THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LADONNA JONES,	)	
Employee	)	OEA Matter No.: 2401-0004-11
	)	
v.	)	Date of Issuance: January 23, 2013
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	STEPHANIE N. HARRIS, Esq.
Agency	)	Administrative Judge
	)	

LaDonna Jones, Employee *Pro-Se*
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 4, 2010, LaDonna Jones ("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's RIF notice was dated July 30, 2010, with an effective date of September 4, 2010. Employee's position of record at the time her position was abolished was a Coordinator/Specialist at Nalle Elementary School ("Nalle"). Employee was serving in Educational Service status at the time her position was abolished. On November 10, 2008, Agency filed an Answer to Employee's appeal.

I was assigned this matter on July 26, 2012. On September 28, 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 ("September 28th Order"). Agency complied, but Employee did not respond to the September 28th Order. On November 6, 2012, I issued an Order for Statement of Good Cause ("November 6th Order") to Employee for failure to submit her brief by the prescribed deadline. Employee was also directed to submit her legal brief, along with her statement of good cause on or before November 16, 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:
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> > 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 30, 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 conducted to eliminate school-based non-instructional positions and was necessitated by budgetary reasons, curtailment of work and reorganization of functions.[1]

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]

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[1] *See* Agency's Answer, RIF Authorization Notice, Tab 2 (November 8, 2010).

[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:

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

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> (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.

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

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*, DCPS conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[5] The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment 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 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.

Employee's Position

In her Petition for Appeal, Employee requests that she be reinstated because the position she held is "open for hire." She states that the RIF action was taken for personal reasons and notes that a current friend of the principal holds her former position. Employee further states that the principal spoke badly of her to other principals, although she received an effective rating on

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[4] *Id.* at p. 5.
[5] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[6] *Id.*
[7] *Id.*
[8] *Id*.
[9] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[10] *Id.*
[11] *See Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

her performance assessment. She also claims that she received no help from staffing assistants with placement in another position. Additionally, Employee claims that her position was denoted on a list of vacancies which she supplied with her Petition for Appeal. She also alleges that funds may have been misappropriated or embezzled due to paperwork she claims shows that she was paid at a higher grade.[12]

Agency's Position

Agency submits that it followed RIF procedures in accordance with 5 DCMR § 1500.2,[13] and that former Chancellor Rhee authorized the RIF of non-instructional, school-based staff at thirty-seven (37) school due to reorganization of functions, curtailment of work, and budgetary reasons. Agency states that the competitive areas for the RIF were defined by schools where the number of positions for non-instructional staff for the 2009-2010 school year exceeded the number of positions available for the 2010-2011 school year. DCPS determined that Nalle was a competitive area and Employee's position, Coordinator/Specialist, was identified as a position that would be subject to the RIF. Agency states that although Employee was the only person within her competitive level, the entire competitive area was eliminated with the instant RIF. Therefore, according to Agency, neither a Retention Register nor a Competitive Level Documentation Form (CLDF) were created and one round of lateral competition was not required. Agency also claims that it properly gave Employee thirty (30) days written notice of the RIF.[14]

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.[15] An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.

According to the RIF Authorization Notice, the Coordinator/Specialist position at Nalle was subject to the RIF.[16] Accordingly, 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

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[12] Petition for Appeal (October 4, 2010).

[13] 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.

[14] Agency Brief (October 11, 2012).

[15] *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).

[16] Agency Answer, Tab 2 (November 8, 2010).

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's RIF notice was dated July 30, 2010 and the effective date for the RIF was September 4, 2010.[17] The notice states that Employee's position was eliminated as part of a RIF and also provided Employee with information about her appeal rights. Moreover, Employee has not contested that she did not receive 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

Employee submitted documentation alleging that her position, Coordinator/Specialist, was denoted on a listing of open vacancies in support of her contention that her position was not eliminated.[18] However, the listing that Employee submitted was dated July 9, 2010, two months prior to the RIF effective date of September 4, 2010, which does not support Employee's contention that her position was open after the RIF took effect.

Additionally, Employee also alleges that a new person was hired in her position after the RIF. Regarding the alleged continued hiring by Agency, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity, which may have occurred at an agency.[19] Further, in *Anjuwan v. D.C. Department of Public Works,*[20] the D.C. Court of Appeals ruled 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."[21] 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 positions are

[17] *Id*., Tab 1.
[18] Petition for Appeal, pp. 7-10 (October 4, 2010).
[19] *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003).
[20] 729 A.2d 883 (December 11, 1998).
[21] *Anjuwan*, 729 A.2d at 885.

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.[22]

Employee also asserts that this RIF action was taken against her for personal reasons. However, Employee has provided no credible evidence to support this contention. While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that would lead the undersigned to believe that the RIF was conducted unfairly.

Grievances

Employee claims that Agency may have misappropriated funds based on documentation she provided showing that her grade level was a fifteen (15), but she was only paid at a grade eleven (11). Agency provided Employee's SF-50, which shows that she was employed at grade level eleven (11). Additionally, in her Petition for Appeal, Employee acknowledged that she was employed at grade level eleven (11). Employee also argues that the principal spoke badly of her and that she did not receive any placement assistance from staffing specialists.

Complaints of this nature, regarding Employee's grade level, co-worker conduct, and placement assistance are considered grievances and do not fall within the purview of OEA's scope of review. Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

Failure to Prosecute

In addition, Employee's failure to respond to the September 28th and November 6th 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.[23] 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.[24] 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.[25] The September 28th and November 6th 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.

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[22] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).
[23] 59 DCR 2129 (March 16, 2012).
[24] OEA Rule 621.2, 59 DCR 2129 (March 16, 2012).
[25] *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:

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STEPHANIE N. HARRIS, Esq.
Administrative Judge