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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0017-10
CLARENCE JOHNSON, JR.,)	
Employee)	
)	Date of Issuance: January 26, 2012
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Diana Bardes Esq., Employee Representative)	
Iris Barber, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 6, 2009, Clarence Johnson (“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”) 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 RW-3 Custodian at Stuart Hobson Middle School. Employee was serving in Career Service status at the time he was terminated.

I was assigned this matter on October 19, 2011. On November 16, 2011, I held a Status Conference for the purpose of assessing the parties’ arguments regarding the RIF. I subsequently ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws. Both parties submitted timely responses to the order. The record is now closed.

JURISDICTION

The 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 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On or around September of 2009, the District of Columbia Public School's (former) Chancellor, Michelle Rhee, determined that Agency needed to conduct a RIF for the 2010 fiscal year as a result of budgetary restraints.¹ According to Agency, the RIF was conducted in order to "eliminate positions at schools that [could] not be supported by final school based budgets for the 2010 fiscal year."²

Employee took exception to being terminated as the result of RIF and filed a petition for appeal with the OEA. Employee requests that this Office conduct an evidentiary hearing to determine the accuracy of the information contained within the CLDF which served as the basis for Employee's termination. Specifically, Employee argues that Agency has provided insufficient evidence to support the allegations contained within the CLDF, thus warranting an evidentiary hearing for the purpose of determining the veracity of such allegations.³ According to Employee, the harmful comments contained within the CLDF are in direct conflict with the superior performance evaluations contained in his personnel file and virtually usurp the multiple years of seniority he had over other employees within his competitive level.⁴

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code by affording Employee one round of lateral competition and 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 the lowest ranked RW-3 Custodian, Employee, was terminated as a result of lateral competition.

¹ See Mayoral Order 2007-186 (August 10, 2007).

² Agency Brief, Attachment A (December 5, 2011).

³ Employee Brief at p. 4 (December 19, 2001).

⁴ *Id.* at. p. 6-7.

In a RIF matter, I am guided primarily by D.C. Official Code § 1-624.08, which states in pertinent part that:

(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... 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.

(f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that: (1) An employee may file a complaint contesting a determination or a separation pursuant to subchapter XV of this chapter or § 2-1403.03; and (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

Accordingly, the issues to be decided in this matter under the aforementioned statute are: 1) whether the employee was afforded one round of lateral competition within his/her competitive level; and 2) whether an employee received thirty (30) days written notice prior to the effective date of their separation from service.

Title 5, DCMR 1503.1 *et al.* provides guidance pertaining to the implementation of the RIF. Specifically, Section 1503.2 states the following:

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
- (d) Length of service.

When Agency implemented the RIF, it gave the following weights to each of the aforementioned factors:

- (a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)
- (b) Significant relevant contributions, accomplishments, or performance – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
- (d) Length of service – (5%)⁵

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.⁶ Agency correctly states that there is no language contained within any applicable regulation, statute or case law that mandates that the factors outlined in 5 DCMR 1503.2 be given equal weight. I agree with this position and find that Agency was within its discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

With respect to this Office's ability to hold an evidentiary hearing on the veracity of the statements contained within Employee's CLDF, D.C. Official Code § 1-624.04 (2001) provides that:

“An employee who has received a specific notice that he or she has been identified for separation from his or her position through a reduction-in-force action may file an appeal with the Office of Employee Appeals if he or she believes that his or her agency has incorrectly applied the provisions of this subchapter or the rules and regulations issued pursuant to this subchapter....”

The OEA's jurisdiction over appeals resulting from Reductions-in-Force is narrowly prescribed. In general, Section 1-624.04 of the D.C. Code allows this Office to examine a challenge to an agency's application of the provisions governing RIFs. In this instant case, the Principal of Stuart Dobson was charged with completing the CLDF forms for each RW Custodian within Employee's competitive level and was given discretion to assign values to the following categories on the CLDF: 1) Needs of the school; 2) Relevant significant contributions, accomplishments or performance; and 3) Relevant supplemental professional experience as demonstrated on the job.⁷

⁵ 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).

⁶ Agency Brief at pp. 4-5 (December 21, 2011). 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.”

⁷ See Agency Brief at pp. 7-8 (December 21, 2011).

According to the Retention Register provided by Agency, there were three (3) Custodian positions at Stuart Hobson Middle School that were subject to the RIF.⁸ Of the three positions, one (1) RW-3 Custodian position was identified to be abolished. Employee received a total of 12.5 points on his Competitive Level Documentation Form (“CLDF”) and was therefore ranked the lowest in his competitive level.

Based on a review of the documents submitted throughout the course of this appeal, including the CLDF and Retention Register submitted by Agency, I find that Employee was afforded one round of lateral competition to which he was entitled under D.C. Official Code § 1-624.08. The Principal of Stuart Hobson has discretion to assign numerical values to the CLDF for each employee as he finds appropriate. This Office will not substitute its judgment for that of the Agency, but will simply ensure that managerial discretion has been legitimately invoked and properly exercised. I further find that Agency did not abuse its discretion in conducting one round of lateral competition in Employee’s case.

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.”

The notice of termination letter was dated October 2, 2009. The letter further stated that the effective date of the RIF was November 2, 2009. Employee therefore received thirty (30) days written notice prior to the effective date of his termination.

I find that Agency provided Employee with one round of lateral competition and gave Employee thirty (30) days written notice prior to the effective date of his termination. Based on the foregoing, I find that Agency complied with D.C. Official Code § 1-624.08 and Employee’s termination as a result of the RIF must be 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:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

⁸ *Id.* at Tab D (December 21, 2011). Employee’s competitive area was Stuart Hobson Middle School. Employee’s competitive level was RW-3 Custodian.