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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Paula McDonough)	OEA Matter No. 2401-0175-04
Employee)	
)	Date of Issuance: February 15, 2006
v.)	
)	Joseph E. Lim, Esq.
)	Senior Administrative Judge
D.C. Public Schools)	
Agency)	
)	

Brenda Zwack, Esq., Employee Representative
Sara Moskowitz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On July 27, 2004, Employee, an ET-15 Early Childhood School Teacher with the D.C. Public Schools (the "Agency"), filed a Petition for Appeal with the Office of Employee Appeals (the "Office"), contesting Agency's decision separating her from government service pursuant to the abolishment of her job for financial reasons (the "RIF"), effective June 30, 2004. This matter was assigned to me on April 15, 2005. I held a Prehearing Conference on June 6, 2005 and a hearing on August 15, 2005. I closed the record after the conclusion of the hearing.

JURISDICTION

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

ISSUE

Whether Agency's action separating Employee from service as a result of the RIF was in accordance with applicable law, rule or regulation.

OVERVIEW OF AGENCY'S RIF PROCESS

Section 149 of the District of Columbia Appropriations Act of 1996 (DCAA-96), Pub. L. 104-134 (April 26, 1996), 110 Stat. 1321-77, amended certain sections of the Comprehensive Merit Personnel Act (CMPA) pertaining to RIF's for the 1996 fiscal year.¹ Prior to the passage of DCAA-96, an entire agency was considered to be a "competitive area" for RIF purposes. Section 149 of DCAA-96 permitted an agency to establish, for the first time, competitive areas less than the entire agency.² These changes to the CMPA remained in effect for RIF's conducted during "the fiscal year ending September 30, 2000, and each subsequent fiscal year. . . ." See D.C. Official Code § 1-624.08 (2001). Further, consistent with the earlier modifications to the CMPA, § 1-624.08 limited an employee's appeal rights to this Office to the following areas: 1) that an agency had violated an employee's entitlement to one (1) round of "lateral competition" within his or her competitive level; and 2) that an employee had not been given thirty (30) days specific notice prior to the effective date of the RIF.

Following the passage of DCAA-96, Agency published new RIF regulations.³ By and large, these regulations remained in effect for fiscal year 2004 RIF's. Section 1501.1 of these regulations, 43 D.C. Reg. at 5265, permitted the superintendent to establish "competitive areas based upon . . . a major subdivision of the Board of Education, including discreet organizational levels such as an individual school or office." Each employee within a school or office was then assigned to a "competitive level".⁴

The following RIF regulations are also relevant to this matter:

1503 REDUCTION IN FORCE PROCEDURES

1503.1 An employee who encumbers a position which is abolished

¹ A RIF is an orderly process for the reduction of positions within an agency for, *inter alia*, budgetary reasons and major reorganizations.

² Section 149(a) amended § 2401 of the CMPA as follows: "A personnel authority may establish lesser competitive areas within an agency on the basis of all or a clearly identifiable segment of an agency's mission or a division or major subdivision of an agency."

³ See 43 D.C. Reg. 5264 *et seq.* (1996).

⁴ Section 1502.1 of the RIF regulations, 43 D.C. Reg. at 5266, defines "competitive level" as follows: Competitive levels are groups, within a competitive area, consisting of all positions in the same grade or occupational level that are sufficiently alike in the following characteristics that a person could be assigned to any position without changing the terms of appointment or unduly interrupting the work program:(a) Qualifications;(b) Requirements;(c) Duties;(d) Responsibilities;(e) Pay schedules; and(f) Working conditions.

shall be separated in accordance with this chapter notwithstanding date of hire or prior status in any other position.

1503.2 *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, and/or areas of expertise; and
- (d) Length of service.

43 D.C. Reg. at 5266. (emphasis added).

In order to assess each employee in the above areas, Agency devised a form known as the Competitive Level Documentation Form (CLDF). The CLDF was divided into four (4) categories which mirrored the categories set forth in § 1503.2, *supra*. The maximum number of points attainable in each category was twenty-five (25). Five (5) additional points could be awarded for District residency. Thus, the maximum number of points attainable was 105. Individual school principals were given broad discretion to devise methods to evaluate each employee's contributions in the first three (3) categories. "Length of Service" was based upon the following formula: One (1) to five (5) years service - 5 points; Six (6) to ten (10) years - 10 points; Eleven (11) to fifteen (15) years - 15 points; Sixteen (16) to twenty (20) years - 20 points; and twenty-one (21) or more years - 25 points.⁵

After the CLDF's were completed and tallied, each employee was ranked within his/her competitive level. Based upon each school's projected enrollment and funding for the 2004-2005 School Year,⁶ positions were then eliminated, in inverse order of each employee's ranking within a competitive level. It was the principal's discretion to determine the number of positions in each

⁵ Prior military and/or other federal service was considered in arriving at each employee's length of service point total.

