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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No. 2401-0197-10
JESSIE BENTON,)	
Employee)	
)	Date of Issuance: March 26, 2012
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	ERIC T. ROBINSON, Esq.
_____)	Senior Administrative Judge
Jessie Benton, Employee <i>Pro-Se</i>		
W. Iris Barber, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2009, (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“the OEA” or “the Office”) contesting the District of Columbia Public School’s (“Agency” or “DCPS”) action of terminating his 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 his position was abolished was a Non-Instructional Aide at Spingarn Senior High School. Employee was serving in Educational Service status at the time he was terminated.

I was assigned this matter on February 6, 2012. On February 9, 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. Due to a typographical error, on February 15, 2012, I sent out an amended order which provided the parties with additional time in which to submit their respective briefs. Both parties submitted timely 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 schools¹.

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02², which encompasses more extensive procedures, for the reasons explained below, I find that D.C.

¹ See *Agency's Answer*, Tab 1 (December 31, 2009).

² 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.”³ 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.”⁴

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

⁴ *Id.* at p. 5.

However, the Court of Appeals took a different position. In *Washington Teachers' Union*⁵, the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."⁶ 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."⁷ 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."⁸

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.⁹ 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."¹⁰ 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."¹¹

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹² 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 submits that Agency has provided insufficient evidence to support the abolishment of his position and requests an evidentiary hearing for the purpose of determining the legality of Agency's instant action. Employee cites that during his eight year tenure with DCPS that he has never received an unfavorable evaluation. Employee also cited to Federal

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

⁶ *Id.* at 1132.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

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

¹¹ *Id.*

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

regulations pertaining to the RIF of Federal employees. I find that the Code of Federal Regulations, do not, given the circumstances, have any applicability to the instant matter. Employee also argues that there was no shortage of work. This is also inapplicable since that is outside of the OEA's purview to review. Moreover, Agency did not cite lack of work as a reason to undertake the instant RIF, but rather the Chancellor implemented the instant RIF due to budgetary constraints¹³.

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 his termination. Moreover, Agency avers that it was not required to provide Employee with one round of lateral competition since he was in a single person competitive level at the moment his position was abolished. Agency further maintains that it utilized the proper competitive factors in implementing the RIF.

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.¹⁴

Here, Spingarn Senior High School was identified as a competitive area, and Non-Instructional Aide was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there was only one Non-Instructional Aide, Employee herein, stationed at Spingarn Senior High School.

¹³ See DCPS Brief at 1 (March 7, 2012).

¹⁴ District of Columbia Public Schools' Brief at 2-3 (March 7, 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.

According to the Retention Register produced by Agency, Employee was the sole Non-Instructional Aide stationed at Spingarn Senior High School. Accordingly, I conclude that Employee was properly placed into a single-person competitive level and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(e) pertaining to multiple-person competitive levels when it implemented the instant RIF.

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* (emphasis added) give an employee thirty (30) days notice *after* such employee has been *selected* (emphasis added) for separation pursuant to a RIF.

Here, Employee received his RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice states that Employee’s position is being abolished as a result of a RIF. The Notice also provides Employee with information about his appeal rights. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Lack of Budget Crisis

In *Anjuwan v. D.C. Department of Public Works*,¹⁵ 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.¹⁶ 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 employees’ 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.¹⁷

Administrative Leave

Pursuant to District Personnel Manual (“DPM”) § 2422.11, an employee who receives written notice of release from his or her competitive level due to reduction in force may be placed on administrative leave at the discretion of the agency head (or his or her designee). Contrary to Employee’s allegation, I find that the fact that he was placed on administrative leave

¹⁵ 729 A.2d 883 (D.C. 1998).

¹⁶ See *Waksman v. Department of Commerce*, 37 M.S.P.R. 640 (1988).

¹⁷ *Gaston v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

prior to the abolishment of his position of record is not a matter that may be adjudicated by this tribunal.

Performance Review Rating

6 DCMR Section 2416 provides that an agency will use the current performance rating in conducting the RIF. Current Performance rating is defined as: “performance rating for the year which ended March 31 preceding the date of the RIF notice.”¹⁸ 6 DCMR § 2416.1. While Employee argues that he should not have been removed from service because he had perennially received good performance ratings. However Employee’s argument neglects to take note that he was not given one round of lateral competition because he was in a single person competitive level when his last position of record was abolished. Therefore, DCPS was not required to consider Employee’s performance evaluation because there were no other similarly situated person(s) (another non-instructional aide stationed at Spingarn Senior High School) to compare him to.

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) day legal notification was properly served. I, therefore, 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 their removal is upheld.

ORDER

It is hereby ORDERED that Agency’s action of abolishing Employee’s position through a Reduction-In-Force is UPHOLD

FOR THE OFFICE:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

¹⁸ See *Dupree v. D.C. Office of Employee Appeals*, 992 A.2d 403, 413 (D.C. 2010).