

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

WASHINGTON TEACHERS' UNION	:	
LOCAL #6, AMERICAN FEDERATION	:	
OF TEACHERS, AFL-CIO,	:	Docket No. 2009 CA 007482 B
	:	Judge Bartnoff
Plaintiff,	:	Calendar 4
	:	
MICHELLE RHEE, CHANCELLOR, et al.:	:	
	:	
Defendants.	:	

**ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY
INJUNCTION AND MOTION FOR A TEMPORARY RESTRAINING ORDER**

In mid-September 2009, defendant District of Columbia Public Schools (“DCPS”) gave notice to plaintiff Washington Teachers Union, Local #6, American Federation of Teachers, AFL-CIO (“WTU” or “the Union”), to DCPS staff, and to the parents and guardians of DCPS students of an impending reduction-in-force (“RIF”) of school-based personnel. DCPS asserted that the RIF was necessitated by a reduction in the school system’s budget that was enacted by the District of Columbia City Council shortly before the beginning of the school year. In anticipation of the RIF, on September 28, 2009, the Union filed a group grievance against what it characterized as a “mass discharge,” which it claimed was being undertaken in violation of the Collective Bargaining Agreement (“CBA” or “the Contract”) between WTU and DCPS. A few days later, on October 2, 2009, DCPS gave notice to 388 of its employees (including 266 WTU members, of whom 229 were teachers) that they were being separated from their employment pursuant to a RIF that was necessitated by the budget shortfall.¹ The affected employees were

¹ Certain of the employees who were separated in the RIF were support or administrative staff and are not part of the WTU bargaining unit. The relief sought in this case would not apply to them.

removed from their positions but remained on administrative leave (and therefore on the employment rolls) for an additional 30 days, until November 2, 2009.

On October 7, 2009, the Union filed this suit against defendants Michelle Rhee, Chancellor of DCPS, DCPS, Mayor Adrian Fenty, and the District of Columbia. Together with the Complaint, the Union filed a motion for a preliminary injunction, by which it is seeking for the affected WTU members to be reinstated to their positions, pending resolution of the Union's grievance.² Based on the representations made to the Court in the course of this case, the Court understands that DCPS has denied the grievance and that WTU has or will be demanding arbitration. The arbitration process is expected to take several months, if arbitration goes forward. The defendants have indicated that they oppose arbitration and may be seeking court intervention in that regard.

After the Complaint and motion for preliminary injunction were filed, the Court set a preliminary injunction hearing for November 5, 2009, which was a date available to the Court and to counsel. On October 22, the day before the defendants' response to the motion for preliminary injunction was due, the plaintiff filed an Amended Complaint, in accordance with Rule 15(a) of the Superior Court Rules of Civil Procedure, to add a claim under the Public Education Reform Amendment Act of 2007.³ In part in light of the Amended Complaint, and with the plaintiff's consent, the defendants then sought an extension of one week, until

² The relief sought in the preliminary injunction also would have precluded the termination of any member of the bargaining unit pursuant to any further RIF, pending resolution of the grievance filed by WTU on September 28. Counsel for the Union clarified at the hearing on November 5, 2009 that the Union is seeking reinstatement of the WTU members subject to the current RIF, pending resolution of the grievance, but is not asking for a preliminary injunction that would extend to any future RIF.

³ Under Rule 15(a), the plaintiff may amend its Complaint once as a matter of course prior to service of a responsive pleading.

October 30, 2009, to file their response to the motion for a preliminary injunction. The requested extension was granted by the Court on October 26, 2009, and the defendants' response was filed on October 30.

No application for a temporary restraining order was filed with the Complaint. But on October 26, 2009—after the plaintiff had agreed that the defendants would have until October 30 to respond to the motion for preliminary injunction on the merits—the plaintiff filed a motion for a temporary restraining order, by which the Union sought for the Court to restrain DCPS from removing any WTU members subject to the RIF from the employment rolls on November 2, 2009, pending resolution of the motion for preliminary injunction.⁴ The plaintiff requested that a hearing on that motion be set for October 28, 2009. The defendants opposed that request.

The Court determined not to set a hearing on the motion for a temporary restraining order on October 28, but it did set a status hearing on that date, at which counsel for both parties were present. The Court advised the parties at that time that it was reluctant to hold a hearing on the motion for a temporary restraining order separately from the scheduled hearing on the motion for a preliminary injunction, given that the legal and factual issues presented by the motions were essentially the same and that the plaintiff had been aware since before this case was filed that the affected WTU members were to be removed from the rolls on November 2. It would have been unfair to require the defendants to respond to the merits of the plaintiff's claims on October 28,

⁴ Under Rule 65(b) of the Superior Court Rules of Civil Procedure, the term of a temporary restraining order is no more than ten days. A temporary restraining order may be extended for an additional ten days for good cause shown, or for a longer period with the consent of the party against whom the order is issued. The proposed temporary restraining order would have had the effect of continuing the pay of the WTU employees subject to the RIF, pending resolution of the motion for a preliminary injunction, but it would not have returned them to their classrooms or other positions at DCPS.

when the Court had just extended the time for them to respond—with the plaintiff’s consent—to October 30 and a hearing previously had been set for November 5.

The asserted purpose of the proposed temporary restraining order is to avoid a claim by the defendants that the relief sought in the motion for preliminary injunction should not be granted because of intervening action affecting the status of the separated employees taken as of November 2, before the hearing scheduled for November 5.⁵ At the status hearing, in response to inquiries from the Court, the defendants agreed (through their counsel from the Office of the Attorney General) that for purposes of the preliminary injunction hearing on November 5, they would not argue that any change in the affected WTU members’ employment status as of November 2 would affect the nature of the relief that could be granted by the Court. In other words, although the defendants opposed the motion for preliminary injunction, they would not argue against the motion based on the removal of the affected employees from the employment rolls on November 2. The Court then determined to hear the motion for temporary restraining order together with the motion for preliminary injunction on November 5.

As a practical matter, the motion for temporary restraining order effectively is subsumed in the motion for preliminary injunction. The proposed temporary restraining order would maintain the affected WTU members on the employment rolls, pending resolution of the motion for preliminary injunction. But the Union has been very clear that the relief it is seeking is for its members who were subject to the RIF to be returned to their jobs, and not merely for them to be carried on the rolls as employees, pending arbitration of the grievance filed by the Union under the Collective Bargaining Agreement.

⁵ No party requested that the preliminary injunction hearing be set on a date prior to November 2, 2009.

The hearing was held on November 5, 2009. The Court initially heard testimony from four witnesses presented by the plaintiff: Mary Collins, WTU staff representative; Emyrtle Bennett, a former guidance counselor at Calvin Coolidge Senior High School; Maurice Asuquo, a former special education teacher at Sharpe Elementary School; and Gwendolyn Griffin, President of the D.C. Parent Teacher Association. The defendants then presented the testimony of Lisa Marie Ruda, the DCPS Chief of Staff. The plaintiff presented rebuttal testimony from George Parker, President of WTU. Because Mr. Parker was permitted to testify about certain new issues that had not been the subject of Ms. Ruda's testimony, the Court allowed the defendants to call David McCray, the chief labor strategist for DCPS, to respond to those additional matters.

I.

Most teacher hiring takes place in an "open hiring" process from April 15 to July 15 of each year, prior to the beginning of the school year in mid-to late August. In the spring and summer of 2009, the District of Columbia Public Schools hired over 900 new teachers for the 2009-2010 school year —substantially more than had been hired in prior years.⁶ DCPS contends

⁶ DCPS contends that for the 2008-2009 school year, it hired 637 new teachers, and that 527 new teachers were hired for the 2007-2008 school year. The Union claims that in response to its inquiries regarding new hires for those years, DCPS provided somewhat lower numbers, but that dispute is not material to the issues now before the court.

In a declaration filed with the Court, Chancellor Rhee further explained that in April 2009, at the beginning of the hiring season for the 2009-2010 school year, DCPS determined that it would need to hire up to 955 new teachers. (DCPS eventually hired 934 new teachers.) A certain amount of attrition occurs every year, as the result of voluntary retirements, resignations, and voluntary separations for performance problems and lack of licensure. According to the Chancellor, DCPS hired more new teachers for the 2009-2010 school year, beyond its needs resulting from attrition, for two primary reasons: (1) because resources had been reallocated to the local school level, as the result of a streamlining of the central operations staff, and many principals chose to spend more of their allocated resources on teachers, and (2) because the Chancellor authorized the addition of approximately 180 special education teacher positions in order to expand the capacity of DCPS to serve more special education students.

that despite a variety of pressures on its budget, it had sufficient budget authority to support the new teachers at the time they were hired, based on the budget that had been approved by the D.C. City Council. The evidence presented to the Court supports that contention.

The history of the DCPS budget for the current school year is described in detail in the Declaration of Michelle Rhee, which was submitted by the defendants, and was further explained in the testimony of Lisa Ruda, the DCPS Chief of Staff. The Court found Ms. Ruda to be a very credible witness, and the plaintiff did not present any substantive challenge to her testimony or to the Rhee declaration with regard to the school budget.

In summary, the record reflects that the Mayor's proposed budget for DCPS for the current school year, as initially submitted by the Mayor to the City Council in March 2009, was \$562 million. That budget provided for increased staffing levels for teachers, among other expenditures. In early April 2009, Chancellor Rhee appeared before the City Council to defend the proposed DCPS budget. On May 12, 2009, in its first reading of the budget, Vincent Gray, the Chairman of the City Council, questioned DCPS's enrollment projections, and the Council proposed to cut the DCPS budget by \$27.5 million.⁷ In response, Chancellor Rhee wrote a letter to Chairman Gray, dated May 12, 2009, in which she described the operational impact of the proposed budget reduction, which she claimed would require a reduction of 338 teachers.

After substantial further public debate and discussion, a meeting was held in late May 2009, which included Chancellor Rhee, the head of the Charter School Board, and Chairman

⁷ The DCPS budget submitted by the Mayor in March 2009 was based on a projected enrollment of 45,054 students for the 2009-2010 school year. The Council's budget amendment was premised on an enrollment of approximately 42,000. The DCPS enrollment for the 2008-2009 school year was 44,681. The enrollment for the current year, as of October 5, 2009, is 45,772. The DCPS projections that Chairman Gray had questioned therefore not only were accurate, but were below the current enrollment.

Gray. At that meeting, an agreement was reached, under which \$24 million was restored to the DCPS budget, based on the audited enrollment level for the 2008-2009 school year, and \$3 million was set aside for future educational purposes, to be released if the actual school enrollment for 2009-2010 met the Chancellor's projection. That agreement was announced publicly by Chairman Gray. On June 2, 2009, the City Council passed a budget of \$568 million for DCPS, which increased the Mayor's proposal by \$6 million but also added additional responsibilities.⁸

DCPS then proceeded with hiring new teachers, based on the budget that was passed on June 2. DCPS insists that its projected teacher staffing needs were included in that budget, as well as in the budget initially proposed by the Mayor in March 2009. No evidence has been presented to the contrary.

Later in June, the District's Chief Financial Officer announced a revised revenue forecast and projected that for Fiscal Year 2010, the District would have \$150 million less in revenue than previously had been projected. In mid-July, the Mayor submitted a revised budget to the City Council, in light of that lower revenue projection, but the budget for DCPS remained at \$568 million. Both Chancellor Rhee in her declaration and Ms. Ruda in her testimony stated that no reduction in the DCPS budget was either submitted or anticipated. If anything, the Mayor's revised budget proposal in July provided DCPS with additional confidence in the budget level that had been approved for the 2009-2010 school year in early June, given the agreement that had been reached with Chairman Gray and the fact that the Mayor's revised budget maintained that agreed funding level for the school system. DCPS therefore continued to hire new teachers

⁸ DCPS contends that those additional responsibilities will cost \$8.6 million.

in the summer of 2009 in the expectation that its budget was sufficient to support those new hires, as well as all returning teachers.

On July 31, 2009, only a few weeks before the beginning of the new school year, the City Council reduced the DCPS budget to \$550 million. That reduction not only cut the DCPS budget by \$18 million from the \$568 that previously had been adopted, but it eliminated the \$3 million set-aside. Given that the audited enrollment in October 2009 not only met but exceeded the Chancellor's projection, that additional \$3 million would have been released to DCPS, under the budget agreement with the City Council. The July 31 budget cut therefore effectively amounted to \$21 million.

In response to the Council's action on July 31, Chancellor Rhee concluded that the most appropriate course of action to ensure that expenditures did not exceed available funds was to reduce teachers and other school-level staff.⁹ She therefore authorized a RIF, pursuant to D.C. Code § 1-524.02 and 5 DCMR §§ 1500 *et seq.*

Virtually all the new teacher positions had been filled prior to July 31, 2009. Teachers all were required to report for professional development on August 17, 2009, and new teachers were required to report a few days earlier. The first day of school for students was August 24, 2009.

⁹ The Anti-Deficiency Act provides that the District of Columbia cannot "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). *See also* D.C. Code § 1-204(a)(9).

There was some mention during the November 5 court hearing of a proposed cut in summer school funding, which the City Council apparently had suggested when it reduced the DCPS budget on July 31. Ms. Ruda explained in her testimony that the Chancellor did not consider that to be a reasonable approach to the budget problem, because of the importance of summer school to DCPS students. Some budget reallocation apparently will be needed to fund summer school in 2010, which Ms. Ruda testified would be forthcoming. No legal claims were presented to the Court regarding any budget reprogramming requirements.

The Court credits Ms. Ruda's testimony that prior to July 31, 2009, there had been no consideration of a RIF at DCPS, much less any decision to conduct a RIF. Once the Chancellor decided that a RIF should be undertaken, a further process was developed to implement the RIF, including an allocation of the cuts to be made by each school. The Chancellor gave the principals discretion to decide how to make their allocated cuts, in accordance with general guidance provided by the Director of School Operations on September 18, 2009, and the applicable regulations. Under that guidance, certain factors such as age and race were not to be included in the process. In addition, in order to eliminate any financial incentive to identify more senior or more highly paid staff for separation, the principals were advised that their school's budget would be credited only with the average cost (salary plus benefits) of any position cut, not the actual cost of the person occupying the position.¹⁰

By letter of September 11, 2009, from Deputy Chancellor Kaya Henderson to WTU President George Parker, the Union was advised of the impending RIF.¹¹ Parents and guardians

¹⁰ The RIF itself was not without costs, including severance. After the RIF decision was made, the Chief Financial Officer of DCPS prepared an estimate of those costs, based on the assumption that on average, the separated teachers would have had 5-10 years of experience. A budget then was prepared that included \$3 million in estimated RIF severance costs. At the time that estimate was prepared, no determination had been made regarding what positions would be eliminated or which employees would be separated in the RIF.

The Union argues that the inclusion of RIF severance in the budget documents prepared after July 31 indicates that a RIF previously had been contemplated. To the contrary, the preparation of that estimate only after July 31 supports DCPS's position that it had no plans for any RIF before July 31, when the City Council effectively reduced the DCPS budget by \$21 million.

¹¹ That letter also makes reference to the "equalization" process that has taken place in the last few years, by which DCPS makes adjustments after the school year begins and student enrollment is confirmed, in order to align staffing and other resources to the actual enrollment and to adjust budgets for particular schools, as warranted. DCPS contends that it conducted the RIF and the equalization together, so that any resulting changes in student schedules and disruptions in the classroom would occur at one time. The Union contends that equalization did not occur this year at all and that as a result, more teachers were separated in the RIF. The basis for that claim is not entirely clear.

of students enrolled in DCPS were advised by a letter from Chancellor Rhee, dated September 15, 2009, that a RIF of school-based positions would take place as of September 30, 2009. A similar letter dated September 16 from Chancellor Rhee was sent to all DCPS staff.

Representatives of the Union have regular meetings (on a more or less weekly basis) with the Deputy Chancellor and other DCPS officials during the school year. One such meeting was held on September 16, 2009, after the Union had been notified of the RIF. WTU President Parker attended that meeting, as did David McCray of DCPS, and the Union indicated prior to the meeting that the upcoming RIF was to be discussed. One of the suggestions made by a Union representative at that meeting was that the RIF might be avoided by furloughing all teachers for 3-4 days. The DCPS representatives responded that given the extent of the budget shortfall, furloughs would be required for more like 30 days, which would be untenable and would have a negative impact on students. The guidance to be provided to principals in implementing the RIF also was discussed, and certain of the Union's suggestions were incorporated in the guidance memorandum sent to the principals on September 18. The RIF was the subject of additional discussion with the Union at another meeting on September 30, 2009.

As noted above, the RIF notices were provided to the affected employees on October 2, 2009. Those employees have not been at their jobs since that date. Apparently some teachers or other employees were escorted out of their schools on October 2, 2009, although that did not occur in all instances or at all schools.¹²

¹² Some individual teachers have filed separate tort lawsuits against the District of Columbia, in which they claim intentional infliction of emotional distress based on the RIF and/or the way they were treated by DCPS when the RIF was implemented as to them. They also have asserted defamation and negligence claims. The plaintiffs in those cases are seeking compensatory and punitive damages.

An additional matter has been raised both by the plaintiff and the defendants. At the end of the school year, teachers are “excessed” if there no longer is a need for them in the schools where they had been placed. During the hiring process in the spring and summer, the excess teachers may be selected for positions at other schools for the coming year, or they themselves may seek out other placements. To the extent that excess teachers are not placed at other schools, it has been DCPS’s practice to assign them to schools as additional resources and to cover the cost under the Central Office budget. There were 65 such teachers in the 2008-2009 school year, out of 1,253 teachers excessed at the end of the 2007-2008 school year. At the end of the 2008-2009 school year, 410 teachers were excessed—far fewer than in the prior year—160 of whom had not been placed as of the end of July 2009. Although that number was greater than had been expected, DCPS again assigned those teachers to schools as additional resources and determined to cover the costs from the Central Office budget.¹³ DCPS acknowledges that the cost of the excess teachers was another pressure on its budget, but it asserts that prior to July 31, 2009, it was set to begin the new school year with each teacher in a funded position and with no reduction of teaching staff.

Although the Union argues that the RIF was not a RIF, but rather a pretext for a mass discharge, it has provided no evidence that the DCPS budget could not support the teaching staff, including the excess teachers funded from the Central Office budget, as well as the new hires, prior to the reduction in the budget enacted by the City Council on July 31. Mr. Parker did testify that all the excess teachers are entitled under the Contract to be placed in positions within their area of certification that he described as “solid”—that is, positions within the principal’s

¹³ The total cost of the 160 excessed teachers was estimated at approximately \$13 million, but likely would be less, because some of those teachers could be expected not to report for duty at the beginning of the school year and others could be expected to replace teachers who did not report.

allocated budget. Those excess teachers who are placed in a school as additional resources but are not in the allocated budget are commonly referred to as “gifts.” Although those teachers have jobs and retain their rights under the Contract, Mr. Parker testified that they generally are not as valuable to the school as a teacher in a position within the school’s budget and they therefore may be more vulnerable to a RIF.¹⁴ Somewhat less than half the excess teachers who were placed in schools as additional resources and paid for from the Central Office budget were separated in the RIF. To the extent that the Union believes that DCPS did not provide excess teachers with their full rights under the Contract, no grievance had been filed in that regard as of the November 5, 2009 hearing.¹⁵

II.