⁶ These projections had been previously determined by Agency's central office and had been provided to each principal.

competitive level that would be eliminated. Here, one position in Employee's competitive level (Early Childhood Teacher), comprised of three individuals, was scheduled for elimination. Employee, who received a total of 45 points on her CLDF, was ranked third out of three.⁷ Thus, Employee was separated from service.

UNDISPUTED FACTS

The following facts are not subject to genuine dispute:

1. According to Agency's personnel records, Employee was an ET-15 Second Grade Elementary School Teacher at Lucy D. Slowe Elementary School.
2. During School Year 2003-2004, Agency experienced financial constraints and made the decision on May 27, 2004 to reduce staffing levels by abolishing positions throughout the school system.
3. Agency required Lucy D. Slowe Elementary School to abolish a set number of positions based on student enrollment and budgetary constraints.
4. Together with input from the Chief Finance Office and the Assistant Superintendent, Lucy D. Slowe Elementary's Principal Patricia Harris determined that two positions would be abolished at the school site.
5. Employee's competitive area was K-6 while her title and grade of competitive level was ET-15 Elementary School Teacher.
6. Using the prescribed CLDF, Employee received 45 points out of a possible total of 105.
7. On May 27, 2004, Agency issued to Employee a letter of official notice of abolishment of her position, effective June 30, 2004.

SUMMARY OF TESTIMONY

Principal Patricia Harris testified (transcript p. 7 – 69) that as the principal of Lucy D. Slowe Elementary School, she was required by regulation to assess each employee using a form known as the CLDF. She met with the teachers a day before the rating to describe the process to them and explain what documents she needed from them to help her allocate the individual points indicated on the form. Harris created a scoring rubric to help her make notes. To come up with her scoring rubric, she looked at the descriptions of points on the CDLF form and used those as her guide.

⁷ The other members of Employee's competitive level and their CLDF scores are as follows: 1) Beverly Worthington – 90; and 2) Geneva Rivera – 85.

In explaining how she awards the points for each section, Harris explained that in the Relevant Significant Contributions, Accomplishments or Performance section, she looks at teacher attendance, building responsibilities such as clubs, reports, report cards, management of studies, luncheon duty, etc. and extra duties before and after school. She adds points for generally on time attendance and call-ins before tardiness or absence, and subtracts points for no leave slips in advance and frequent tardiness. Negative factors in this section include discipline issues, such as allegation of disciplinary action still pending within two years such as AWOL, child abuse, etc. This results in 2-3 lower points.

Harris explained that in the Relevant Supplemental Professional Experience as Demonstrated on the Job section, she looks at the academic training each teacher underwent for her job. Using her own rubric, the professional performance evaluation process (PPEP) meant she gave a maximum of 25 points for professional development teacher courses that the teacher documents. She also described the difference between workshop training hours that all teachers are required to undergo during work hours and training or education hours which are optional and taken at the teacher's own time and expense.

Harris explained that in the Office or School Needs section, this meant that she looks at specialized education such as a degree majoring in special education, reading or math resource, certification specialty or postgraduate degrees. She awards a maximum of 7 points for such degrees. For conflict resolution, she looks at a teacher's management of students or how well the teacher maintains control in the classroom and her response to unruly students.

Extra curricular sponsorship involves after school activities such as sponsorship of clubs. This meant extra duty before or after school on student clubs or sports.

Harris explained that the Length of Service section was self-explanatory and provided by Human Resources as the points were awarded strictly on the years of service, including any military service. An additional 5 points was awarded for D.C. residency or being a pre-1980 employee.

Harris testified that although she consulted with school administration and other principals at the staff meeting, the truth was she had a lot of leeway in how she assigned points, so long as it was consistent with each teacher she ranked. For her, there was no specific amount of points that goes to any one factor; instead it was an amalgam of points.

