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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
PATRICIA LAMOND,)	
Employee)	OEA Matter No.: 2401-0341-10
)	
v.)	Date of Issuance: December 12, 2012
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	STEPHANIE N. HARRIS, Esq.
Agency)	Administrative Judge
_____)	
Patricia LaMond, Employee <i>Pro-Se</i>		
W. Iris Barber, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 26, 2010, Patricia LaMond (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) action of abolishing her position through a Reduction-in-Force (“RIF”). Employee received her RIF notice on July 22, 2010. The effective date of the RIF was August 21, 2010. Employee’s position of record at the time her position was abolished was a Family Service Worker/Social Services Representative at DCPS’ Head Start Office. Employee was serving in Educational Service status at the time her position was abolished. On September 23, 2010, Agency filed an Answer to Employee’s appeal.

I was assigned this matter on July 17, 2012. On July 31, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations (“July 31st Order”). Agency complied, but Employee did not respond to the July 31st Order. On September 18, 2012, I issued an Order for Statement of Good Cause (“September 18th Order”) to Employee for failure to submit her brief by the prescribed deadline of August 28, 2012. Employee was also directed to submit her legal brief, along with her statement of good cause. On October 1, 2012, Employee contacted the undersigned via telephone to request an extension of time. I informed Employee that all extensions of time were required to be made in writing and noted that although the deadline has passed for

submission of her brief and statement of good cause, she could still submit her request for an extension of time for my consideration. However, Employee failed to submit a request for extension, brief, or statement of good cause.

On October 12, 2012, I issued a second Order for Statement of Good Cause (“October 12th Order”), due to Employee’s informal request for extension of time, thereby extending the deadline for submission to October 24, 2012. As of the date of this decision, Employee has not responded to the aforementioned Orders. After reviewing the record, I have determined that there are no material facts in dispute requiring further proceedings and therefore an Evidentiary Hearing is not 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 FACT, ANALYSIS, AND CONCLUSIONS OF LAW

On July 22, 2010, former D.C. School Chancellor Michelle Rhee authorized a RIF pursuant to D.C. Code § 1-624.02, 5 District of Columbia Municipal Regulations (DCMR) Chapter 15, and Mayor’s Order 2007-186. Chancellor Rhee stated that the RIF was necessitated by curtailment of work and reorganization of functions, due to required corrective action resulting from a failure to meet Federal Head Start Performance Standards.¹

¹ See Agency’s Answer, Tab 1 (September 23, 2010).

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02, 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.²

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.

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.

(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*,³ 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.” 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

However, the Court of Appeals took a different position. In *Washington Teachers’ Union*,⁵ the Court of Appeals found that a 2004 DCPS RIF triggered the Abolishment Act instead of “the regular RIF procedures found in D.C. Code § 1-624.02.” 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.”⁶

The Abolishment Act applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). 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.”⁷ 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.”⁸

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.⁹ Moreover, the persuasive language of § 1-624.08, including the term ‘notwithstanding’, suggests that this is the more applicable statutory provision 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, an employee whose position was terminated may only contest before this Office:

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

³ No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

⁴ *Id.* at p. 5.

⁵ 960 A.2d 1123, 1125 (D.C. 2008).

⁶ *Id.*

⁷ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

⁸ *Id.*

⁹ *See Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

Employee's Position

In her Petition for Appeal, Employee requests that “the decision to eliminate [her] position be re-evaluated,” because she provided many beneficial services to the children and families of the Head Start Program. She also asks that the RIF be rescinded and that she be reinstated to her former position or placed in another position.¹⁰

Agency's Position

Agency submits that it followed RIF procedures in accordance with 5 DCMR § 1500.2,¹¹ and eliminated all Family Service Worker positions within the Office of Head Start due to reorganization of functions, curtailment of work, and other compelling reasons. Agency states that it was under corrective action for failing to meet Federal Head Start Performance Standards. With approval from the U.S. Department of Health and Human Services (HHS), Agency implemented a new school wide model to address chronic deficiencies in all program areas and expand access of Head Start services to more students. To ensure accommodation of the expanded number of students, Agency made significant staffing changes based on the following reasons:

- 1) Reorganization of Functions- two new positions, Community and Parent Outreach Coordinator & Family Service Case Management Specialist, were created, which required minimum education requirements;
- 2) Curtailment of Work- the function of the Family Service Worker, which did not require training or experience, was replaced with the Community and Parent Outreach Coordinator & Family Service Case Management Specialist positions; and
- 3) Other compelling reasons- the establishment of the Community and Parent Outreach Coordinator & Family Service Case Management Specialist positions ensured that all staff members who work with DCPS Head Start families have the training and background necessary to provide needed social services, counseling, and parent education services.