The legal standards applicable to motions for preliminary injunction and temporary restraining orders are the same. To prevail on such a motion for emergency relief, the plaintiff must show: (1) a substantial likelihood of success on the merits of the underlying claim; (2) irreparable injury to the plaintiff in the absence of the requested preliminary injunction; (3) that on balance, granting the relief sought would not cause more harm to third parties than a denial would cause to the plaintiff; and (4) that the requested relief is in the public interest. *See Akassy v. Wm. Penn Apartments, L.P.*, 891 A.2d 291, 309-310 (D.C. 2006); *In re Antioch University*,

¹⁴ For example, according to Mr. Parker, many of the excess teachers who were placed in schools as additional resources were put in positions as co-teachers with new teachers. The new teachers were the “teachers of record” in those positions.

¹⁵ Mr. Parker further testified that he was aware of the issue of the excess teachers who were not in “solid” positions immediately prior to the beginning of the school year, but he had thought he would be able to address it as the year progressed. That approach certainly is understandable, given that those teachers all appeared to be in funded positions and that other positions might well have been expected to open up for them as the school year progressed. But the Union’s evaluation of the status of the excess teachers also confirms that prior to the July 31 budget reduction, the Union also apparently recognized that the approved DCPS budget could support the full teaching staff, including both returning and new teachers.

418 A.2d 105, 109 (D.C. 1980). Those are the same standards articulated by the United States Court of Appeals for the District of Columbia Circuit in *Virginia Petroleum Jobbers Association v. Federal Power Comm'n*, 259 F.2d 921 (1958), which long have been held to be applicable in this jurisdiction. *See Antioch, supra*.

In the typical situation, a plaintiff seeks a preliminary injunction to maintain the status quo, pending resolution of the merits of its claims in the litigation. *See Fountain v. Kelly*, 630 A.2d 684, 688 (D.C. 1993). The defendants have suggested that in this case, the plaintiff bears an additional burden because it is seeking not to maintain the status quo as of the date the lawsuit was filed but to restore the affected Union members to the status they previously held, before the RIF notices were issued and before they were removed from their positions. Based on the parties' presentations to the Court, it is undisputed that the teachers and other affected Union members were notified on October 2, 2009 that they were being separated from their employment because of the RIF, and they have not been back to work since that date. As noted above, this suit was filed on October 7, 2009.¹⁶

In *Fountain*, the Court of Appeals indicated that when a party is requesting mandatory preliminary injunctive relief that would result in "significant changes in the situation which existed when the suit was filed" and that would "alter the status quo rather than . . . to maintain it, [the plaintiff] must be held to a substantially higher standard than in the usual case." *Id.* The Court further described the standards governing a mandatory injunction as essentially the same as those applicable to the extraordinary remedy of mandamus. 630 A.2d at 689. But the Court of

¹⁶ For purposes of the instant motion for preliminary injunction, the defendants' position that a higher standard applies therefore does not depend on any action taken on November 2, 2009, but on the fact that the affected WTU members had been removed from their positions in the schools before the motion for preliminary injunction was filed. The Union is not seeking to enjoin removal of the affected teachers from their classrooms, but is seeking to have them reinstated, now that they have been removed.

Appeals also noted that “[t]he status quo is the last uncontested status which preceded the pending controversy.” 630 A.2d at 689, n.5 (citing *District 50, United Mineworkers of America*, 412 F.2d 165, 168 (D.C. Cir. 1969)). The plaintiff argues that in the instant case, given that the Union filed a group grievance challenging the impending RIF as a mass discharge even before the RIF formally was implemented, the “last uncontested status” that preceded the pending controversy was that the affected WTU members were employed and in their positions with DCPS. The plaintiff therefore disputes that its claims in this case should be held to any higher standard, beyond the already stringent requirements for obtaining a preliminary injunction.

The Court in *Fountain* stated that a party seeking a mandatory preliminary injunction must show that the law and the facts clearly support its position. In that case, the Court characterized the plaintiff’s “prospects of ultimate victory” as “less than auspicious,” 630 A.2d at 689, so there was no real question that the plaintiff could show a substantial likelihood of success on the merits, much less meet some higher standard. Similarly, for the reasons described below, the Court finds that the plaintiff cannot establish that the requested temporary restraining order and preliminary injunction should be granted in this case, under the traditional tests, without consideration of any more stringent standard.

III.

A. Likelihood of success on the merits.

There is no question in this case that when DCPS terminated the employment of the affected teachers and other WTU members, it did so through the procedures applicable to a RIF, and not through the procedures that would have had to be followed under the Contract, had those employees been discharged. There also is no question that as a matter of law, the Chancellor has the authority to implement a RIF, in accordance with applicable statutes and regulations, for

budgetary reasons, among others. *See* D.C. Code §1-617.08 (a) (3)-(5); 5 DCMR § 1500.2 (a). It is not for this Court to second-guess the Chancellor’s decision about whether a RIF is the appropriate means to address a budget shortfall. *See, eg., District of Columbia v. Sierra Club*, 670 A.2d 354, 365 (D.C. 1996); *Quattlebaum v. Barry*, 671 A.2d 881, 884 (D.C. 1995).