Harris said she met with the teachers individually and did the form together with the teacher as a partner, signed off, and moved on to the next teacher. She generally added or subtracted points for each category as she talked with each teacher during the conference. Harris gave them a chance to object to her assignment of points.

For Employee's competitive level of ET-15 Elementary School Teacher, she competed with Geneva Rivera and Beverly Worthington. Harris said that the reason why Employee was RIFFed was because her total of 52 points was less than the 85 points of Geneva Rivera and 90 points of

Beverly Worthington.

In explaining the points she awarded the teachers for attendance on the Relevant Significant Contributions, Accomplishments or Performance section, Harris testified that Ms. Worthington and Ms. Rivera had superior attendance records to Employee because they were at work daily on a regular basis whereas Employee was at work at Slowe Elementary School for only a short period. At the time of the evaluation, Employee worked at Slowe School for only 15-20 days and was absent 3.5 days. Harris elaborated that Employee reported to work after her administrative leave on February 2 instead of January 2, thereby missing an entire month of attendance and that Employee was frequently on leave.

Under cross-examination, Harris admitted that Employee was on prior administrative leave because of an allegation of child abuse which turned out to be unfounded. Harris also agreed that Employee called in for her absences and that her attendance record, although brief, showed she was absent only three and a half times. As for the others, Ms. Worthington worked daily but was late 91 times while Ms. Rivera was late 65 times and absent frequently.

In explaining the points she awarded the teachers for Relevant Supplemental Professional Experience as Demonstrated on the Job section, Harris said she gave Ms. Worthington 25 points for her Masters Degree in Education Administration from Trinity College because it was a postgraduate degree which she considers to be above the minimum requirements. She added that Ms. Worthington gave full documentation for her degree. Ms. Rivera also earned a Masters Degree in Education Administration from Trinity College. Harris recalls that Employee also showed documentation that she had post-graduate work so she gave Employee the full 25 points for this section.

In explaining the points she awarded the teachers for extra curricular sponsorship on the Office or School Needs section, Harris said Employee had lots of clubs and activities but was not awarded points because they had no relation to school needs.

In summary, Harris testified that she gave Ms. Worthington more points on the CLDF because Worthington met expectations on her most current PPEP rating; engaged in building responsibilities; and turned in leave slips in advance of taking leave. Harris testified that Ms. Rivera accrued more points on the CLDF than did Employee because Rivera participated in building responsibilities and turned in leave slips in advance of taking leave.

Harris stressed that she was consistent with the criteria she set and the points that she gave for each teacher. She also pointed out that even if she gave the full 25 pts for attendance in the Relevant Significant Contributions, Accomplishments or Performance section of the CLDF, Employee would still have only 70, less than Ms. Rivera's 85 points and Ms. Worthington's 90 points.

Mary Collins (transcript p. 98 – 121) a field representative for the Washington Teachers Union for 5 years, testified that there was no uniform process among the school principals in

applying the Competitive Level Documentation Form. She defined a point rubric as an unofficial device used to compute points for the CLDF in which each element that is being considered for evaluation for a particular purpose would have a specific point value. Collins said principals need official documents and records to support the points. Collins said that sometimes, teachers did not know how many points would be added or subtracted for each factor on the point rubric. She admitted that not all schools used a point rubric in CLDF's.

Collins was aware that at the time of the RIF, Employee had allegations of unjustified corporal punishment of a student at Lucy Diggs Slowe Elementary School. This charge was later found to be unsubstantiated by an arbitrator. Collins did not represent the union at that school.

Employee testified (transcript p. 122 – 153) that she started teaching on December 2, 1997 and taught in different D.C. public schools until her November 20, 2002 termination for alleged corporal punishment of a student. The termination was subsequently overturned after arbitration. She said she came back to work in February 2004 instead of January 2004 because management could not put her in a classroom before then. On February 20, 2004, she was placed on administrative leave for 70 days. See Employee Exhibit 4. The investigation was completed with a finding that no action against Employee was warranted. See Employee Exhibit 5. Employee went back to work on April 30, 2004.

On May 17, 2004, Principal Harris informed the teachers that Agency had identified three teacher positions for abolishment due to budgetary limitations. See Employee Exhibit 6. They only had one night to gather their supporting documents for use in the CLDF during their May 18, 2004 meeting with Principal Harris. Employee said she gave all her documents to Principal Harris but claimed that Harris did not look at all of them. Employee has a Masters of Science degree in addition to courses she took in educational institutes such as George Mason University, Trinity, Loyola, George Washington, and Carnegie. Because of her limited time at the Lucy Diggs Slowe Elementary School, her extra-curricular activities were performed at her prior schools.