Additionally, Agency asserts that the Chancellor had the authority to identify the Head Start Office as a separate competitive area pursuant to 5 DCMR § 1501. Agency submits that the Chancellor also had the authority to identify the Family Service Worker (Social Service Representative) positions as a competitive level, pursuant to 5 DCMR § 1502. Agency further asserts that because all of the Family Service Worker Social Service Representative) positions were eliminated, it was not required to consider competitive factors or complete a Competitive Level Documentation Form (CLDF). Agency also contends that it provided Employee with

¹⁰ *Id.*

¹¹ 5 DCMR § 1500.2 states in relevant part that a RIF is a process whereby the total number of positions is reduced for one of the following reasons:

- (a) budgetary reasons;
- (b) curtailment of work;
- (c) reorganization of functions; or
- (d) other compelling reasons.

specific written notice dated July 22, 2010 that her position with DCPS was being eliminated effective August 22, 2010.¹²

Abolishment of Entire Competitive Level

This Office has consistently held that when an employee holds the only position in her competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added), D.C. Official Code § 1-624.08(d), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR § 1503.3 and 6 DCMR § 2420.3, are inapplicable.¹³

Agency has provided an affidavit from Peter Weber, who served as the Interim Director of Human Resources during the time of the instant RIF. Mr. Weber states that he was responsible for compiling the names of all employees who reported to the Office of Head Start in the position of Family Service Worker (Social Service Representative), and notifying employees of their termination. Mr. Weber also submitted a listing of all employees who worked as and performed work as a Family Service Worker, which was also synonymous with the position title of Social Service Representative. Mr. Weber further asserted that “every employee identified for the RIF who worked and performed work in the Family Service Worker position” was separated from service.¹⁴

Based on the documents of record, I find that Employee’s entire competitive level was properly abolished and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(d) pertaining to multiple-person competitive levels when it implemented the instant RIF. For this reason, Agency did not have to rank and rate Employee through one round of lateral competition.

Notice Requirements

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 “[a]n employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The specific notice shall state specifically what action is to be taken, the effective date of the action, and other necessary information regarding the employee’s status and appeal rights.” Additionally, 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).

Here, the record shows that Employee received her RIF notice on July 22, 2010 and the effective date for the RIF was August 21, 2010.¹⁵ The notice states that Employee’s position was

¹² Agency Brief (August 14, 2012).

¹³ *Perkins v. District Department of Transportation*, OEA Matter No. 2401-0288-09 (October 24, 2011); *Allen v. Department of Health*, OEA Matter No. 2401-0233-09 (March 25, 2011); *Wigglesworth v. D.C. Department of Employment Services*, OEA Matter No. 2401-0007-05 (June 11, 2008); *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005).

¹⁴ Agency Brief, Tabs B, E (February 29, 2012).

¹⁵ Petition for Appeal, pp. 8-10 (July 26, 2010).

eliminated as part of a RIF and also provided Employee with information about her appeal rights. The record shows that Employee signed an Exit Summary on the same date as her RIF Notice, July 22, 2010.¹⁶ Further, Employee has not contested that she received thirty (30) days written notice. Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the instant RIF.

RIF Rationale

Regarding Employee's request that the instant RIF be rescinded, in *Anjuwan v. D.C. Department of Public Works*,¹⁷ the D.C. Court of Appeals held that OEA's authority over RIF matters is narrowly prescribed. The Court ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide and explained that OEA's authority is to determine whether the RIF complied with applicable District personnel statutes and regulations dealing with RIFs. The Court further noted that OEA does not have the "authority to second guess ... management decisions about which position should be abolished in implementing the RIF."¹⁸

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of whether an Agency's RIF was bona fide, nor can OEA entertain an employees' claim regarding how an agency chooses which position are subject to a RIF. In this case, how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.¹⁹

Failure to Prosecute

Employee's failure to respond to the July 31st, September 18th, and October 12th Orders provides a basis to dismiss this petition. OEA Rule 621.3 grants an AJ the authority to impose sanctions upon the parties as necessary to serve the ends of justice.²⁰ The AJ may, in the exercise of sound discretion, dismiss the action if a party fails to take reasonable steps to prosecute or defend her appeal.²¹ Specifically, OEA Rule 621.3(b) provides that the failure to prosecute an appeal includes failing to submit required documents after being provided with a deadline for such submission.²² The July 31st, September 18th, and October 12th Orders advised Employee of the consequences of not responding, including sanctions resulting in the dismissal of this matter. Employee's responses to these Orders were required for a proper resolution of this matter on the merits. Accordingly, I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office and this serves as an alternate ground for the dismissal of this matter.

¹⁶ *Id.*, p. 10.

¹⁷ 729 A.2d 883 (December 11, 1998).

¹⁸ *Anjuwan*, 729 A.2d at 885.

¹⁹ *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

²⁰ 59 DCR 2129 (March 16, 2012).

²¹ OEA Rule 621.2, 59 DCR 2129 (March 16, 2012).

²² *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).

CONCLUSION

Based on the foregoing, I find that Employee was properly separated via the instant RIF after her entire competitive level was abolished and she was given thirty (30) days written notice prior to the effective date of the RIF. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge