THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRENDAN CASSIDY,	)	
Employee	)	OEA Matter No. 2401-0253-10R13R16
	)	
v.	)	Date of Issuance: March 22, 2018
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON SECOND REMAND

This matter has been previously 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 Administrative Judge ("AJ") issued his Initial Decision on April 10, 2012.[2] In its July 2013 Opinion and Order, the OEA Board found that the AJ failed to consider all material issues of law or fact raised by Employee on appeal. Therefore, it remanded the matter to the AJ

[1] *Petition for Appeal*, p. 6 (December 2, 2009).
[2] The AJ ruled that Agency's action was proper and consistent with processing RIFs. Moreover, he held that Employee was provided with the requisite thirty-day notice for a RIF action. Accordingly, he upheld the RIF against Employee. *Initial Decision* (April 10, 2012).

to consider Employee's arguments.[3]

On remand, the parties engaged in an extensive discovery process and an evidentiary hearing was held by the AJ. Of importance to note, was Employee's assertion that Agency failed to use D.C. Official Code § 1-624.08 and District Personnel Manual ("DPM") Chapter 24 when conducting the RIF action against him.[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. However, the AJ improperly relied on Title 5, DCMR § 1503.2 *et al.* and 1503.1 when analyzing Employee's one round of lateral competition.[5]

Employee filed a Petition for Review on Remand on July 2, 2015. He contended 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.[6] On August 5, 2015, Agency filed its Response to Employee's Petition for Review on Remand. It provided that if DPM Chapter 24 should have been considered, it still complied with those requirements.[7] Accordingly, Agency requested that the OEA Board uphold the AJ's Initial Decision on Remand.[8]

On September 13, 2016, the OEA Board held that in accordance with *Webster Rogers, Jr.*

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[3] *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).
[4] *Employee's Closing Argument, Proposed Findings of Fact, and Proposed Conclusions of Law,* p. 40 and 62-70 (May 5, 2015).
[5] *Initial Decision on Remand* (May 28, 2015).
[6] *Petition for Review of Initial Decision on Remand* (July 2, 2015).
[7] Agency explained 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 asserted that it considered all of these factors together. Therefore, its decision to RIF Employee was proper.
[8] *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).

v. D.C. Public Schools, 2012 CA 006364 P(MPA)(D.C. Super. Ct. December 9, 2013), 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. Accordingly, the matter was remanded to the AJ a second time, for the limited purpose of determining if Agency complied with DPM Chapter 24 when conducting the RIF action, as required in D.C. Official Code § 1-624.08.[9]

The AJ held a Status Conference on October 17, 2016. Subsequently, he issued a Post-Status Conference Order requesting that both parties submit briefs on whether Agency complied with DPM Chapter 24.[10] On October 24, 2016, Employee filed a Motion Requesting Certification of an Interlocutory Appeal. In his motion, Employee argued that his case would be unfairly prejudiced if Agency was allowed to submit briefs on DPM Chapter 24, when it had ample opportunity to provide this information before the record was closed.[11]

Subsequently, on October 27, 2016, the AJ issued an order granting Employee's certification of the Interlocutory Appeal to the OEA Board.[12] On January 24, 2017, the Board issued an order granting Employee's Interlocutory Appeal. The Board determined that it would have been improper for the AJ to request additional briefs on DPM Chapter 24. It reasoned that Agency should not be allowed another opportunity to provide additional arguments through the submission of briefs. Accordingly, the Board granted the Interlocutory Appeal and remanded the matter to the AJ with instructions to determine whether the RIF resulting in Employee's termination was conducted in accordance with Chapter 24 of the DPM.[13]

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[9] *Brendan Cassidy v. D.C. Public Schools*, OEA Matter No. 2401-0253-10R13, *Opinion and Order on Remand* (September 13, 2016).
[10] *Post-Status Conference Order* (October 20, 2016).
[11] *Motion Requesting Certification of an Interlocutory Appeal Regarding the Office's Plan to Accept Briefs or Any Further Argument on Remand and Motion to Stay the Proceedings During the Time the Interlocutory Appeal is Pending*, p. 2 (October 24, 2016).
[12] *Order Regarding Employee's Motion for an Interlocutory Appeal* (October 27, 2016).
[13] *Brendan Cassidy v. D.C. Public Schools*, OEA Matter No. 2401-0253-10R13R16, *Opinion and Order on Motion for Interlocutory Appeal*, p. 5-6 (January 24, 2017).

