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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 2401-0179-10
PHYLLIS LOVETT,	)	
Employee	)	
	)	Date of Issuance: May 11, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Eric T. Robinson, Esq.
_____	)	Senior Administrative Judge
John Mercer, Esq., Employee's Representative	)	
W. Iris Barber Esq., Agency's Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On November 27, 2009, Phyllis Lovett (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“the OEA” or “the Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) action of terminating her employment through a Reduction-in-Force (“RIF”). The effective date of the RIF was November 2, 2009. Employee’s position of record at the time her position was abolished was ET-15 Special Education Teacher at Ballou Senior High School (“Ballou”). Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter on February 7, 2012. On February 16, 2012, I ordered the parties to submit written briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. After some delay, both parties have submitted their respective responses to the order. 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.

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<sup>1</sup> See *Agency's Answer*, Tab 1 (January 7, 2010).

<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.

Official Code § 1-624.08 (“Abolishment Act or the Act”) is the more applicable statute to govern this RIF.

Section § 1-624.08 states in pertinent part that:

(a) ***Notwithstanding*** any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect for the fiscal year ending September 30, 2000, and each subsequent fiscal year, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).

(b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.

(c) ***Notwithstanding*** any rights or procedures established by any other provision of this subchapter, any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).

(d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level.

(e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.

In *Mezile v. D.C. Department on Disability Services*, the D.C. Superior Court found that “the language of § 1-624.08 is unclear as to whether it replaced § 1-624.02 entirely, or if the government can only use it during times of fiscal emergency.”<sup>3</sup> 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*<sup>5</sup>, the District of Columbia Public Schools (“DCPS”) conducted a 2004 RIF “to ensure

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<sup>3</sup> *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

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

<sup>5</sup> *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”<sup>6</sup> 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>7</sup> The Court stated that the “ordinary and 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>8</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>9</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>10</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>11</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>12</sup> Moreover, the persuasive language of § 1-624.08, including the term ‘notwithstanding’, suggests that this is the more applicable statutory provision in order 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, I find that an employee whose position was terminated may only contest before this Office:

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

### ***Employee’s Position***

Employee contends a number of rights were violated both by DCPS as it implemented the instant RFI as well as the appeal process that Employee was required to undergo in order to contest Agency’s action. In Employee’s Brief, dated May 7, 2012, Employee, through counsel highlights the following violations:

- The RIF was improperly executed and failed to satisfy due process of law.

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<sup>6</sup> *Id.* at 1132.

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

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

<sup>9</sup> *Id.*

<sup>10</sup> *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

<sup>11</sup> *Id.*

<sup>12</sup> *Mezile v. D.C. Department of Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

- Equitable and due process consideration created by OEA's failure to comply with mandatory timelines to determine jurisdiction and consider, hear and decide this petition on the merits pursuant to DC Official Code § 1-606.03.
- DCPS failed to substantiate that the RIF was based on a budget shortfall.
- DCPS failed to establish that Employee received adequate notice of the RIF prior to its implementation.
- Employee contends that the score and ranking that she received as part of the RIF was incorrect.

### *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. Employee was given thirty (30) days written notice prior to the effective date of her termination. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that since Employee was one of the lowest ranked personnel in her competitive level and area, she was properly terminated as a result of the one round of lateral competition.

### **Analysis**

Under Title 5 DCMR § 1501.1, the Chancellor 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>13</sup>

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<sup>13</sup> District of Columbia Public Schools' Brief at 2-3 (March 8, 2012). School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

Here, Ballou was identified as a competitive area, and ET-15 Special Education Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were twenty ET-15 Special Education Teachers stationed at Ballou. Only fifteen of those positions survived the instant RIF.

Employee was not the only ET-15 Special Education Teacher within her competitive level and was, therefore, required to compete with other similarly situated employees in one round of lateral competition. According to Title 5, DCMR § 1503.2 *et al.*:

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>14</sup>

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<sup>14</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*

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>15</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.” 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 Competitive Level Documentation Form (“CLDF”) in cases where employees subject to a RIF must compete against each other in a lateral competition. In conducting the instant RIF, the principal of Ballou 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 three (3) points on her CLDF. Employee was one of the five lowest ranked persons in her competitive area and level. Employee’s CLDF stated, in pertinent part, the following:

Ms. Lovett fails to show gains in student growth. This is exemplified by her inability to maintain accurate records that detail grading and/or justification of grading systems...

Low expectations are frequently demonstrated for students or groups of students. She neglects to employ rigor in instruction and fails to prepare students to matriculate with non-disabled peers...

Despite Ms. Lovett’s certification in Special Education, she is not tailoring instruction to address the specific needs of the students. Lesson plans do not reinforce the goals of the IEP and are not standards based.

### **Office or school needs**

This category is weighted at 75% on the CLDF and includes: 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 the other employees within her competitive level. Employee argues that the documentary evidence does not support the score afforded to her. Again, the principal of Ballou was given the discretion to complete Employee’s CLDF. Employee has provided little credible evidence that may bolster her score in

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*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>15</sup> Agency Brief at 5 (March 8, 2012).

this area. Moreover, I find that the Principal at Ballou had wide latitude to invoke his managerial discretion with respect to assessing the on-the-job performance and capabilities of his subordinates. With respect to Office and School needs, I find that in this matter I will not substitute my judgment for that of the Principal of Ballou as it relates to the score he accorded to Employee and her colleagues in the instant matter.