When asked if Harris told her that she was using her last performance evaluation for the CLDF, Employee wasn't positive. Employee Exhibit 7 shows that all her performance evaluation reports from 1998 through 2002 indicate that she met expectations. She was not told that her half-day AWOL would result in deducted points. She denied being late and said she gave advance notice of sick days. After coming back to work on May 3, she took sick leave on several occasions after a few days. Employee said her meeting with Harris lasted only 15 minutes. She saw the points she was awarded before she signed the form in protest. Employee added that although she had been a teacher for approximately 18.5 years, she taught at D.C. public schools for approximately 6 years.

Positions of the Parties

Agency argues that the Principal Harris's scoring of the three teachers in the ET-15 Elementary School Teacher competitive level was uniform and fair. Agency further points out that Employee's final score of 45 was far below those of her competitors, Ms. Rivera's 85 points and Ms.

Worthington's 90 points.

Employee counters that Agency's rationale for conducting a RIF rang hollow when it hired more teachers after conducting its 2004 RIF. Employee also takes issue with the fairness of Principal Harris in awarding points on the CLDF. She asserts that Harris had no uniform standard, and that her judgment calls on the awarding of points was based on favoritism. Employee takes issue with the scoring on her PPEP, the use of her advanced educational degrees, and her attendance.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS

D.C. Official Code § 1-624.08 (2001) limited an employee's appeal rights to this Office to the following areas: 1) that an agency had violated an employee's entitlement to one (1) round of "lateral competition" within his or her competitive level; and 2) that an employee had not been given thirty (30) days specific notice prior to the effective date of the RIF. Thus, Employee's first argument regarding Agency's rationale for conducting a RIF cannot be entertained by this Office as it does not fall under the two areas permitted by § 1-624.08.

Employee's second argument regarding the fairness of the grading of her CLDF by Principal Harris goes to an employee's entitlement to one round of "lateral competition" within her competitive level and thus can be entertained. However, as the uncontested testimonies of both parties' witnesses point out, there is no uniform established procedure on how a school principal goes about allocating points.

The only statutory or regulatory mandate in the ranking of teacher positions in the RIF process is the use of the CLDF. The CLDF form itself merely gives illustrative examples of what to consider in each of the four areas (Relevant significant contributions, accomplishments, or performance; Relevant supplemental professional experiences as demonstrated on the job; Office or school needs, including: curriculum, specialized education, degrees, licenses, and/or areas of expertise; and Length of service) in which the teachers are ranked. The examples given sometimes seem to overlap into another area. For example, the training and professional development required under the Relevant Supplemental Professional Experiences as Demonstrated on the Job seem to be similar to the degrees and specialized education examples in the Office or School Needs area.

Although Principal Harris used a point rubric to assist her in allocating points; even Employee's witness, Union Representative Mary Collins admitted that not all principals used a point rubric. In short, apart from using the CLDF, school principals had a lot of leeway in scoring their employees. The only area in which the principal had no leeway was the Length of service area, as this was provided by Human Resources.

Employee's major complaints were that she was not given enough points for her advanced degrees and attendance. However, in examining her CLDF, I note that Employee had already received the maximum 25 points for the Relevant Supplemental Professional Experiences as Demonstrated on the Job area. As for her attendance, which is in the Relevant Significant

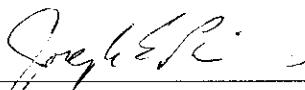
Contributions, Accomplishments, or Performance area; I note that even if she were to receive the maximum 25 points, her resulting total score would only be 65 points. This would still be below Ms. Rivera's score of 85 and thus Employee's position would still have been eliminated by the RIF.

Based on my observation of their demeanor, I find the witnesses to be generally credible. I also find that Principal Harris scored the teachers in a manner that was as fair and consistent as she could, and that her reasons for her allocation of points was generally sound. I therefore conclude that Employee received the proper round of lateral competition within her competitive level. I therefore conclude that the Agency's action separating Employee from service pursuant to the modified RIF should be upheld.

ORDER

It is hereby ORDERED that Agency's action separating Employee from service pursuant to the modified RIF is UPHeld.

FOR THE OFFICE:



JOSEPH E. LIM, Esq.
Senior Administrative Judge