The District of Columbia Comprehensive Merit Personnel Act, D.C. Code § 1-601.01, *et seq.*, and particularly D.C. Code § 1-624.02, provide for specific procedures to be followed in the event of a RIF of DCPS employees. Those RIF procedures are further defined in Chapter 15 of the District of Columbia Municipal Regulations (“DCMR”). Although it appears that RIF procedures may have been a subject of collective bargaining between DCPS and employee unions in the past, the current CBA does not address the procedures to be followed in the event of a RIF. The defendants take the position that as a matter of law, the responsibility to manage the DCPS budget lies exclusively with the Chancellor (through a delegation to her from the Mayor) and that under D.C. Code §1-617.08 (a)(3)-(5) and (a-1), the authority to order and to conduct a RIF is not properly the subject of collective bargaining.¹⁷ The Union may not agree with that position, but the current CBA provides no basis for any challenge to the merits of a RIF, the procedures used in conducting a RIF, or the validity of a RIF as applied to any particular employee. The sole provision in the current contract relating to a RIF is Article XLII, which

¹⁷ The statute provides that “the respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations: . . . [t]o relieve employees of duties because of lack of work or other legitimate reasons; [t]o maintain the efficiency of the District government operations entrusted to them;. . . [and] [t]o determine. . . [t]he mission of the agency, its budget, its organization, the number of employees, and to establish the tour of duty. . . .” D.C. Code § 1-617.08. In addition, Section 1-617.08(a-1) provides that an “act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section.”

provides only that during the life of the CBA, DCPS agrees to consult with the Union prior to a reduction-in-force, abolishment or furlough.

During the preliminary injunction hearing, the Court held an extensive colloquy with plaintiff's counsel regarding the difference between a discharge, under Article VII of the CBA, and a RIF. The plaintiff contends that the termination of the Union members at issue in this case should be considered a mass discharge, which is subject to the grievance procedures of the Contract, including arbitration. But the plaintiff also acknowledged that if the terminations at issue in this case were a RIF, the discharge procedures in Article VII of the CBA are inapplicable.

There is a procedure established by statute for a District of Columbia employee who has been separated through a RIF to file an appeal to the Office of Employee Appeals ("OEA") "if he or she believes that his or her agency has incorrectly applied the provisions of this subchapter or the rules and regulations issued pursuant to this subchapter." D.C. Code § 1-624.04.¹⁸ Such an appeal must be filed no later than 30 calendar days after the effective date of the RIF action, and "[t]he filing of an appeal shall not serve to delay the effective date of the action." *Id.* The legislature therefore has provided a mechanism for an employee who has been subject to a RIF to challenge that action, but the legislature also has decreed that the RIF not be stayed pending any such appeal. Either the employee or the agency may appeal the OEA decision to the Superior Court, pursuant to D.C. Code § 1-6-6.03(d).¹⁹

¹⁸ See also D.C. Code § 1-606.03(a) ("An employee may appeal a . . . reduction in force (pursuant to subchapter XXIV of this chapter). . . to the Office [OEA]. . .").

¹⁹ The District of Columbia Court of Appeals repeatedly has held that an employee subject to a RIF must exhaust his or her administrative appeal to the OEA before he or she can challenge the RIF in court. See, e.g., *Washington Teachers Union v. District of Columbia*, 960 A.2d 1123, 1134 (D.C. 2008). The RIF at issue in that case was undertaken under the Abolishment Act,

In this case, the plaintiff is not challenging the way the RIF was undertaken, in terms of the regulations applicable to a RIF, nor is it challenging any particular RIF decision. Nevertheless, the plaintiff called two witnesses, a school counselor and a teacher, who presented testimony to suggest that the RIF decisions as to them were unwise or were motivated by inappropriate considerations.²⁰ The plaintiff's purpose in presenting their testimony in this case was to attempt to show that the RIF was a pretext to get rid of employees who for some reason were out of favor with their school principals or with the current management of DCPS. The Court recognizes that questions could be raised about particular RIF decisions, in terms of the position that was eliminated, the individual whose employment was terminated, or both. Any employees separated pursuant to the RIF have the right to file timely appeals to the OEA, and counsel for the defendants acknowledged that mistakes may well have been made in particular instances. Nevertheless, some questionable RIF decisions do not establish that the RIF was a pretext for a mass discharge, given the undisputed evidence that the DCPS budget was sufficient to support the existing staff and the new teachers being hired for the current school year, until the Council reduced the budget by \$21 million only two weeks before the new teachers were scheduled to report.

rather than the general RIF statute at issue here, but the procedures for challenging the RIF are the same.

