**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | OEA Matter No. 2401-0008-14 |
| BARBARA BAILEY, | ) | |
| Employee | ) | |
| | ) | Date of Issuance: March 24, 2015 |
| v. | ) | |
| | ) | |
| DISTRICT OF COLUMBIA | ) | |
| PUBLIC SCHOOLS, | ) | Senior Administrative Judge |
| Agency | ) | Eric T. Robinson, Esq. |
| | ) | |

Neil S. Hyman, Esq., Employee Representative
Sara White, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND PROCEDURAL HISTORY

According to the documents of record, On August 1, 2013, the Chancellor of the District of Columbia Public Schools ("DCPS" or the "Agency") authorized a Reduction-In-Force ("RIF") of two Special Education Specialist positions in the Office of Special Education ("OSE") due to budgetary reasons. Barbara Bailey ("Employee") encumbered one of the aforementioned positions. Consequently, on August 16, 2013, Employee received written notice that her position was scheduled to be abolished effective September 17, 2013. Employee filed a petition for appeal with the Office of Employee Appeals contesting the RIF of her last position of record. The undersigned was assigned this matter on or about June 16, 2014. Thereafter, I issued an order requiring the parties to submit written briefs regarding whether the Agency conducted the instant RIF in accordance with all applicable laws, rules and regulations. The parties complied with this order. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

### JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

## ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

## BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

## FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

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

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[1] 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.

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."[2] 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."[3]

However, the Court of Appeals took a different position. In *Washington Teachers' Union*[4], the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[5] The Court of Appeals

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[2] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[3] *Id.* at p. 5.
[4] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[5] *Id.* at 1132.

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."[6] 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."[7]

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.[8] 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."[9] 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."[10]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[11] 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 her separation from service; and/or

2. That he/she was not afforded one round of lateral competition within her competitive level.

***Employee's Position***

Employee contends that DCPS provide her with a:

> … facially invalid, unsubstantiated, and insufficient CLDF, the means by which a round of lateral competition was purportedly afforded. DCPS failed to provide any information, explanation, or support for the award of zero points in the category of significant relevant contributions, accomplishments, or performance, and lacked sufficient information in the office needs and relevant supplemental professional experience as

[6] *Id.*
[7] *Id.*
[8] *Id*.
[9] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[10] *Id.*
[11] *Mezile v. D.C. Department of Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

> demonstrated on the job categories, such that a reviewing court would be unable to decipher whether the determination was legitimate or proper.[12]

Employee also contends that that the OEA should adjust the weight that was given in each category in her CLDF in order to right an unjust conclusion of abolishing Employee's position. Employee also contends that D.C. Official Code §1-624.01 violates her procedural due process thereby making it unconstitutional because it limits her right to substantively review this action. Employee also argues that her procedural due process rights were violated since the RIF removal process does not allow for a pre-termination hearing. Lastly, Employee alleges that her reviewer, Ms. Carla Watson was biased thereby presenting another violation of her due process rights.

***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 person in her competitive level and area, she was properly terminated as a result of the one round of lateral competition.

**Analysis**

Employee was not the only Special Education Specialist 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

[12] Brief for the Employee at 3 (August 29, 2014).

(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 – (20%)

(b) Significant relevant contributions, accomplishments, or performance – (50%)

(c) Relevant supplemental professional experiences as demonstrated on the job – (20%)

(d) Length of service – (10%)

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.[13] 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. [14]

***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, DCPS 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 DCPS' Department of Human Resources ("DHR").

Employee contends that her CLDF was devoid of meaningful value as it relates to substantiating the abolishment of her last position of record. I disagree. After reviewing her CLDF, I note that Employee was awarded zero points under the rubrics of "Relevant Significant Contributions, Accomplishments, or Performance and "Relevant Supplemental Professional Experiences as Demonstrated on the Job." Employee was awarded ten points for length of service in recognition of her twenty years of service. Employee was also awarded zero points under "Office Needs" which merited the following explanation from her reviewer:

[13] Agency Brief at 4 – 5 (July 25, 2014).
[14] It should be noted that OEA has consistently held that DCPS is allowed discretion to accord different weights to the factors enumerated in 1503.2. Thus, Agency is not required to assign equal values to each of the factors. *See White v. DCPS*, OEA Matter No. 2401-0014-10 (December 30, 2001); *Britton v. DCPS*, OEA Matter No. 2401-0179-09 (May 24, 2010).

> Employee's role is to ensure compliance with special education law at local schools with respect to the timeliness of IEP completion and documentation in special education records, among other things. Employee implements this core responsibility with a medium degree of fidelity. Employee struggles to be able to communicate policies and procedures to stakeholders involved in the compliance process. Employee has not been able to assume the responsibility of working independently with schools in the field. Employee has been known to make errors in reporting data to an outside agency. Accordingly, the Office cannot necessarily rely upon the accuracy of Employee's work.

Despite Employee arguments to the contrary, the foregoing description is congruent with an award of zero points. Moreover, Employee's assessments indicate that Employee did not have a workmanlike knowledge of databases that she was required to access and operate, e.g. IDEA and Employee was unable to multitask or complete a majority of her assignments in a timely fashion.[15] 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."[16] I find no credible reason to second guess management's assessment of Employee herein. Mere disagreement with an assessment or the assessor is not enough to overturn an adverse action predicated on said assessment. I also find Employee's citation to favorable reviews that she received years ago as being unpersuasive and not indicative of her current work performance, which may change over time.

***Evidentiary Hearing***

According to Employee, an evidentiary hearing is needed to validate the truthfulness of the principal's statements contained within her CLDF. OEA Rule 619.2[17] states in part that an Administrative Judge can "require an evidentiary hearing, if appropriate." Additionally, OEA Rule 624.2 indicates that it is within the discretion of the administrative judge ("AJ") to either grant or deny a request for an evidentiary based on whether or not the AJ believes that a hearing is necessary.[18] After reviewing the record, the undersigned has determined that there are no material facts in dispute and therefore Employee's request for an evidentiary hearing is denied.

Further, it appears that Employee's basis for requesting an evidentiary hearing is to be afforded an opportunity to explore and undoubtedly dispute "…interpretations of their worth against [the] principals' evaluations."[19] While it is unfortunate that Agency had to release any

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[15] See Agency's Answer at Tab 2 ( November 18, 2013).

[16] *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).

[17] 59 DCR 2129 (March 16, 2012); *See also* OEA Rule 619.2, 59 DCR 2129 (March 16, 2012).

[18] *See Gray-Avent v. D.C. Department of Human Resources*, OEA Matter No. 2401-0145-08, *Opinion and Order on Petition for Review* (July 30, 2010).

[19] *Washington Teachers' Union* at 780.

employee as a result of budgetary constraints, there is nothing within the record to corroborate that the RIF was conducted unfairly.

***Grievances***

It is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals[20]. 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 (e.g. that for varied reasons the RIF process is unconstitutional) 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.

***Conclusion***

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 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

[20] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.