THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DENISE EDMONDS,	)	
Employee	)	OEA Matter No.: 2401-0151-10
	)	
v.	)	Date of Issuance: May 14, 2012
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	STEPHANIE N. HARRIS, Esq.
Agency	)	Administrative Judge
	)	

Denise Edmonds, Employee *Pro-Se*
W. Iris Barber, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 18, 2009, Denise Edmonds ("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 October 2, 2009. The effective date of the RIF was November 2, 2009. Employee's position of record at the time her position was abolished was a Counselor at Janney Elementary School ("Janney"). Employee was serving in Educational Service status at the time her position was abolished. On December 23, 2009, Agency filed an Answer to Employee's appeal.

I was assigned this matter on or around February 8, 2012. On February 15, 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. Both parties have timely submitted their legal briefs. After reviewing the record, I have determined that there are no material facts in dispute and therefore a 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 September 10, 2009, former D.C. School Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, 5 DCMR Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was necessitated for budgetary reasons, explaining that the 2010 DCPS fiscal year budget was not sufficient to support the current number of positions in the schools.[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, Tab 1 (December 23, 2009).

[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;

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 laws were current and that the government triggers the use of the applicable statute by using "specific language and procedures."[4]

> (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).
[4] *Id.* at p. 5.

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

Employee asserts in her Petition for Appeal that she "[w]as not evaluated nor given the criteria for [the] RIF form at the time of separation."[12] Employee also asserts that she was "excessed" from her initial assignment at the end of fiscal year 2009, noting that she had no experience working with an elementary school population nor was she previously hired as a counselor.[13] Employee states that she was hired as a math teacher in September 2008, but not for an elementary school.[14]

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[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.)
[12] Petition for Appeal (November 18, 2009).
[13] *Id.*
[14] *Id.*

Additionally, Employee states in her brief that due to a budgetary elimination of her position as a math teacher, she was placed at Janney Elementary School on August 17, 2009.[15] Employee asserts that her evaluation with DCPS was done on May 13, 2009 while she worked at Transition Academy and she received an 'Exceeds Expectations' evaluation.[16] Employee notes that Agency did not provide any ranking factors, as was stated in the RIF notice.[17] Employee alleges that DCPS failed to follow proper legal procedures for this RIF, noting that "the approach was oppressive, unethical, unfair, politically motivated and scandalous."[18] Employee further alleges that there was not a budgetary crisis as DCPS hired additional teachers in August 2009.[19] Employee also notes the negative impact that the RIF has had on her livelihood and her reputation as a teacher.[20]

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.[21] Agency explains that each school was identified as a separate competitive area and each position title constituted a separate competitive level. Janney was determined to be a competitive area and the Counselor position was the competitive level.[22] Agency maintains that Employee was in a single person competitive level since she was the only Counselor at Janney.[23] Agency explains that Employee was not entitled to one round of lateral competition since the entire competitive level within the competitive area was eliminated.[24] Agency also argues that because one round of lateral competition was not warranted due to the elimination of the entire competitive area, a Competitive Level Documentation Form ("CLDF") was not required.[25]

Single Person Competitive Level

Regarding Employee's contention that Agency did not provide her with ranking factors, this Office has consistently held that when an employee holds the only position in her competitive level, D.C. Official Code § 1-624.08(e), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR 1503.2, are both inapplicable.[26] An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position. Therefore, Agency was not

[15] Employee's Brief (March 14, 2012).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Agency's Brief (February 29, 2012).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *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).

required to evaluate Employee's performance or assess her prior evaluations in the instant matter.

According to the Retention Registry provided with Agency's Brief, there was one Counselor position at Janney. Accordingly, I conclude that Employee was properly placed into a single-person competitive level and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(e) pertaining to multiple-person competitive levels when it implemented the instant RIF. For this reason, Agency did not have to complete a CLDF 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 October 2, 2009 and the effective date for the RIF was November 2, 2009.[27] The RIF notice states that Employee's position was eliminated as part of a RIF. The notice also provided Employee with information about her appeal rights. Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Grievances

Employee alleges that after she was terminated, Agency hired additional teachers. This Office has previously held that it lacks jurisdiction to entertain any post-RIF activity that may have occurred at an agency.[28] Employee also alleges that she was improperly placed as a Counselor at Janney after being 'excessed' from her position as a math teacher at Transition Academy. However, a complaint of this nature is a grievance and does not fall within the purview of OEA's scope of review. Additionally, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals.

Lack of Budget Crisis

Employee alleges that there was no budget shortfall as DCPS hired additional teachers in August 2009. Employee also alleges that Agency conducted the RIF in an unethical, unfair, and

[27] Agency Answer, Tab 3 (December 9, 2009).
[28] *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).

politically motivated manner. In *Anjuwan v. D.C. Department of Public Works*,[29] the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court of Appeals explained that as long as a RIF is "justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF…"[30] The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds…[or] management decisions about which position should be abolished in implementing the RIF."[31]

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employee's claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds on personnel services or how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.[32]

Moreover, the undersigned notes Employee concern that the RIF has had a negative impact on her livelihood and tarnished her reputation. While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that corroborates or proves that the RIF was conducted unfairly or in contradiction of District of Columbia statutes, regulations, and laws.

CONCLUSION

Based on the foregoing, I find that Employee's position was correctly abolished after she was properly placed in a single person competitive level and 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

[29] 729 A.2d 883 (December 11, 1998).
[30] *Id*. at 885.
[31] *Id*.
[32] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).