²⁰ One of those witnesses, Maurice Asuquo, provided compelling and disturbing testimony regarding his treatment at Sharpe Health School. Mr. Asuquo is blind and has certifications in special education and visual impairment. He had been teaching Braille, communication skills development, and assisted technology. But in December 2006, he was assigned to teach visual arts, including drawing and painting (for which he is not certified), primarily to sighted students. He objected to that assignment, for obvious reasons, and received a performance rating of "needs improvement"—the first negative performance rating he has received in his 18 years of teaching. It does not appear that Mr. Asuquo took any formal action under the Contract or otherwise to challenge what appears to have been an inappropriate assignment, nor did he state that he had appealed the RIF to OEA.

The primary focus of the plaintiff's argument on the merits is based on the policy supporting arbitration of labor disputes. The Union argues that if there is a basis for its claim that its dispute with DCPS is arbitrable under the Contract, a preliminary injunction should be entered in order to protect the arbitration process. The cases the Union relies on to support that argument do not go nearly as far as the Union suggests, and none of them are directly applicable here. Certain of those cases address deference to an arbitrator's award after arbitration proceedings have been concluded, as opposed to whether an injunction should issue pending arbitration. Further, several of the cases involve mandatory arbitration provisions that clearly applied to the circumstances at issue. *See, eg., Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) (enjoining a strike when a no-strike provision of a collective bargaining agreement was combined with a mandatory arbitration provision).²¹

In contrast, the decision by DCPS to conduct the RIF and the way the RIF was implemented are not covered by the CBA and therefore are not subject to the grievance procedure or to mandatory arbitration, under the Contract. The Union does not (and cannot) contest the Chancellor's legal authority to conduct a RIF to address a budget shortfall, nor is it contending in this case that the procedures used to implement the RIF were unlawful. To the extent that the Union is making any claim that a challenge to the RIF is subject to arbitration under the Contract, the Court does not find that there is a substantial likelihood of success on the merits of such a claim.

²¹ In that case, the Court also found that the Norris-LaGuardia Act, 29 U.S.C. § 104, which generally precludes the federal district courts from enjoining a strike in breach of a no-strike provision in a collective bargaining agreement, did not prohibit the issuance of an injunction in favor of arbitration when the dispute was undoubtedly subject to a mandatory arbitration provision, the employer was presently ready to proceed with arbitration, and the breaching strike caused irreparable harm to the employer. No similar federal statutes or other questions of federal law are present here.

Apparently in recognition that the Contract does not apply to a RIF, the Union contends that the RIF was a subterfuge for an improper mass discharge, which would be arbitrable under the Contract. The plaintiff further argues that because its claim on the merits is based on preservation of the efficacy of the grievance and arbitration process, the Court need not reach the merits of the underlying grievance. That argument is untenable, in the circumstances of this case. The efficacy of the grievance process is implicated in this case only if that process is applicable to the plaintiff's challenge to the RIF, and that challenge is premised on the plaintiff's assertion that the RIF was a pretext for a mass discharge. In the circumstances, the Court cannot merely accept the plaintiff's assertion that its claims are arbitrable, without examining the premise of the claim of pretext.

Based on the record before the Court, the Court finds that the plaintiff has shown virtually no likelihood of success on the merits of its claim that the RIF was not really a RIF and instead should be considered a mass discharge. At most, the plaintiff showed that a large number of teachers were hired in the spring and summer of 2009, which DCPS does not dispute. But the plaintiff presented no evidence to refute the evidence presented by DCPS that its budget included those new teachers at the time they were hired, as well as the returning teachers, that DCPS was planning for the new school year based on the budget that was passed in early June and its budget agreement with the Council Chairman, and that the RIF was instituted in response to the \$21 million budget reduction enacted by the City Council on July 31.²²

²² Even if the Union now has other suggestions for operational adjustments that DCPS could or should have made in response to the \$21 million budget reduction, the Union has no legal right to challenge the Chancellor's decision to conduct a RIF on that account. The Union did suggest that DCPS could have considered somehow terminating the employment of the newly-hired employees, based on their probationary status. Not only does that suggestion ignore particular school needs, but it directly contradicts the position the Union has taken in another pending case

The one claim that the plaintiff can make is that it has the right to be consulted in advance of a RIF, under the Contract. Mr. Parker testified that DCPS did not enter into “impact bargaining,” but the Contract by its terms only requires “consultation.” Even if a failure to consult properly could be the subject of a grievance, the Court does not find that the Union can show a likelihood of success on the merits of that claim. The evidence before the Court establishes that the Union was notified of the intended RIF on September 11, that it held meetings with DCPS on the subject of the RIF before the RIF was implemented, and that certain of the Union’s suggestions were included in the guidance provided to principals regarding how the RIF should be conducted. On that record, the Union cannot reasonably claim that DCPS did not consult with it prior to the RIF.

The motion for preliminary injunction was filed before the plaintiff amended its Complaint to add a claim under Section 103(a) of the Public Education Reform Amendment Act of 2007, D.C. Code § 38-172(a), and it is not clear that the plaintiff now is seeking a preliminary injunction or temporary restraining order based on that statute. By its terms, the statute confirms the Mayor’s authority to “govern the public schools in the District of Columbia” and the Mayor’s “authority over all curricula, operations, functions, budget, personnel, labor negotiations and collective bargaining agreements, facilities, and other education related matters. . . .” The statute further provides that in exercising that authority, the Mayor “shall endeavor to keep teachers in place after the start of the school year and transfer teachers, if necessary, during summer break.” The defendants argue with some force that the statute does not create any enforceable rights in third parties, nor does it restrict the Mayor’s oversight and budget functions

with regard to the rights of probationary employees to challenge their discharges, under the Contract. The Court in that case agreed with the Union, and that ruling is now on appeal.

so as to warrant any judicial intrusion. *See Robert Siegel, Inc. v. District of Columbia*, 892 A.2d 387, 395-96 (D.C. 2006).

The plain language of the statute at most indicates what the Mayor should “endeavor” to do. It does not preclude the Mayor (or the Chancellor, as the Mayor’s designee) from conducting a RIF of teachers or from transferring teachers during the school year, in appropriate circumstances. That statute therefore provides no additional support for the plaintiff’s motions for a temporary restraining order or a preliminary injunction.

B. Irreparable injury.

The Court of course recognizes that losing a job is harmful to the affected employee. But the loss of employment generally is not considered irreparable injury in the context of a request for a preliminary injunction, given that compensatory damages and back pay can be awarded, if the employee eventually prevails on the merits. *See Sampson v. Murray*, 415 U.S. 61 (1974); *Farris v. Rice*, 453 F.Supp.2d 76, 79 (D.D.C. 2006).²³ The affected WTU members have appeal rights before the OEA, with further review by the Court. If they are successful in those appeals, they can be reinstated or otherwise can be compensated for any damages caused by an unlawful RIF.

The plaintiff also argues irreparable injury based on the potential for frustration of the arbitration process, if the Union were to prevail on the merits of its grievance in arbitration and DCPS then were to contend that it could not reinstate the affected teachers without undue disruption. But that claim at best is speculative. Further, the purported threat to the arbitration process is substantially reduced in this case because a challenge to a RIF is not subject to arbitration under the Contract. The plaintiff’s attempt to invoke arbitration by claiming the RIF

²³ Notably, the teacher and the counselor who testified at the hearing both were uncertain that they wanted to return to their positions at DCPS at this point.

was a pretext, notwithstanding the undisputed evidence regarding the budget and the timing of the budget reduction that led to the RIF, undercuts the claim of irreparable injury based on the arbitration process itself.

The Union also argues in its motion for a temporary restraining order that if temporary relief is not ordered, it would suffer irreparable harm because employees would become disengaged with the Union. The cases cited by the Union to support that claim of injury involve actions by an employer that threaten the very existence of the union, such as withdrawal of recognition, and none of them involved a RIF or other response to budgetary constraints. Those cases are inapposite to the circumstances here.²⁴

C. Harm to third parties.

The Union argues that the relief it is seeking would not cause harm to the defendants or to third parties. It claims that DCPS students have been harmed by the disruption to their education caused by the RIF and that reinstatement of the affected teachers to their classrooms would benefit the students.

The defendants strongly dispute those claims. The Court agrees that the balance of the equities favors denial of the preliminary injunction. At this juncture, the affected teachers and other WTU members are no longer serving in their positions. The schools have revised schedules and staffing to address the changes resulting from the RIF, and students and school staff have adjusted to those changes. Reinstatement of the affected teachers would not avoid disruption, but instead would cause additional disruption to the schools and the students.

²⁴ The Court did not permit the plaintiff to elicit testimony regarding opinions of WTU members about Chancellor Rhee, although it did permit the plaintiff's counsel to argue in his closing that the Chancellor is engaging in "union-busting." It is clear from the testimony presented that at least some WTU members have strong animosity to the Chancellor and may believe that she is attempting to break the Union. Those opinions regarding the Chancellor's alleged motivation do not establish irreparable injury.

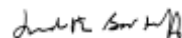
IV. The public interest.

Finally, the Court finds that the public interest does not favor the relief sought by the plaintiff. Given the budget shortfall and the statutory requirements that prohibit the Mayor and the Chancellor from spending money they do not have, reinstatement of the affected WTU members pending arbitration of their grievance would require the District to find some other way to address the gap in the DCPS budget. The District asserts, and the plaintiff has not disputed, that in that event, other staff would then be subject to a RIF—even further into the school year—or programs that have been deemed essential would have to be cut. Such an action would not benefit DCPS, its teachers, students, or staff, or the wider District of Columbia community.

Based on the foregoing and the entire record, it is by the Court this **24th day of November 2009**

ORDERED that Plaintiff's Motion for a Temporary Restraining Order be and it hereby is **DENIED**, and it is

FURTHER ORDERED that Plaintiff's Motion for a Preliminary Injunction be and it hereby is **DENIED**.



Judge Judith Bartnoff
Signed in Chambers

Copies to:

All counsel of record
via Case file Express