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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
CHERISE R. WITHERSPOON,)	
Employee)	OEA Matter No. J-0140-15
)	
v.)	Date of Issuance: July 15, 2016
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	Michelle R. Harris, Esq.
)	Administrative Judge

Cherise R. Witherspoon, Employee, *Pro Se*
Carl K. Turpin, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 9, 2015, Cherise Witherspoon (“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 August 7, 2015. This matter was assigned to me on October 7, 2015. Agency’s Answer was due on or before October 19, 2015. On October 19, 2015, Agency filed a Motion to request additional time in which to file its Answer. On October 23, 2015, Agency submitted its Answer and Motion to Dismiss.

Agency noted in its Motion to Dismiss that OEA lacks jurisdiction over this appeal because Employee filed a grievance before filing with OEA. Subsequently, I issued an Order on October 28, 2015, requiring Employee to address the jurisdiction issue raised by Agency. Employee’s brief was due on or before November 13, 2015. On November 13, 2015, Employee submitted a response and requested more time in which to file her brief. Employee’s request was granted and her brief was now due on December 4, 2015. Employee submitted her brief in a timely manner, and asserted therein that she was not provided the appropriate notice of her appeal rights. On December 10, 2015, Agency filed a withdrawal of its Motion on Jurisdiction.¹ Agency cited that they were made

¹ In her Petition for Appeal, Employee notes that she filed a grievance with the EEOC, Labor Relations and Council of School Officers (CSO). However, there was no documentation provided by either party that suggested a formal grievance had been filed with the CSO, rather it appeared Employee sent a letter to the CSO, but that someone there told her to file with OEA.

aware of additional information concerning Employee and that there is no jurisdictional dispute.² However, Agency did not address Employee's claim regarding lack of notice. Consequently, on January 12, 2016, I issued an Order directing Agency to address the issues Employee cited in her brief. On January 27, 2016, Agency submitted its response and notes that while OEA rules were provided to Employee, Agency did not supply her with an OEA appeal form. On February 5, 2015,³ the undersigned Administrative Judge ("AJ") issued an Order Regarding Jurisdiction, finding that OEA had jurisdiction over Employee's Petition for Appeal.

The Order Regarding Jurisdiction also required the parties to submit briefs addressing the issue of whether the RIF was properly conducted in accordance with all applicable laws, statutes and rules. Agency's brief was due on February 25, 2016, and Employee's brief was due March 28, 2016. Agency filed its brief on February 25, 2016. On March 28, 2016, Employee requested additional time in which to respond because she did not receive Agency's brief until March 23, 2016. On March 29, 2016, I issued an Order granting Employee's request. Employee's brief was now due on or before April 11, 2016. On April 7, 2016, Agency submitted a request indicating that both parties would like to mediate the matter. Following a failed mediation attempt, the matter was assigned back to me and I issued an Order on May 18, 2016, requiring Employee to submit her brief. Employee's brief was due on or before June 2, 2016. Employee submitted her brief within the prescribed deadline.

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.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The authority for conducting a RIF is primarily set forth in two statutes, D.C. Code §§ 1-624.02 and 1-624.08. Because the instant RIF was conducted to "eliminate positions that would be redundant or unnecessary following a reorganization of functions"⁴, I have determined that D.C. Code § 1-624.02 is the more applicable statute regarding the instant RIF. A RIF pursuant to D.C. Official Code § 1-624.02 (a) 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. D.C. Official Code § 1-624.02.

² Agency's Request to Withdraw Motion on Jurisdiction (December 10, 2015).

³ The order was re-issued on February 26, 2016. An internal mailing error caused Employee's order to be returned to the Office.

⁴ Agency's Brief at Exhibit 1 (February 25, 2016).

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF.

Employee's Position

Employee contends that the RIF was improper and that she was subject to unfair labor practices, harassment, workplace bullying and retaliation following her refusal to falsify documents.⁵ Employee argues that she was asked to falsify documents and was subject to a hostile work environment, which she believes was the reason for her being subject to the RIF.⁶ Employee indicated that following her separation from service, there were three (3) new positions created.⁷ Employee argues that the job functionalities of one of those positions, Coordinator of Strategy and Logistics, was comparable to her Business Manager position, though it had new responsibilities, but nothing that she was unfamiliar with.⁸ Employee requested that she be reinstated, receive a step increase, be provided back pay, along with reimbursement of medical expenses and compensation for pain and suffering. Additionally, Employee requested to have an IMPACT score removed from her personnel record and punitive damages. Employee also indicates that she was verbally informed that her position was eliminated due to lack of funding.⁹

