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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	OEA Matter No.: 2401-0112-10
PHILLIP HAUGHTON,	)	
Employee	)	
	)	Date of Issuance: June 7, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Agency	)	Monica Dohnji, Esq.
	)	Administrative Judge

James DeVita, Esq., Employee’s Representative  
Sara White, Esq., Agency’s Representative

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On October 30, 2009, Phillip Haughton (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) action of abolishing his 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 his position was abolished was an ET-15 Special Education Teacher at Prospect Elementary School (“Prospect”). Employee was serving in Education Service status when his position was abolished.

I was assigned this matter on February 7, 2012. On February 17, 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 have complied. After reviewing the record, I have determined that there are no material facts in dispute and therefore, a hearing is not warranted. The record is now closed.

**JURISDICTION**

This 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.<sup>1</sup>

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02<sup>2</sup>, which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

Specifically, section § 1-624.08 states in pertinent part that:

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<sup>1</sup> See Agency's Answer, Tab 1 (December 9, 2009).

<sup>2</sup> 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*,<sup>3</sup> 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.” 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.”<sup>4</sup>

However, the Court of Appeals took a different position. In *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*,<sup>5</sup> DCPS conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.” 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.”<sup>6</sup> The Court stated that the “ordinary and

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<sup>3</sup> No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

<sup>4</sup> *Id.* at p. 5.

<sup>5</sup> 960 A.2d 1123, 1125 (D.C. 2008).

<sup>6</sup> *Id.*

plain 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.”<sup>7</sup>

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.<sup>8</sup> 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.”<sup>9</sup> 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.”<sup>10</sup>

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.<sup>11</sup> 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 may only contest before this Office:

1. That he did not receive written notice thirty (30) days prior to the effective date of his separation from service; and/or
2. That he was not afforded one round of lateral competition within his competitive level.

### ***Employee’s Position***

In his petition for appeal, Employee submits that Agency failed to follow appropriate procedures as required by D.C. Code § 1-624.08. He also alleges that the information on his Competitive Level Documentation Form (“CLDF”) is incorrect and false. He explains that the ratings “given are too low and incorrect.” He further explains that he was not properly rated because he was not “in a solid position” and that the principal had only been working at the school for six (6) to eight (8) weeks when he evaluated Employee.<sup>12</sup> Employee further submits that he was not given one round of lateral competition because Agency failed to conduct the appropriate analysis required for one round of lateral competition as required by D.C. Code § 1-624.08 and 5 DCMR § 1503.<sup>13</sup> Employee notes specifically that the principal failed to mention his Bachelors and Masters degrees under the Needs of the School category of the CLDF. Employee also notes that neither his CLDF nor those of his colleagues mentions the curriculum, specialized education, degrees, licenses or areas of expertise. Employee maintains that the analysis of the Needs of the School category is a required RIF procedure, and the principal’s use

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

<sup>10</sup> *Id.*

<sup>11</sup> *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

<sup>12</sup> Petition for Appeal (October 30, 2009).

<sup>13</sup> The Brief of Employee Phillip Haughton at pp. 3- 4. (March 30, 2012).

of this category to conduct analysis of each individual's work performance violates Agency's own rules for conducting a RIF.<sup>14</sup>

### ***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 by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of his separation. Agency asserts that there were eighteen (18) ET-15 Special Education teacher positions at Prospect, and two (2) positions were identified as the positions that would be subject to the RIF. Agency maintains that it utilized the proper competitive factors in implementing the RIF and that Employee was the lowest ranked ET-15 Special Education teacher, and was terminated as a result of the round of lateral competition.<sup>15</sup>

### ***Analysis***

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS is authorized to establish competitive areas when conducting a RIF so long as those areas are based "upon all or a clearly identifiable segment of the mission, a division or a major subdivision of the Board of Education, including discrete organizational levels such as an individual school or office." For the 2009/2010 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area. In accordance with Title 5, DCMR § 1502.1, competitive levels in which employees subject to the RIF competed were based on the following criterion:

1. The pay plan and pay grade for each employee;
2. The job title for each employee; and
3. In the case of specialty elementary teachers, secondary teachers, middle school teachers and teachers who teach other specialty subjects, the subject taught by the employee.<sup>16</sup>