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

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area and contends that the CLDF did not account for her significant contributions. Employee has provided little credible evidence that may bolster her score in this area. With respect to significant relevant contributions, accomplishments, or performance, I find that in this matter I will not substitute my judgment for that of the Principal of Ballou as it relates to the score he accorded to Employee and her colleagues in the instant matter.

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

This category accounts for 10% of the CLDF. Employee used similar argument as noted in the preceding sections in order to substantiate her contention that she should have been awarded additional points on his CLDF. I find that this falls within the rubric of managerial discretion. Considering as much, I again find that Employee's arguments to the contrary are unconvincing.

**Length of service**

This category 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.

An outstanding performance rating in the previous year gets employee an extra four (4) points in the length of service category. I find that Employee has not provided any credible supporting documentary evidence to support any additional points being awarded in this category. Employee received a total of 3 weighted points in this category.

According to Employee, an evidentiary hearing is needed to validate the truthfulness of the principal's statements contained within her CLDF. Employee also contends that a review of her school related accomplishment and activities would prove that the CLDF scores are in direct conflict with her previous work performance throughout her tenure with DCPS.

In reviewing the documents of record, Employee does not proffer any credible 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>16</sup> According to the CLDF, Employee received a total score of 3.5 after all of the factors outlined above were tallied and scored. The next lowest colleague received a total score of 72. Employee has not proffered any credible evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome in this matter.<sup>17</sup>

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.<sup>18</sup> This Office will not substitute its judgment for that of an agency when determining whether a penalty imposed against an employee should be sustained. Rather, this Office limits its review to determining if “managerial discretion has been legitimately invoked and properly exercised.”<sup>19</sup> A penalty will not be disturbed if it comes “within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment.”<sup>20</sup>

Employee also argues that her appeal process is flawed due to the inordinate amount of time that has transpired since her OEA petition for appeal was filed. She also takes umbrage with respect to the pace that her matter has progressed since it was assigned to the undersigned. According to Employee, her due process rights were violated because this Office allegedly took too long to calendar and decide her appeal. Employee now takes offense because the pace has quickened too fast now that it has been assigned. Employee notes that this Office has been processing a large number of similarly situated DCPS employees due to a Writ of Mandamus that was filed on November 1, 2011, by the Washington Teachers' Union, on behalf of DCPS employees removed from service via the instant RIF. Employee correctly notes that approximately two years transpired prior to this matter being assigned to my docket. Employee claims that she has not had an appropriate amount of time in which to conduct discovery and to otherwise prepare for further litigation in this matter. I disagree. Employee, either on her own, or through counsel, could have completed all or at least some of the legwork necessary in order to prepare for her “day in court” for two years. She opted to sit and wait for the matter to be assigned. Employee could have obtained counsel, propounded discovery requests, attempted mediation, or completed any number of other logistical items in order to prepare for the moment when she would be able to actively prosecute her appeal. Employee could have started her preparation from the moment she received Agency's Answer to her petition for appeal. Instead, she chose to sit and wait. Employee, either on her own, or through counsel, has made her decision – she must now live with the consequences.

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<sup>16</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>17</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).

<sup>18</sup> See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

<sup>19</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

<sup>20</sup> *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915 (1985).

### **Lack of Budget Crisis**

In *Anjuwan v. D.C. Department of Public Works*,<sup>21</sup> the D.C. Court of Appeals held that OEA lacked the authority to determine whether an Agency's RIF was bona fide. The Court explained that, as long as a RIF is justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF.<sup>22</sup> The Court in *Anjuwan* also noted that OEA does not have the "authority to second-guess the mayor's decision about the shortage of funds...about which positions should be abolished in implementing the RIF."

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employee's claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds for personnel services. Likewise, how Agency elected to reorganize internally, was a management decision, over which neither OEA nor this AJ have any control.<sup>23</sup>

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

Title 5, §1506 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 1506.1 states that "an employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The notice shall state specifically what action is taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights." Additionally, the D.C. Official Code § 1-624.08(e) which governs RIFs provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF. (Emphasis added). The RIF Notice is dated October 2, 2009. The effective date of the RIF was November 2, 2009. The RIF Notice states that Employee's position is being abolished as a result of a RIF. The RIF Notice also provides Employee with information about her appeal rights. Moreover, Employee has not submitted any credible evidence that would show that she did not receive her RIF notice on the date indicated therein. Therefore, I find that Employee was given the required thirty (30) days notice prior to the effective date of the RIF.

### **Conclusion**

It is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals<sup>24</sup>. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Employee's other ancillary arguments are best characterized as grievances and outside of the OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims.

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<sup>21</sup> 729 A.2d 883 (D.C. 1998).

<sup>22</sup> See *Waksman v. Department of Commerce*, 37 M.S.P.R. 640 (1988).

<sup>23</sup> *Gaston v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

<sup>24</sup> Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

Based on the foregoing, I find that Employee's position was abolished after she properly received one round of lateral competition and a timely thirty (30) day legal notification was properly served. Therefore, I conclude that Agency's action of abolishing Employee's position was done so 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 of abolishing Employee's position through a Reduction-In-Force is UPHeld.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.  
SENIOR ADMINISTRATIVE JUDGE