Agency's Position

Agency states that it had authority to conduct the instant RIF and in separating Employee, it complied with the procedures required, as well as the related provisions set forth in Chapter 24 of the District Personnel Manual ("DPM").¹⁰ Agency asserts that pursuant to the Memorandum dated April 13, 2015, the Chancellor "authorized a RIF of non-instructional, school-based staff due to an elimination of positions that will be redundant or unnecessary following a reorganization of functions for the 2016 fiscal year."¹¹ Agency argues that the Chancellor had the authority to define the competitive areas for the RIF in accordance with 5-E DCMR § 1501. Agency explains that the reductions were made on a school by school basis, and the competitive areas for the RIF were "defined by schools where the number of positions for non-instructional staff for the 2014-2015 year exceeded by the number of positions available for the 2015-2016 year."¹²

Agency cites that Employee was a Business Manager at Anacostia Senior High School during the 2014-2015, school year. Pursuant to the RIF authorization, Anacostia Senior High School was determined to be a competitive area, and Employee's position was a competitive level subject to the RIF. Further, Agency notes that Employee was the only person in her competitive level subject to the RIF. Additionally, Agency explains that because the entire competitive level was abolished, there was no one against whom Employee could compete with for identical positions and duties, thus, it was not required that she have one round of lateral competition.¹³ Further, Agency explains

⁵ Employee's Petition for Appeal (September 9, 2015).

⁶ *Id.*

⁷ *Id.*

⁸ Employee's Brief (June 2, 2016).

⁹ Employee's Petition for Appeal (September 9, 2015).

¹⁰ Agency's Brief (February 25, 2016).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

that because there was no competitive level, that a Retention Register was not required. Agency also highlights that Employee received timely notice of her separation from service due to the RIF. Agency maintains that Employee was provided notice on May 15, 2015, and her effective date of separation was August 7, 2015.¹⁴

Round of Lateral Competition

In order to determine if Agency conducted the instant RIF properly; the undersigned must evaluate whether Agency, pursuant to D.C. Official Code § 1-624.02(a)(1) and (2), met the requirements for lateral competition. The DPM provides that each personnel authority has the responsibility to establish the competitive levels, and that these levels shall be based upon employee's position of record.¹⁵ Additionally, the DPM requires that the competitive levels be "sufficiently alike" in the qualification requirements, such that an incumbent of one position could successfully perform the duties and responsibilities of any of the other positions.¹⁶ Generally, an employee's position of record is shown through the issuance of an SF-50 Notification of Personnel Action.¹⁷ "Pursuant to Chapter 24 of the DPM, § 2409, each Agency shall generally constitute a single competitive area, and Agency personnel are authorized to establish lesser competitive areas when conducting RIFs."¹⁸

In the instant matter, the April 13, 2015, Memorandum that authorized the instant RIF provided that the competitive areas, which were established on a school by school basis, would include Anacostia Senior High School.¹⁹ Additionally, the Business Manager EG position at Anacostia Senior High School was identified as a competitive level that would be eliminated by the RIF. Based on Employee's SF-50 at the time the RIF was conducted, she was employed as the Business Manager at Anacostia Senior High School. As a result of the RIF, Employee's position was eliminated and she was separated from service. At the time of the RIF, Employee was the only person employed in that position, thus I find that the position was a single-person competitive level. Employee does not dispute that she was the Business Manager at Anacostia Senior High School during this time. Accordingly, I conclude that the statutory provision of the D.C. Official Code § 1-624.02(a)(2), requiring Employee to have one round of lateral competition is inapplicable because the position was eliminated. OEA has consistently held that where an entire competitive level is eliminated, there is no one against whom an employee can compete.²⁰ Consequently, I find that one round of lateral competition is inapplicable in the instant RIF. I also find for the aforementioned reasons, that a Retention Register was not required.

¹⁴ *Id.*

¹⁵ 6-B DCMR §§§ 2410.1, 2410.2, 2410.3.

¹⁶ 6-B DCMR § 2410.4.

¹⁷ See *Armeta Ross v. D.C. Office of Contracting & Procurement*, OEA Matter No. 2401-0133-09-R11 (April 8, 2013).

¹⁸ See *Leon Graves v. Department of Youth Rehabilitation Services*, OEA Matter No. 2401-0018-14 (July 3, 2014).

¹⁹ Agency's Brief at Exhibit 1 (February 24, 2016).

²⁰ See *Laura Smart v. D.C. Child and Family Services Agency*, OEA Matter No. 2401-0328-10, Opinion and Order on Petition for Review (March 4, 2014); *Jessica Edmond v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0344-10, p. 6 (November 6, 2012); *Nicole Sivoletta v. D.C. Public Schools*, OEA Matter No. 2401-0193-04, p. 3 (December 23, 2005); *Evelyn Lyles v. D.C. Dept. of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *R. James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).

Priority Reemployment

D.C. Official Code § 1-624.02(a)(3) provides that employees separated pursuant to a RIF under this section are to be afforded consideration for priority reemployment. In the RIF notice dated May 15, 2015, Agency indicated that Employee's position had been eliminated, but that there may be positions at other schools for which Employee may be qualified.²¹ Agency included information regarding upcoming staffing fairs and information regarding assistance to help Employee find employment. Further, the notice indicated that Employee could apply for any vacancies at Agency or within District Government that may arise in the future.²² Additionally, the notice indicated that Employee would receive "some priority consideration", but was not guaranteed reemployment.²³ Accordingly, I find that Agency complied with the RIF requirement to consider Employee for priority reemployment.

Consideration of Job Sharing

Pursuant to D.C. Code § 1-624.02(a)(4) and DPM Section 2404, when a RIF is conducted, an Agency *may* consider job sharing and reduced hours for employees separated pursuant to the RIF (emphasis added). The DPM addresses Agency's responsibility for considering job sharing and reduced working hours. Specifically, DPM section 2404.1 provides:

An employee *may* be assigned to job sharing or reduced working hours, provided the following conditions are met (emphasis added):

- (a) The employee is not serving under an appointment with specific time limitation; and
- (b) The employee has voluntarily requested such an assignment in response to agency's request for volunteers for the purpose of considering the provisions of subsection 2403.2(a) of this chapter in order to preclude conducting, or to minimize the adverse impact of, a reduction in force.

"Furthermore, DPM section 2403.2 provides that, "[a]n Agency *may*, within its budget authorization, take appropriate action, prior to planning a reduction in force, to minimize the adverse impact on employees or the agency (emphasis added)."²⁴ Accordingly, I find that it is a discretionary measure, not a requirement, for the Agency to consider offering or implementing job sharing alternatives that may minimize the impact of a RIF on employees or the agency. In the instant matter, there is no evidence in the record indicating any job sharing considerations were offered on the part of the Agency. However, because this is a discretionary measure and not a mandate, I find that Agency did not violate the RIF procedures and regulations under D.C. Code § 1-624.02(a) (4).

²¹ Agency Brief at Exhibit 2 (February 25, 2016).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Notice/Employee Appeal Rights

D.C. Code § 1-624.02(a)(5) states that Agency must provide employees separated pursuant to a RIF their appeal rights. Each employee separated pursuant to a RIF shall be entitled to written notice at least thirty (30) days before the employee's separation from service.²⁵ Here, Employee was notified that she was subject to separation from service pursuant to a RIF on May 15, 2015, and that the effective date of separation was August 7, 2015.²⁶ The undersigned finds that this timeline provided more than the thirty (30) days' notice required by the statute.

Retaliation

Employee submits that the RIF was improper because she was retaliated against following her refusal to falsify documents.²⁷ To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) she engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) her employer took an adverse personal action against her; and (3) there existed a causal connection between the protected activity and the adverse personnel action.²⁸

A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.²⁹ Here, Employee states that she was terminated because of her unwillingness to falsify documents.³⁰ The instant RIF was effectuated across an entire competitive area within Agency, which included the school where Employee was employed. There is no evidence in the record to suggest that Employee was singled out, rather her position was deemed as one of those that would be eliminated through the RIF. Consequently, I find that Employee's retaliation claims are unsubstantiated, and as such, fall outside the scope of OEA's jurisdiction.

Grievances

Employee further indicated that she was subject to harassment and workplace bullying. She also explained that following her separation from service, there were three (3) new positions created. Employee argues that the job functionalities of one of those positions, Coordinator of Strategy and Logistics, was comparable to her Business Manager position, though it had new responsibilities, but nothing she was unfamiliar with.³¹ This Office has previously held that it lacks the jurisdiction to entertain any post-RIF activity which may have occurred at an agency.³² 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 are 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

²⁵ See DPM § 2422.

²⁶ Agency' Brief (February 25, 2016).

²⁷ Employee's Petition for Appeal (September 9, 2015).

²⁸ *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).

²⁹ *Id.*

³⁰ Employee Petition for Appeal at Attachment (September 9, 2015).

³¹ Employee's Brief (June 2, 2016).

³² *Williamson v. DCPS*, OEA Matter No. 2401-0080-04 (January 5, 2015).

claims. Accordingly, I find that Agency, in conducting the instant RIF, properly followed all proper District of Columbia statutes, regulations and laws.

ORDER

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

FOR THE OFFICE:

Michelle R. Harris, Esq.
Administrative Judge