On March 10, 2017, Agency issued a Notice of Supplemental Authority. It argued that the D.C. Court of Appeals decision in *Vilean Stevens and Ike Profit v. District of Columbia Department of Health,* 150 A. 3d 307 (D.C. 2016), affirmed the decision of the OEA and the Superior Court, but the Court made several determinations that were directly counter to OEA's position on the application of the Abolishment Act.[14] Employee filed a Motion to Exclude on March 17, 2017. He, again, requested that Agency not be allowed an opportunity to provide additional arguments or authority.[15]

On May 25, 2017, the AJ issued his Second Initial Decision on Remand. The AJ held that he could not rely on the arguments presented in Agency's Notice of Supplemental Authority. He explained that doing so would run afoul with the clear instructions given by the OEA Board in its Opinion and Order on Motion for an Interlocutory Appeal. Without referencing any of the regulations outlined in DPM Chapter 24, the AJ determined that the RIF was properly conducted under the Abolishment Act; that Employee offered no proof that the competitive level and area in the instant matter were not properly constructed; that Employee was afforded one round of lateral competition; and that Agency provided Employee the required thirty-day notice. The AJ concluded that Employee's CLDF score was accurate and removal was appropriate because of his placement as the lowest ranked ET-15 English teacher at Agency. Accordingly, he upheld Agency's RIF action against Employee.[16]

On June 29, 2017, Employee filed a Petition for Review of the Second Initial Decision on Remand. He argues that the AJ's decision to dismiss his appeal was factually and legally

[14] *District of Columbia Public Schools' Notice of Supplemental Authority* (March 10, 2017).
[15] *Employee's Motion to Exclude* (March 17, 2017).
[16] As it related specifically to the grievances filed, the AJ asserted that OEA no longer has jurisdiction over grievance appeals. He explained that Employee failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. In addition, he argued that Employee's numerous ancillary arguments were best characterized as grievances and are outside OEA's jurisdiction to adjudicate. *Second Initial Decision on Remand,* p. 2-6 (May 25, 2017).

incorrect. Employee states that he presented evidence to support a favorable ruling that Agency did not apply the regulations in Chapter 24 of the DPM. He explains that the AJ's decision failed to address or even acknowledge any aspect of DPM Chapter 24. Further, he argues that the decisions issued by the AJ were not based on substantial evidence and included an erroneous interpretation of statute and regulations. Employee contends that his due process rights were violated and that the AJ provided clear evidence of bias and a perceived lack of judicial integrity. Therefore, he requests that the OEA Board apply DPM Chapter 24 to the facts of his case and reverse the Second Initial Decision on Remand and the RIF action.[17]

Agency filed its response to Employee's petition on August 3, 2017. It submits that the AJ was correct in finding that it complied with Chapter 24. It is Agency's position that both Title 5, DCMR § 1503 and DPM Chapter 24 outline similar factors to be taken into account when providing one round of lateral competition. Further, Agency denies Employee's assertions that it failed to place him on a Priority Reemployment list. Agency, again, argues that the ruling in *Stevens v. District of Columbia Department of Health* overruled the OEA's decision that its RIFs were conducted pursuant to the Abolishment Act, instead of D.C. Official Code § 1-624.02.[18] Therefore, it requests that this Board uphold the AJ's ruling.[19]

The AJ provided a shockingly inadequate analysis of Chapter 24 in his Second Initial Decision on Remand. While it would be appropriate for this Board to remand the matter to the AJ to actually comply with its Opinion and Order on Remand, we will not. As requested by Employee, we will provide an analysis of DPM Chapter 24 based on the record before us. This

[17] *Petition for Review of Second Initial Decision on Remand,* p. 3-8 (June 29, 2017).
[18] Agency asserts that Chapter 15 of the DCMR and not Chapter 24 of the DPM should govern Employee's RIF procedure because Chapter 24 applies only to RIFs carried out under the Abolishment Act. It states that under *Stevens*, the RIF should be governed by the general RIF statute, not the Abolishment Act. Based on *Stevens*, Agency argues that it was within its rights to conduct the 2009 RIF pursuant to the RIF statute and Title 5, Chapter 15 of the DCMR.
[19] *District of Columbia Public Schools' Response to Employee's Petition for Review* (August 3, 2017).

will be done primarily because this matter has been pending for far too long, and we do not wish to run the risk of the AJ wasting any additional time of the parties involved.

D.C. Official Code §1-624.08(f)(2) provides that "an employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied." Sections (d) and (e) offer the following:

> (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 (emphasis added).
>
> (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.

Because the AJ determined that D.C. Official Code §1-624.08 governed this RIF action, we must rely on DPM Chapter 24 to determine if Agency provided one round of lateral competition and thirty days' notice.

DPM Chapter 24

The relevant provisions of DPM section 2406 provide the following:

> 2406.1 If a determination is made that a reduction in personnel is to be conducted pursuant to the provisions of §§ 2400 through 2431, the agency shall submit a request to the appropriate personnel authority to conduct a reduction in force.
>
> 2406.2 Upon approval of the request as provided in §§ 2406.1, the agency shall prepare the following:
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> (a) An administrative order or equivalent identifying the competitive area, and the positions to be abolished, by position number, title, series, grade, and organizational location, and the reason therefore; and

> (b) A D.C. Standard Form 52 (DC SF 52) for each position to be abolished, without indicating the name of the incumbent of the position.
>
> 2406.4 The approval by the appropriate personnel authority of the administrative order or amendment thereof shall constitute the authority for the agency to conduct a reduction in force.

Moreover, DPM Section 2408.1 provides that "the retention standing of each competing employee shall be determined on the basis of tenure of appointment, length of creditable service, veterans preference, residency preference, and relative work performance, and on the basis of other selection factors as provided in these regulations. Together, these factors shall determine whether an employee is entitled to compete with other employees for employment retention and, if so, with whom, and whether the employee is retained or released."

The record contains documents which provide that Chancellor Rhee was delegated authority to authorize the RIF. Through a letter to her deputy, Chancellor Rhee then authorized the Office of Human Resources to conduct the RIF. The document included the reason for the RIF; the RIF competitive areas; competitive levels, which were based on pay plans, pay grades, job titles, and subject taught; the competitive factors, which included the school needs, relevant performance, professional experience, District residency, Veteran's preference, and prior performance evaluations; and the timeline for the RIF notices.[20] Thus, Agency adhered to all of the terms provided for in DPM sections 2406.1, 2406.2(a), and 2406.4 of the regulation.

The Board was unable to locate a Standard Form 52 in the record, as required by DPM § 2406.2(b). However, we do not believe that Employee was prejudiced by this oversight because the information required in the Standard Form 52 is provided in the authorization notice and the database documents provided by Agency. The Standard Form 52 requests, *inter alia*, the type of personnel action taken, the position to be abolished, Veterans' Preference, pay series,

[20] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #1 (January 7, 2010).

employment type, the effective date, date of request, and grade and step. As provided above, the authorization notice from Chancellor Rhee established the reason for the RIF; competitive areas; competitive levels (pay plans, pay grades, job titles, and subject taught); competitive factors (school needs, relevant performance, professional experience, District residency, Veteran's preference, and prior performance evaluations); and the timeline for the RIF notices.[21] Additionally, the database document provided by Agency submitted the competitive area, position, pay plan, grade, full-time equivalent designation, name, employee number, position status (filled or vacant), competitive level, selection factors derived from employees' CLDF (including the school needs, their relevant contributions and performance, and professional experience), number of years employed by the District and federal government, Veterans' preference, residency preference, evaluation scores, total scores, and a field to indicate if they were separated from service due to the RIF.[22] Therefore, although not within a Standard Form 52, the information was evidenced in the record by Agency.

As for the retention register requirements, the database document included information beyond the requirements of DPM section 2408.1 regulation.[23] Although the database document does not provide a separate retention register, we determine that it is a *de minimus* error because the document is arranged by separate competitive levels so one can easily compare all employees within each competitive level. The database document indicates the action taken, but it does not provide the effective date of the action. The effective date of the RIF is, however, provided in

[21] *Id.*
[22] *District of Columbia Public Schools' Brief,* Exhibit A (March 8, 2012).
[23] As previously provided, the document includes centralized data which included the competitive area, position, pay plan, grade, full-time equivalent designation, name, employee number, position status (filled or vacant), competitive level, selection factors derived from employees' CLDF (including the school needs, their relevant contributions and performance, and professional experience), number of years employed by the District and federal government, Veterans' preference, residency preference, evaluation scores, total scores, and a field to indicate if they were separated from service due to the RIF. *Id.*

Employee's notice.[24] Thus, Agency provided one round of lateral competition and did not impede Employee's due process rights.

Due Process with RIF actions

As it relates to due process in RIF actions, the D.C. Court of Appeals reasoned in *Grant v. District of Columbia*, 908 A.2d 1173, 1179 (D.C. 2006), and *Burton v. Office of Employee Appeals*, 30 A.3d 789, 798 (D.C. 2011) (citing *Leonard v. District of Columbia*, 794 A.2d 618, 624 (D.C. 2002), that in order to invoke due process protections, an employee must show that a protected liberty or property interest is implicated. However, the Court held in *Hoage v. Board of Trustees of University of District of Columbia*, 714 A.2d 776, 782 (D.C. 1998), that when the personnel action taken against an employee is a RIF, opposed to an adverse action for cause, "it is by no means obvious that a property interest in continued employment is even implicated . . . ." Furthermore, the *Hoage* Court reasoned that even if a property right is implicated by the RIF action, an employee is not denied due process if they are given notice and the opportunity to be heard.[25]

In the current matter, it is clear that Employee had an opportunity to be heard. Employee was able to present his arguments to OEA through his submission of documentary evidence. Additionally, he provided witness testimony, and he had the opportunity to cross examine Agency's witnesses at an evidentiary hearing. Thus, although Agency did not meet all of the specific requirements provided in DPM Chapter 24, as it relates to form 52 and the retention register, the RIF process was followed, and Agency did not violate Employee's due process rights. Employee was definitively provided an opportunity to be heard at OEA.

[24] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #4 (January 7, 2010).
[25] *Also see Dupree v. District of Columbia Office of Employee Appeals,* 36 A.3d 826 (D.C. 2011) and *Laura Smart v. D.C. Child and Family Services,* OEA Matter No. 2401-0328-10, *Opinion and Order on Petition for Review* (March 4, 2014).

Notice

Moreover, it is undisputed that Employee received adequate notice of the RIF action. The notice requirements are outlined in DPM section 2422. The relevant sections provide the following:

> 2422.1 Each competing employee selected for release from his or her competitive level under this chapter shall be entitled to written notice at least thirty (30) full days before the effective date of the employee's release.
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> 2422.3 A notice shall not be issued less than thirty (30) days before the effective date of the employee's release.
>
> 2422.5 An agency shall not retain an employee beyond the end of the notice period.
>
> 2422.6 The notice to the employee shall specify the effective date of the employee's release from his or her competitive level.
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> 2422.8 A reduction-in-force action shall not be taken before the effective date of a notice.

The notice is dated October 2, 2009 and provided that "beginning immediately, [Employee] will be on paid administrative leave until November 2, 2009, the effective date of [his] separation." The notice explained that Employee may receive severance pay. It also stated that he may be eligible to retire in lieu of being separated. It provided Employee's appeal rights and that because he was separated as the result of a RIF, he would receive priority re-employment consideration.[26]

[26] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #4 (January 7, 2010). As it relates to priority re-employment, 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 section 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 DCPM." *Petition for Appeal*, p. 7 (December 2, 2009). Employee's RIF notice provides the following:

> You may apply for any job vacancies at DCPS or within the District government that arise in the future. Employees separated pursuant to a reduction in force receive priority re-employment consideration, but are not guaranteed re-

Conclusion

Employee's RIF appeal has been thoroughly reviewed and analyzed at OEA. If, as Agency suggests, the general RIF statute should have been used, then the AJ provided substantial evidence in the first Initial Decision that the RIF action would be upheld under 5 DCMR § 1501. However, if the Abolishment Act was the correct statute in this matter, then Chapter 24 of the DPM is applicable. At the request of the Employee not to remand the matter to the AJ again, the Board provided a comprehensive analysis of Chapter 24 here. The RIF action is upheld under a review of either 5 DCMR § 1501 or DPM Chapter 24. Employee was provided with an opportunity to be heard. He received one round of lateral competition and adequate notice of the RIF. Therefore, we must deny Employee's Petition for Review of the Second Initial Decision on Remand.

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employment.

Thus, as Agency provided, it did comply with this statutory and regulatory requirements for the priority re-employment list, as was evidenced in Employee's RIF notice.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review of Second Initial Decision is **DENIED**.

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

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Jelani Freeman

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.