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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0106-10
CAROL SCOTT,)	
Employee)	
)	Date of Issuance: May 15, 2012
v.)	
)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
Agency)	Monica Dohnji, Esq.
_____)	Administrative Judge
Taylor N. Lewis, Esq., Employee’s Representative)	
Sara White, Esq., Agency’s Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 29, 2009, Carol Scott (“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”). The effective date of the RIF was November 2, 2009. Employee’s position of record at the time her position was abolished was an ET-15 Social Studies Teacher at Woodson Business and Finance (“Woodson”). Employee was serving in Education Service status when her position was abolished.

I was assigned this matter on or around February 8, 2012. On February 17, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. Both parties submitted timely responses to the order. 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 FACTS, 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 schools¹.

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02², which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

Specifically, 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).*

¹ See Agency's Answer, Tab 1 (December 9, 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;
 - (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.

(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.

The Abolishment Act (“the Act”) applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). Further, the legislation pertaining to the Act was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF.³ In *Washington Teachers’ Union*, the District of Columbia Public Schools (“DCPS”) conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”⁴ 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.”⁵ Furthermore, 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 In *Hoey v. Office of Employee Appeals*, the D.C. Court of Appeals, in examining the statutory meaning of ‘notwithstanding,’ noted that the use of such clause “clearly signals the drafter’s intention that the provision of the ‘notwithstanding’ section override conflicting provisions of any other section.”⁷

It should be noted that 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.”⁸ 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.”⁹ I find that DCPS triggered the use of § 1-624.08 by noting that the RIF was necessitated for budgetary reasons. While *Mezile* notes that the government’s use of the procedures prescribed by § 1-624.02 can show intent, several of the provisions § 1-624.02,

³ *Washington Teachers’ Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

⁴ *Id.* at 1132.

⁵ *Id.*

⁶ *Id.*

⁷ 30 A.3d 789 (D.C. Nov. 3, 2011) (citing *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993)).

⁸ *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

⁹ *Id.* at p. 5.

including priority reemployment, job sharing, length of service, and relative work performance are found in 5 DCMR Chapter 15, which was also used to conduct the instant RIF.¹⁰ Additionally, the provisions of § 1-624.08 including a notice period and one round of competition, are encompassed in § 1-624.02. Thus, the Agency's use of procedures in similar statutory regulations does not trigger the applicable statute governing the instant RIF. I find that the intent is set forth in the reason that necessitated the RIF, which in this case was due to budgetary reasons, rather than the procedures used in the implementation of the RIF. Although DCPS enacted the RIF, in part, pursuant to § 1-624.02, based on the holdings of *Mezile*, *Washington Teachers Union*, and *Hoey*, this Office finds that § 1-624.08 is the more applicable statute to govern the instant RIF.¹¹

Moreover, the Act provides that, “[N]otwithstanding 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.”¹² 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.”¹³ The Abolishment Act was enacted after § 1-624.02, and thus is a more streamlined statute for use during times of fiscal emergency.¹⁴ 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 their separation from service; and/or
2. That she was not afforded one round of lateral competition within their competitive level.

Employee’s Position

In her petition for appeal, Employee submits that “I was told that the RIF was due to a budget shortfall but the agency is still hiring.”¹⁵ Employee further asserts that she was terminated “based on my age & seniority. Two young Caucasian teachers with less experience was kept [sic]. This is age discrimination.”¹⁶ Employee explains that “[e]valuation, tenure, years of service was not a factor. Race was a factor.”¹⁷ Employee notes in her brief that Agency failed to follow proper RIF procedure because it did not give Employee a proper round of lateral competition.¹⁸ Specifically, Employee maintains that, Agency “improperly completed Ms. Scott’s competitive level ranking score card

¹⁰ See DPM §§ 1500, 1503, 1505, 1506, 1507.

¹¹ While § 1-624.02 provides a broader basis for appeal, there is no substantial evidence to show that Agency did not comply with the statutory provision provided.

¹² *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

¹³ *Id.*

¹⁴ *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

¹⁵ Petition for Appeal, p. 3 (October 29, 2009).

¹⁶ *Id.*

¹⁷ *Id.* at p.5.

