, motivation, and reinforcement. In addition, [they] use[ ] a myriad of teaching methods and instructional activities to accommodate the different learning styles of students in [their] class." The CLDFs further contend that each of the teachers "supports a positive school climate. [They] get along well with other staff members and is accommodating to necessary changes in scheduling, teaching assignments, or other duties." Additionally, the forms describe that each teacher "is enthusiastic about Ballou. [They] constantly display[ ] a model level of professionalism when interacting with staff and has a respectful approach when dealing with students." Finally, each CLDF similarly provides that the employee "teaches within an organized work space and materials, with objective-driven lesson plans. As [they] implement[ ] the Teaching and Learning Framework, [they] interact[ ] positively and respectfully with students." *Id.*

individual evaluations and is a clear violation of the holding in *Sligh et al*.

The *Sligh* court held that where there has been a violation, it is within the discretion of an Administrative Judge to grant an evidentiary hearing if necessary to "adduce testimony to support or refute any fact alleged in a pleading." As the court reasoned, "it is within the jurisdiction of OEA to determine whether or not the requirements of a RIF have been satisfied. A hearing on the facts and circumstances of the computation of the CLDF may [be] necessary in order to determine whether the requirement of one round of lateral competition was satisfied."[24]

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. As previously provided, Agency used the following language in Employee's CLDF:

> Mr. Willis fails to show gains in student growth. He does not have high expectations for Ballou students, which is apparent in his failure to employ rigorous instruction; to apply principles of learning such as active participation, motivation and reinforcement; and to use a variety of teaching methods and instructional activities to accommodate various student-learning styles. Mr. Willis was not prepared to teach on the first day of school. He failed to establish a set of norms, routines, or procedures.
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> Mr. Willis is not tailoring instruction to address the specific needs of the students. Lesson plans are not standards-based. In fact, he lacks skills that match the instructional model of the school and does not participate in school-wide activities.
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> Mr. Willis does not support a positive culture. He does not actively support programs, assemblies and/or meetings and is inflexible in dealing with variations in the schedule. He often arrives to work late and does not support parent and community engagement. Additionally, he has displayed a negative attitude by aligning himself with teachers [who] foster conflict and resistance to

[24] *Evelyn Sligh, et al. v. District of Columbia Public Schools*, 2012 CA 000697 P(MPA), p. 5 (D.C. Super. Ct. March 14, 2013).

> implementing the school improvement plan.
>
> Mr. Willis continues to teach without lesson plans[;] he fails to state an objective[;] and his workplace is disorganized. It is evident that Mr. Willis does not reinforce positive behavior.

In accordance with *Shaibu*, Employee provided many contradictory claims to rebut those made by Agency on his CLDF. He asserted that he was a member of the local school restructuring team which provided support to implement Ballou's comprehensive school reform program. Additionally, he claimed that he worked with administrators, teachers, students, parents, and community members to plan and implement programs to improve Ballou.[25] Employee provided that he obtained a Master's Degree in Science Education, a Bachelor of Science Degree in Biology, certification to teach science, specialized education in environmental science, and training in Advanced Placement Environmental Science and Biology. In addition, he served as Chairperson of Ballous's Science Department. Employee contended that he applied his education and training and provided lessons to his students through his experience from programs at NASA, the Foundation for Advanced Education in the Sciences, the Smithsonian Institute, the Natural Science Institute for Teachers on Minority Students, and the Audubon Naturalist Society.[26] As for Agency's claim of Employee's lack of preparation for the first day of school and the disorganization of his classroom, Employee explained that during the first week of school, he was ordered by the school's administration to move his classroom of five years to a new room. He claimed that he was "severely disadvantaged . . . in the ranking procedure where other[s] in his competitive level received high points for having an organized classroom."[27] As for his lesson plans, Employee provided that he taught from a textbook with accompanying lesson plans. He noted that he is recognized in the textbook as having contributed

[25] *Petitioner Robert Willis' Brief,* p. 4 (April 10, 2012).
[26] *Id.*, 4-5.
[27] *Id.* at 6.

to its development.[28] Finally, Employee claimed that he consistently received the rating of "exceeds expectations" on his annual evaluations.[29]

As it stands, the record does not reflect that there was substantial evidence to support Agency's CLDF. This Board finds that the AJ abused his discretion in this matter.[30] We believe that an evidentiary hearing should have been conducted to determine if one round of lateral competition was actually afforded to Employee given the boilerplate language used by Agency and the contradictory evidence raised by Employee. Accordingly, Employee's case is REMANDED to the Administrative Judge for further consideration consistent with this opinion.

[28] *Id.* at 7.
[29] *Id.* at 13.
[30] As provided in *Johnson v. United States,* 398 A.2d 354, 363 (D.C. 1979), "failure to exercise choice in a situation calling for choice is an abuse of discretion whether the cause is ignorance of the right to exercise choice or mere intransigence because it assumes the existence of a rule that admits of but one answer to the question presented."

ORDER

It is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**. This matter is **REMANDED** to the Administrative Judge to consider the case on its merits.

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.