Here, Prospect was identified as a competitive area, and ET-15 Special Education teacher was determined to be the competitive level in which Employee competed. Employee has not provided any credible evidence that he was placed in the wrong competitive level. According to the Retention Register provided by Agency, there were eighteen (18) ET-15 Special Education Teachers subject to the RIF. Of the eighteen (18) positions, two (2) were identified to be abolished. Because Employee was not the only ET-15 Special Education Teacher within his competitive level, he was required to compete with other employees in one round of lateral competition. According to Title 5, DCMR § 1503.2 *et al.*:

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<sup>14</sup> *Id.*

<sup>15</sup> Agency's Brief (March 12, 2012).

<sup>16</sup> *Id.* at pp 2-3. School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

If a decision must be made between employees in the same competitive area and competitive level, the following factors, in support of the purposes, programs, and needs of the organizational unit comprising the competitive area, with respect to each employee, shall be considered in determining which position shall be abolished:

- (a) Significant relevant contributions, accomplishments, or performance;
- (b) Relevant supplemental professional experiences as demonstrated on the job;
- (c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise; and
- (d) Length of service.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

- (a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)
- (b) Significant relevant contributions, accomplishments, or performance – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
- (d) Length of service – (5%).<sup>17</sup>

Agency argues that nothing within the DCMR, applicable case law, or D.C. Official Code prevents it from exercising its discretion to weigh the aforementioned factors as it sees fit.<sup>18</sup> Agency cites to *American Federation of Government Employees, AFL-CIO v. OPM*, 821 F.2d 761 (D.C. Cir. 1987), wherein the Office of Personnel Management was given “broad authority to issue regulations governing the release of employees under a RIF...including the authority to reconsider and alter its prior balance of factors to diminish the relative importance of seniority.”

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<sup>17</sup> It should be noted that OEA has consistently held that DCPS is allowed discretion to accord different weights to the factors enumerated in 1503.2. Thus, Agency is not required to assign equal values to each of the factors. See *White v. DCPS*, OEA Matter No. 2401-0014-10 (December 30, 2001); *Britton v. DCPS*, OEA Matter No. 2401-0179-09 (May 24, 2010).

<sup>18</sup> Agency Brief at pp. 4-5 (March 5, 2012).

I agree with this position and find that Agency had the discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

### ***Competitive Level Documentation Form***

Agency employs the use of a CLDF in cases where employees subject to a RIF must compete against each other in lateral competition. In conducting the instant RIF, the principal of Prospect was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the “length of service” category was completed by the Department of Human Resources (“DHR”).

Employee received a total of five (5) points on his CLDF and was therefore ranked the lowest in his competitive level. Employee’s CLDF stated, in pertinent part, the following:

“Phillip Haughton is a poor performing teacher at Prospect LC. He has a history of insubordination, non-compliance, and chronic unprofessional behavior during collaborative meetings and in the general school environment. In addition, these occurrences include his recent hostile communication towards the 2<sup>nd</sup> floor teaching staff here at Prospect Learning Center.

In the Classroom, he wastes instructional time and lacks rigor. His students are often disengaged and fail to perform highly....

On Tuesday, September 15, 2009 at approximately 2:30pm, Mr. Haughton’s behavior during collaboration was completely unprofessional and disruptive. ... Several teachers said, “We are just exhausted with his confrontational and divisive behavior. We get more done when he does not show up to collaboration.”

On Friday, August 21, 2009 when (Instructional coach) and I entered his classroom we advised him that lesson plans are required. His response that day was, “Oops I left it in the car.” It is understood that lesson plans are used as a guide for teachers while constructing the learning experiences for students.

On September 1, 2009 we ... met and he was advised in person and via email at that time to please refrain from using collaboration time inappropriately.... Collaboration time in the morning and afternoon should be used to discuss children and related instructional best practices.