¹⁸ Employee’s Brief in Opposition to District of Columbia Public School’s Brief, p.4 (April 2, 2012).

when her professional degree was not considered,¹⁹ and for not receiving credit for her contribution at Woodson.²⁰ Employee notes that she made numerous contributions at Woodson - organized field trips; participated in assemblies at Woodson; and collaborated with the Meridian Center to make cultural programs available to Woodson students that were not considered in her competitive level ranking score card.²¹

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 by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of her separation. Agency asserts that, there were two (2) ET-15 Social Studies Teacher positions at Woodson, and one (1) out of the two (2) positions was identified as positions that would be subject to the RIF. Agency maintains that it utilized the proper competitive factors in implementing the RIF and that the lowest ranked ET-15 Social Studies Teacher, Employee, was terminated as a result of the round of lateral competition.²²

Analysis

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS is authorized to establish competitive areas when conducting a RIF so long as those areas are based “upon all or a clearly identifiable segment of the mission, a division or a major subdivision of the Board of Education, including discrete organizational levels such as an individual school or office.” For the 2009/2010 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area. In accordance with Title 5, DCMR § 1502.1, competitive levels in which employees subject to the RIF competed were based on the following criterion:

1. The pay plan and pay grade for each employee;
2. The job title for each employee; and
3. In the case of specialty elementary teachers, secondary teachers, middle school teachers and teachers who teach other specialty subjects, the subject taught by the employee.²³

Here, Woodson was identified as a competitive area, and ET-15 Social Studies Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency,²⁴ there were two (2) ET-15 Social Studies Teachers subject to the RIF. Of the two (2) positions, one (1) was identified to be abolished.

¹⁹ *Id.*

²⁰ *Id.* at p. 5.

²¹ *Id.*

²² Agency's Brief (March 12, 2012).

²³ *Id.* at pp 2-3. School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

²⁴ *Id.* at Exhibit A.

Employee was not the only ET-15 Social Studies Teacher within her competitive level and was, therefore, required to compete with other employees in one round of lateral competition. According to Title 5, DCMR § 1503.2 *et al.*:

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.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

- (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%)²⁵

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.²⁶ 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...including the authority to reconsider and alter its prior balance of factors to diminish the relative importance of seniority.” I agree with this position and find that Agency had the discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

²⁵ 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).

²⁶ Agency Brief at pp. 4-5 (March 12, 2012).

Competitive Level Documentation Form

Agency employs the use of a CLDF in cases where employees subject to a RIF must compete against each other in lateral competition. In conducting the instant RIF, the principal of Woodson was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the “length of service” category was completed by the Department of Human Resources (“DHR”).

Employee received a total of forty-one and a half (41.5) points on her CLDF, and was, therefore, ranked the lowest in her competitive level. Employee’s CLDF stated, in pertinent part, the following:

“Ms. Scott is generally regarded as a good teacher and has engaged classes. She is able to successfully scaffold information so students learn material that allows for all kinds of thinking skills. She is willing to learn on her own and has sought out the help of our school’s Instructional Coach on matters related to literacy and teaching various skills.

Ms. Scott is frequently late to school. ... she has missed faculty meetings held by the school’s principal and has a history of not cooperating with and being disrespectful to administrators. She has also been seen leaving students in her classroom unattended.”²⁷

Office or school needs

This category is weighted at 75% on the CLDF and includes: curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of five (5) points out of a possible ten (10) points in this category; a score much lower than the other employee within her competitive level. Employee argues that her Masters in teaching was not considered in her competitive level ranking score card. Employee received a total of five (5) points in this area. It can be reasonably assumed that her degrees were taken into consideration in the calculation of the awarded points. And there is no indication that this would supplant the higher score received by the other employee in the Competitive Level who was not separated from service pursuant to the RIF. Moreover, it is within the principal of Woodson’s managerial expertise to assign numeric values to this factor.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area. This category includes factors such as student outcomes, rating, awards, attendance etc. Employee contends that she did not receive any credit for her contributions at Woodson – organization of field trips; participation in assemblies at Woodson; and collaboration with the Meridian Center to make cultural programs available to Woodson students. However, the principal has discretion to award points in this area giving her independent knowledge of the employees and

²⁷ *Id.* at Exhibit B.

student body. Moreover, this Office cannot substitute its judgment for that of the principal at Woodson.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee did not provide any documentation to supplement additional points being awarded in this area. Moreover, it is within the principal of Woodson's managerial expertise to assign numeric values to this factor.

Length of service

This category accounts for 5%. It was completed by DHR and was calculated by adding the following: 1) years of experience; 2) military bonuses; 3) D.C. residency points; and 4) rating add—four years of service was given for employees with an “outstanding” or “exceeds expectations” evaluation within the past year. The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

Here, Employee's Service Computation Date (“SCD”) is 1994. She was employed with Agency for a total of fifteen (15) years. She received a total of fifteen (15) points for years of experience, and a score of eight (8) for years of service. She did not receive any points for Veterans preference or D.C. residency. An outstanding performance rating in the previous year will get an employee an extra four (4) years of service. In the school year 2008/2009, Employee did not receive an “outstanding” or “exceeds expectations” performance rating. Employee received a total weighted score of four (4) points in this category. She does not contest the calculation of the points awarded. Therefore, I find that Agency properly calculated this number.

In reviewing the documents of record, Employee does not offer any statutes, case law, or other regulations to refute Agency's position regarding the principal's authority to utilize discretion in completing an employee's CLDF during the course of the instant RIF. In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*, 109 F.3d 774 (D.C. Cir. 1997), the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that “school principals have total discretion to rank their teachers” and noted that performance evaluations are “subjective and individualized in nature.”²⁸ Moreover, according to the CLDF, Employee received a total score of forty-one and a half (41.5) after all of the factors outlined above were tallied and scored. The next lowest colleague who was retained received a total score of sixty-two and a half (62) points. Employee has not proffered any evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome in this case.²⁹

Accordingly, I find that the principal of Woodson had discretion in completing Employee's CLDF, as she was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. 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. I, therefore, find that

²⁸See also *American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

²⁹See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (stating that a material fact is one which might affect the outcome of the case under governing law.)

Agency did not abuse its discretion in completing the CLDF, and Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

Thirty (30) Days Notice Requirement

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.” Additionally, the 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, Employee received her RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice states that Employee’s position is being abolished as a result of a RIF. The Notice also provided Employee with information about her appeal rights. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Lack of Budget Crisis

Employee alleges that although she was informed that the RIF was due to a budget shortfall, Agency was still hiring. In *Anjuwan v. D.C. Department of Public Works*,³⁰ 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...”³¹ 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.”³²

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 employees’ 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.³³

Discrimination

Employee further alleges that her termination was based on age and seniority. Employee explains that race was a factor in conducting the RIF. Employee also mentions that she filed a claim on October 7, 2009, with the Equal Employment Opportunity Commission. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights (“OHR”). Per this statute, the purpose of the OHR is to “secure an end to unlawful discrimination in employment...for any reason other than that of individual merit.” Complaints classified as unlawful discrimination are described in the District of Columbia Human Right

³⁰ 729 A.2d 883 (December 11, 1998).

³¹ *Id.* at 885.

³² *Id.*

³³ *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

Act.³⁴ Additionally, District Personnel Manual (“DPM”) § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, the Court in *Anjuwan v. D.C. Department of Public Works* held that OEA’s authority over RIF matters is narrowly prescribed³⁵. This Court explained that, OEA lacks the authority to determine broadly whether the RIF violated any law except whether “the Agency has incorrectly applied...the rules and regulations issued pursuant thereto.” This court further explained that OEA’s jurisdiction cannot exceed statutory authority and thereby, OEA’s authority in RIF cases is to “determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs.” *Citing Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997). Therefore, I find that Employee’s claims of race and age discrimination fall outside the scope of OEA’s jurisdiction.

CONCLUSION

Based on the foregoing, I find that Employee’s position was abolished after she properly received one round of lateral competition and a timely thirty (30) day legal notification was properly served. I therefore conclude that Agency’s action of abolishing Employee’s position was done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in her removal is upheld.

ORDER

It is hereby **ORDERED** that Agency’s action separating Employee pursuant to a RIF is **UPHELD**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

³⁴ D.C. Code §§ 1-2501 *et seq.*

³⁵ 729 A.2d 883 (December 11, 1998).