Since then he has failed [to] comply with any of these directives. ...”<sup>19</sup>

**Office or school needs**

This category is weighted at 75% on the CLDF and accounts for any factors that may have an impact on the success of the school or achievement of the students at the school such as; curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of zero (0) points out of a possible ten (10) points in this category; a score much lower than other employees within his competitive level. In his petition for appeal, Employee asserts that the ratings he received were too low, and the comments in his CLDF are incorrect and false. He also submits that his Bachelors and Masters degrees were not taken into consideration by the principal.<sup>20</sup> However, Employee has failed to provide any evidence to highlight how the degrees translate into his classroom expertise. Also, there is no indication that this would supplant the higher score received by the other employees in his competitive level who were not separated from service pursuant to the RIF. Moreover, it is within the principal of Prospect’s managerial expertise to assign numeric values to this factor. As such, this Office cannot substitute its judgment for that of the principal at Prospect.

**Significant relevant contributions, accomplishments, or performance**

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area. This category includes factors such as student outcomes, rating, awards, attendance etc. Employee did not provide any documentation to supplement additional points being awarded in this area. Moreover, it is within the principal’s managerial discretion to award points in this area given his independent knowledge of the employees and student body.

**Relevant supplemental professional experiences as demonstrated on the job**

This category accounts for 10% of the CLDF. Employee did not provide any documentation to supplement additional points being awarded in this area. Moreover, it is within the principal of Prospect’s managerial expertise to assign numeric values to this factor.

**Length of service**

This category accounts for 5%. It was completed by DHR and was calculated by adding the following: 1) years of experience; 2) military bonuses; 3) D.C. residency points; and 4) rating add—four years of service was given for employees with an “outstanding” or “exceeds expectations” evaluation within the past year. The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

Here, Employee’s Service Computation Date (“SCD”) is listed as 1986. He was employed with Agency for twenty-three (23) years. He received twenty-three (23) points for

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<sup>19</sup> *Id.* at Exhibit B.

<sup>20</sup> Employee’s Brief, *supra*.

Years of Experience. He received six (6) points for D.C. residency. Employee did not receive any points for Veterans preference. He did not receive an “outstanding” or “exceeds expectations” performance rating for the prior year, and therefore, did not receive the additional four years. Employee received a weighted total of five (5) points in this category, the maximum number of points available for this category. He does not contest the points awarded. Therefore, I find that Agency properly calculated this number.

In his petition for appeal, Employee also contends that “I was not rated properly because I was not in a solid position.”<sup>21</sup> He notes that the “principal was only working at the school for six to eight weeks when he rated me.” However, in reviewing the documents of record, Employee does not offer any statutes, case law, or other regulations to refute Agency’s position regarding the principal’s authority to utilize discretion in completing an employee’s CLDF during the course of the instant RIF. In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*, 109 F.3d 774 (D.C. Cir. 1997), the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that “school principals have total discretion to rank their teachers” and noted that performance evaluations are “subjective and individualized in nature.”<sup>22</sup> Employee has a total score of five (5) points after all of the factors outlined above were tallied and scored. The next lowest colleague who was retained received a total score of forty-seven (47) points. Employee has not proffered any other evidence to suggest that a further re-evaluation of his CLDF scores would result in a different outcome in this case.<sup>23</sup> Accordingly, I find that the principal of Prospect had discretion in completing Employee’s CLDF as he was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. I therefore find that Agency did not abuse its discretion in completing the CLDF, and Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

### ***Thirty (30) Days Notice Requirement***

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* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added). Here, Employee received his 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 provided Employee with information about his appeal rights. Employee has not alleged that he did not receive a written thirty (30) days notice prior to the effective date of the RIF. Thus, it is

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<sup>21</sup> Petition for Appeal, at p. 5 (October 30, 2009).

<sup>22</sup> See also *American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

<sup>23</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (stating that a material fact is one which might affect the outcome of the case under governing law).

undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

### *Grievances*

Employee submits that he was not properly rated because he was not in a solid position, and the principal had only worked at the school for six to eight weeks when he rated him. Complaints of this nature are grievances, and do not fall within the purview of OEA's scope of review. Further, 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. Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

### CONCLUSION

Based on the foregoing, I find that Employee's position was abolished after he properly received one round of lateral competition and a timely thirty (30) days legal notification was properly served. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in her removal is upheld.

### ORDER

It is hereby **ORDERED** that Agency's action separating Employee pursuant to a RIF is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.  
Administrative Judge